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## Rated "M" for Misleading: How Deceptive, Anti-Consumer Practices in the Videogame Industry Became the New Norm

Luis Baez

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**RATED “M” FOR MISLEADING: HOW DECEPTIVE, ANTI-CONSUMER PRACTICES IN THE VIDEOGAME INDUSTRY BECAME THE NEW NORM**

*Luis Baez\**

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“The idea that [the videogame] industry as a whole has figured out a way that [consumers] can’t return broken products . . . is a little bit ridiculous. We have to find a way to protect the consumer.”

– *Jeff Cannata*<sup>1</sup>

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1. Christian Spicer & Jeff Cannata, 44: *Rub Superman’s Shoulders*, DLC (Oct. 13, 2014), <http://5by5.tv/dlc/44>.

## INTRODUCTION

Viewership of competitive videogame events surpasses almost every major professional sport event.<sup>2</sup> Major tournaments for videogames like “Dota 2” and “League of Legends” had more worldwide viewers than the 2015 Masters, NBA Finals, World Series, and Stanley Cup Finals.<sup>3</sup> They also pay their winners more.<sup>4</sup> Only the National Football League’s Super Bowl is popular enough in terms of viewership numbers to hold off the ever-increasing popularity of both competitive and casual videogaming and its growing audience.<sup>5</sup> The industry is an estimated sixty-five billion dollar market with one billion unique players across the world, and it shows no signs of slowing growth.<sup>6</sup>

As videogame technology rapidly evolves, legal issues related to videogame streaming over the Internet through YouTube or Twitch, commentating over live broadcasts, and competitive, local tournaments offering large cash payouts, have presented themselves—in a mostly problematic fashion.<sup>7</sup> Many of these issues, however, are related to what consumers do with a videogame *after* its purchase. But it is also becoming—however unfortunate—more and more common that videogames are being marketed, distributed, and sold to hundreds of thousands of consumers in a broken, non-functional state *before* their purchase at big-box retail stores or over the Internet through digital downloads.<sup>8</sup> Worse yet, most big-box stores do not accept videogames

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2. Ben Casselman, *Resistance is Futile: eSports is Massive . . . and Growing*, ESPN THE MAG. (June 22, 2015), [www.espn.com/espn/story/\\_/id/13059210/esports-massive-industry-growing](http://www.espn.com/espn/story/_/id/13059210/esports-massive-industry-growing).

3. *Id.*; Nick Schwartz, *27 Million People Watched the “League of Legends” World Championship (more than the World Series or NBA Finals)*, USA TODAY SPORTS (Dec. 1, 2014, 6:12 PM), <http://ftw.usatoday.com/2014/12/league-of-legends-worlds-viewership-esports-world-series-nba-finals>.

4. Casselman, *supra* note 2.

5. *Id.*

6. Major Nelson, *Hear Xbox’s Aaron Greenberg Share the Latest on the Gaming Industry’s Growth*, XBOX.COM (May 17, 2013, 9:10 PM), <http://news.xbox.com/2013/05/x360-aaron-greenberg-industry-growth>; Darren Heitner, *Why 2016 Should be a Year of Tremendous Growth for eSports*, FORBES (Dec. 31, 2015, 8:03 AM), <http://www.forbes.com/sites/darrenheitner/2015/12/31/why-2016-should-be-a-year-of-tremendous-growth-for-esports/#2a6acfa62b96>.

7. See generally Philip Kollar, *Are Let’s Play Videos from PewDiePie and Others Actually Legal?*, POLYGON (Jan. 6, 2015, 7:00 PM), <http://www.polygon.com/2015/1/6/7505331/pewdiepie-lets-play-video-legality>; Mona Ibrahim, *Deconstructing Let’s Play, Copyright, and the YouTube Content ID Claim System: A Legal Perspective*, GAMASUTRA (Dec. 12, 2013, 1:16 PM), [http://www.gamasutra.com/blogs/MonaIbrahim/20131212/206912/Deconstructing\\_Lets\\_Play\\_Copyright\\_and\\_the\\_YouTube\\_Content\\_ID\\_Claim\\_System\\_A\\_Legal\\_Perspective.php](http://www.gamasutra.com/blogs/MonaIbrahim/20131212/206912/Deconstructing_Lets_Play_Copyright_and_the_YouTube_Content_ID_Claim_System_A_Legal_Perspective.php).

8. Brian Crecente, *Broken Video Games Are the New Norm, What Developers Need to Do to Fix That*, POLYGON (Nov. 24, 2014, 4:06 PM), <http://www.polygon.com/>

for return when the shrink-wrap has been opened, and most—if not all—publishers have onerous end user license agreements (EULA) on deck for their customers to accept before they even have a chance to inspect and determine whether the videogame is actually playable.<sup>9</sup>

As an illustration to help guide a reader who is unfamiliar with modern day videogames and the current problems permeating the industry to be addressed in this Article, consider the following hypothetical: It is the year 1980. Ronald Reagan was elected President of the United States, Billy Joel won a Grammy, and Olympic teams across the world boycotted the Summer Olympics.<sup>10</sup> Namco, an up-and-coming videogame publisher, announces the release of a videogame called "Pac-Man." Namco announces and advertises through television commercials and magazines that players could control Pac-Man in order to eat pellets scattered through a maze. If a player succeeded at eating every pellet in a maze without making contact with the one of four ghosts that were chasing her, then she completed that level and would move on to a more difficult maze. Thousands of children go on to force their parents to take them to a local electronic store in order to buy a copy of the videogame.

When the player gets home, she plugs in her new game into the console, plugs in her controller, and turns on her television to start playing. However, when it comes time to take control of Pac-Man on the first stage, nothing is working right. Pressing the up arrow on her controller sends Pac-Man traveling right, pressing the left arrow pauses the game, and every time Pac-Man moves through a particular section of the maze, his image disappears and he is nowhere to be seen. The game is effectively unplayable as a consequence of its programming.

But when she tries to take the game back to the store for a refund, she is told that the store does not accept refunds of opened videogames and that, in other words, because the videogame turns on and images appear on the screen, it still "works" and is therefore nonrefundable. Namco's EULA also disclaims any warranties, excludes the possibility of repair or replacements, and has a mandatory arbitration clause preventing her and

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2014/11/24/7277363/broken-video-games-are-the-new-norm-what-developers-need-to-do-to-fix; Michael McWherton, *2014 in Review: The Year that Sucked*, POLYGON (Dec. 21, 2014, 5:03 PM), <http://www.polygon.com/2014/12/21/7413619/2014-in-review-the-year-that-sucked>; Ben Gilbert, *Why Are so Many Video Games Broken at Launch?*, ENGADGET (Nov. 24, 2014), <http://www.engadget.com/2014/11/24/broken-video-games/>.

9. See, e.g., *Returns & Exchanges*, BEST BUY, <http://www.bestbuy.com/site/help-topics/return-exchange-policy/pcmcat260800050014.c?id=pcmcat260800050014> (stating that "videogames must be returned within 90 days if *unused, unopened and unmarked* (emphasis added)).

10. For a brief history of early videogame development in the 1980s, see Michael Stevens, *A Brief History of Video Game Consoles from the Early 1970s to the late 1990s*, VENTUREBEAT (Dec. 30, 2013, 2:41 PM), <http://venturebeat.com/community/2013/12/30/a-brief-history-of-video-game-consoles-from-the-early-1970s-to-the-late-1990s/>.

thousands of other consumers with the same problem from joining a class-action lawsuit to seek redress for purchasing a videogame that does not work as advertised.

In the present day, there is an ever-growing laundry list of modern videogames with issues similar to the ones in the above-described hypothetical.<sup>11</sup> These videogames are sold with promises of workable online multiplayer and other online features, yet they do not work. Draconian EULAs leave videogame consumers without legal remedies (and if they do, they are too expensive for individual consumers to pursue). Today's videogame consumer has little to no bargaining power in the marketplace when it comes to the terms of their EULA.

Anti-consumer practices in the industry have thrived because of (1) how videogames are treated in the context of case law distinguishing software contracts as those for the sale of goods or contracts for service, (2) the enforceability of onerous EULAs; and (3) because the judiciary's widespread understanding of terms under the Uniform Commercial Code (UCC)—like “opportunity to inspect”—has not kept pace with videogame technology. As one court has put it, when the judiciary tries to “pour new wine into old legal bottles, [it] sometimes miss[es] the nuances.” In this industry, the nuances are of significant import.

This Article argues that an examination of the circumstances surrounding today's videogame industry and marketplace render any EULA or other agreement that prevents a videogame consumer from returning a broken videogame for a refund renders it per se unconscionable and that, in the interest of justice, additional consumer protection must be crafted for videogame consumers. To advance this position, this Article will discuss (1) the current state of how videogames are treated under contract law (whether it be the common law or UCC); (2) examples of misleading advertising and recently released broken videogames and how their EULAs protect them; and (3) whether high-profile videogame litigation and other remedies available to consumers are enough to curtail an industry intent on eroding the rights of its customers.

In short, the nature of the industry, its advertising practices, and way in which videogames are delivered and distributed have created the need for additional consumer protection. Without it, videogame publishers will continue their race to the bottom in terms of standards, honesty, and consumer-friendly practices.

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11. See *infra* Part II.G.

## I. EULAS AND CONTRACTS FOR THE SALE OF VIDEOGAMES

The largest impediment to the restoration of consumer rights in the videogame industry is the enforceability of the EULA in the United States. Videogames are treated by the law the same way that any type of computer program or software is. For example, purchasing a copy of the latest version of Microsoft Office at your local Best Buy is functionally the same as purchasing a copy of the most recent version of Street Fighter or Call of Duty—they are each different forms of software. EULAs, or “shrink-wrap licenses,” operate as the contract between a consumer and publisher of software bought and sold in the market. It is the terms of EULAs that comes with the sale of modern videogames—whether sold digitally on a disc—that has led to the increase in the sale and release of nonfunctional and broken videogames.

Analysis of how EULAs are reviewed by courts depends primarily on whether the particular EULA is determined to be a contract for the sale of goods, and thus governed by the terms of the UCC, or whether it is a contract for services, and, accordingly, governed by the common law. Although it may be of little practical import (because even those contracts governed by the UCC can be modified to waive a consumer’s traditional Article 2 inspection and rejection rights), it is important to understand the framework by which software—and by extension videogames—are analyzed by courts in the United States.

### A. Videogame Software as “Goods” Under the UCC

The Seventh Circuit’s decision in *ProCD, Inc. v. Zeidenberg* is the seminal case on the issue of the enforceability of EULAs in modern day software purchases. In the case, ProCD sold at big-box retail stores software on a CD-ROM that included a program containing information gathered from 3000 different telephone directories across the United States. The program was called “SelectPhone.” ProCD sold the CD-ROM at two different prices: one price for consumers and another (higher) price for commercial customers. This difference, as discussed by the Seventh Circuit, was the primary motivation for the EULA (or “shrink-wrap license” as it is referred to as in the text of the case). Importantly, the terms of the EULA were only accessible after the software was purchased at the store and the shrink-wrap was torn open. The EULA itself was encoded onto each disc and would appear on a customer’s screen before she was allowed to run the program. It also appeared in the text of the manual and was drafted to apply to every use and installation of the program. In order to use the software, a customer had to agree to the

EULA's terms.<sup>12</sup>

Matthew Zeidenberg, the defendant in *ProCD*, bought a consumer version of the software at a local retail store.<sup>13</sup> He then formed a company and took the information from the software, repackaged it, and uploaded it to an Internet website he created so that millions of users could access the information on ProCD's software at a much lower cost through his website than had they purchased it at the store.<sup>14</sup> The issue in the case was whether the terms of the EULA were enforceable because they were not available to the consumer prior to the program's purchase.<sup>15</sup> The lower court held that the terms of the EULA were not enforceable because its terms did not appear on the outside of the package for consumers to review prior to the program's purchase.<sup>16</sup>

The Seventh Circuit prefaced its analysis by noting that it analyzed EULAs as ordinary contracts governed by the common law and UCC.<sup>17</sup> Although Zeidenberg argued that the terms of the EULA were not a part of the agreement between the parties because its terms were not on the outside of the package's software, the court believed that it would be impracticable to print or place EULAs on the outside of every package.<sup>18</sup> Instead, the court reasoned that customers and sellers of software would be benefitted by a system providing "[n]otice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable."<sup>19</sup> The court also discussed this type of exchange in the context of digital purchases.<sup>20</sup> It noted that many software sales are digital, and that the digital nature of the exchanges make EULAs advantageous for the new and emerging software market.<sup>21</sup>

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12. *Id.*

13. *Id.* In explaining the issue of the case from Zeidenberg's prospective, the court stated that the "user purchases a serial number, which activates the software's features. On Zeidenberg's arguments, these unboxed sales are unfettered by terms—so the seller has made a broad warranty and must pay consequential damages for any shortfalls in performance, two "promises" that if taken seriously would drive prices through the ceiling or return transactions to the horse-and-buggy age."

14. *Id.*

15. *Id.* For more information on the impact of this case on contract law and goods in a mass-market context, see *id.* See Jane Kaufman Winn & James R. Wrathall, *Who Owns the Customer? The Emerging Law of Commercial Transactions in Electronic Customer Data*, 56 BUS. LAW. 213, 245 (2000) (discussing the impact of this case on contract law and goods in a mass-market context).

16. *ProCD, Inc.*, 86 F.3d at 1450.

17. *Id.*

18. *Id.*

19. *Id.* at 1451. The Court also cited *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, (1991) as part of its analysis (stating that "to use the ticket is to accept the terms, even terms that in retrospect are disadvantageous . . .").

20. *Id.*

21. *Id.*

The court cited § 2–204(1) of the Uniform Commercial Code as its starting point.<sup>22</sup>

The court emphasized that, as seller of the good, ProCD is allowed to dictate the terms of acceptance through the EULA:

A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance. And that is what happened. ProCD proposed a contract that a buyer would accept by *using* the software after having an opportunity to read the license at leisure.<sup>23</sup>

The court then explained the options a customer of the software had if the terms of the EULA were not agreeable or the software is incapable of installation: “Any buyer finding [unacceptable terms] can prevent formation of the contract by returning the package, as can any consumer who concludes that the terms of the license make the software worth less than the purchase price.”<sup>24</sup>

The court then turned to § 2–606 of the UCC to reinforce its position.<sup>25</sup> § 2–606 provides that a “buyer accepts goods under § 2–606(1)(b) when, after an opportunity to inspect, he fails to make an effective rejection under § 2–602(1).”<sup>26</sup> The court then described the sequence of events from the defendant-consumer’s perspective:

Zeidenberg inspected the package, tried out the software, learned of the license, and did not reject the goods. We refer to § 2–606 only to show that the opportunity to return goods can be important; acceptance of an offer differs from acceptance of goods after delivery, see *Gillen v. Atlanta Systems, Inc.*, 997 F.2d 280, 284 n.1 (7th Cir.1993); but the UCC consistently permits the parties to structure their relations so that the buyer has a chance to make a final decision after a detailed review.<sup>27</sup>

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22. *Id.* at 1452. UNIFORM COMMERCIAL CODE § 2–204(1) provides that a “contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.”

23. *ProCD, Inc.* 86 F.3d at 1452 (emphasis added). Part of this Article’s position is that “using” software as courts see that term is outdated. Although software is “used” by way of its installation, many of the issues with modern videogame software do not present themselves until after a customer has already consented to a EULA.

24. *Id.*

25. *Id.*

26. *Id.*; U.C.C. § 2–602(1).

27. *Id.* The court also went on to add that “[c]ompetition among vendors, not judicial revision of a package’s contents, is how consumers are protected in a market economy.” *Id.* (citing



Following its analysis, the court held that the terms of the EULA were enforceable.<sup>28</sup> *ProCD*'s significance in the context of today's videogame market, as discussed in detail below, cannot be overemphasized. The court's holding in *ProCD* is dependent on the consumer having the ability to, as the court put it, "tr[y] out the software."<sup>29</sup> It also referenced the buyer's opportunity for a "detailed review" following the software's purchase at the store, but before her acceptance of the EULA.<sup>30</sup> That is not how modern day videogame transactions work. Instead of the step-by-step chance for review a customer of *ProCD* had under the Seventh Circuit's view, consumers today are now bound by the terms of the EULA the moment they purchase the videogame at the store or online, and are stuck with videogames they otherwise would have returned had they been afforded the opportunity for a "detailed review."<sup>31</sup>

### B. Videogames as Service Contracts Under the Common Law

While some courts view contracts for the sale of software as contracts for the sale of goods, other courts have held, depending on the facts before them, that the sale of software is a purchase of a service. A significant case highlighting this distinction is *Conwell v. Gray Loon*.<sup>32</sup> In this case, the Indiana Supreme Court analyzed whether a contract for the creation and publication of an Internet website was one for the sale of a good or a service contract.<sup>33</sup>

In *Gray Loon*, a company called Piece of America contacted Gray Loon to design and publish to the Internet a website so that it could sell individual square-inch parcels of land to customers.<sup>34</sup> A year after Gray Loon created and published the website, the owners of Piece of America contacted Gray Loon so that it could add additional features to its current website.<sup>35</sup>

The requests were approved, but neither party memorialized their agreement in writing.<sup>36</sup> Gray Loon did not save an older version of the website before it started to make changes.<sup>37</sup> Once the additions were

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Digital Equip. Corp. v. Uniq Digital Techs., Inc., 73 F.3d 756 (7th Cir.1996)).

28. *Id.* at 1455.

29. *Id.* at 1453.

30. *Id.*

31. *Id.*

32. *Conwell v. Gray Loon Outdoor Mktg. Grp., Inc.*, 906 N.E.2d 805, 811 (Ind. 2009).

33. *Id.* at 808.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* A portion of their contract over the original agreement to make the initial website stated: "It is Gray Loon's philosophy that clients have purchased goods and services from us and that inherently means ownership of those goods and services as well."

complete, Gray Loon sent a bill to Piece of America, but it no longer wanted to use the new version of the website and decided not to pay the bill.<sup>38</sup> Following a series of events whereby Gray Loon attempted to collect on its invoices, Gray Loon sued Piece of America for nonpayment.<sup>39</sup> Piece of America countersued for conversion for Gray Loon's failure to save a version of the original website.<sup>40</sup> The issue in the case was whether the contract, to create and publish a website between the parties, was one for the sale of a good or a service contract.<sup>41</sup>

Piece of America argued that the law of the case was the common law, and that its contract with Gray Loon constituted one for services only and was not one for the sale of goods.<sup>42</sup> The test cited by the court in making its decision was the "predominant thrust" test.<sup>43</sup> The court noted that scholars were still attempting to address the issue of how to treat contracts for the sale of software.<sup>44</sup> Referencing efforts by the American Law Institute and the National Conference of Commissioners of Uniform State Laws, the court noted that the determination of whether a software or Internet contract is one for a good or a service has to do with how and where the subject item of the contract was created or transmitted.<sup>45</sup>

After discussing the Indiana Court of Appeals' split on the issue, the court stated that the law seemed to indicate that a contract for the sale of customized, unique software is a service contract, while a contract for the sale of a pre-made, mass-produced software is one for the sale of a good.<sup>46</sup> But it cautioned that "[W]hen courts try to pour new wine into old legal bottles, [they] sometimes miss the nuances."<sup>47</sup> The court went on to state that one of its lower courts of appeal held that the sale of customized computer software was not a sale of goods contract.<sup>48</sup>

According to that court, the sale of software was a service contract akin to one wherein a client seeks a lawyer's advice.<sup>49</sup> As that court put it:

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38. *Id.*

39. *Id.* at 808–09.

40. *Id.* at 809.

41. *Id.* at 810–11.

42. *Id.* at 810.

43. *Id.* at 811–12.

44. *Id.* at 811.

45. *Id.* ("Where software is contained in a tangible medium, especially when produced on a mass scale, courts have had a difficult time placing software into the established categories. Unsurprisingly, this challenge has prompted suggestions that a new legal paradigm may be needed.")

46. *Id.* at 811–12

47. *Id.* at 812.

48. *Id.* at 811–12.

49. *Id.* at 812 (citing *Data Processing Servs., Inc. v. L.H. Smith Oil Corp.*, 492 N.E.2d 314, 319 (Ind. Ct. App. 1986)).

While a tangible end product, such as floppy disks, hard disks, punch cards or magnetic tape used as a storage medium for the program may be involved incidentally in this transaction, it is the skill and knowledge of the programmer which is being purchased in the main, not the devices by which this skill and knowledge is placed into the buyer's computer. The means of transmission is not the essence of the agreement.<sup>50</sup>

The court also discussed another case which held that a contract for the sale of goods existed where the good sold was "pre-existing, standardized" software.<sup>51</sup> Because Piece of America contacted Gray Loon to perform the service of building a website tailored to their orders, the court held that the predominant thrust doctrine suggested that the UCC did not apply to the contract at issue.<sup>52</sup>

The analysis of the *Gray Loon* court is significant because it mentions a common response to consumer advocates that call for reform in the videogame industry: that consumers are not purchasing merely a physical disc with a piece of software on it, but they are purchasing the "skill and knowledge" of programmers who designed the videogames they purchased. In other words, despite the fact that these videogames can be mass-produced like a car or widget, customers are actually paying for a videogame developer's service in designing the game, not the physical CD-ROM as a good. In courts across the country that adopt this interpretation, any issues consumers have with the videogames they purchased are subject to change or redress by the videogame's publisher by way of the "service" element of their contract, and consumers do not have a right upon purchase to reject broken videogames within the meaning of the UCC.

### *C. New Wine, Old Bottles*

Case law among both state and federal courts are split on the issue of whether a contract for the sale of a videogame is one for a service or good. Ideally, consumers in jurisdictions that hold videogames as goods under the UCC would be entitled to typical buyer's remedies in the UCC, but, as shown below, all of these rights are written out by contract anyway. Nonetheless, it is still an issue worth addressing so that, at the very least,

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50. *Id.* (quoting *Data Processing Servs., Inc. v. L.H. Smith Oil Corp.*, 492 N.E.2d 314, 319 (Ind. Ct. App. 1986)).

51. *Id.* (citing *Olcott Int'l & Co. v. Micro Data Base Sys., Inc.*, 793 N.E.2d 1063, 1071 (Ind. Ct. App. 2003)).

52. *Id.* (stating that "to be sure, one can copy a website using tangible, movable objects such as hard drives, cables, and disks. These objects are in themselves just as certainly goods, but it does not necessarily follow that the information they contain classifies as goods as well . . .").

consumers have an opportunity to argue that provisions of EULAs are unconscionable.<sup>53</sup>

It was perfectly reasonable to consider provisions of videogame contracts (whether they be service contracts or goods) that limit a buyer's remedies and rights as reasonable during the time when *ProCD* and *Gray Loon* were decided (1999 and 2009, respectively). During those years, consumers would have no reason to return software because it would work properly. So, when a ProCD customer purchased software, open the package, and installed the program on their computer, within the first few minutes of its use they would know that the program ran properly. As shown below in the next Part, this inspection process is not so simple in the context of modern day videogames. If anything, the past two years have shown that EULAs which write out a consumer's remedies ought to be considered per se unconscionable.

## II. BROKEN RELEASES

Too many high-profile videogame releases over the past few years have been released in a state that most consumers and observers of the industry call "broken."<sup>54</sup> Much like the Pac-Man example discussed above, these videogames are released in states where player-controlled protagonists get stuck in walls, consumers cannot connect to online multiplayer servers, and features players were promised pre-release in advertisements or demos are nowhere to be found. This Part will review some of the most broken videogame releases to date and highlight the stark contrast between what consumers are promised before they buy the videogame, what they get when they buy it, and how they are left out in the cold when they try to hold videogame publishers accountable for releasing videogames that do not work.

### A. *Batman: Arkham Knight*

Today, most videogame consumers play their games on one of three platforms: the Xbox One, the PlayStation 4, or a personal computer

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53. UNIFORM COMMERCIAL CODE § 2-302(1) (stating that "(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result" and "(2) when it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination . . .").

54. Luke Plunkett, *New Video Games Shouldn't Be So Broken*, KOTAKU (Nov. 13, 2014, 10:35 PM), <http://kotaku.com/new-video-games-shouldnt-be-so-broken-1658570535>.

(PC).<sup>55</sup> More often than not, videogames are released exclusively to either the Xbox One or PlayStation 4.<sup>56</sup> Fans of the “Batman: Arkham” series published by Warner Bros. Interactive Entertainment were excited to learn that the upcoming release of Batman: Arkham Knight was going also to be released on the PC, bucking the trend of the industry’s console-exclusive releases. Prior to the videogame’s release, it was advertised that PC users would only need six gigabytes of ram to run the videogame at recommended settings.<sup>57</sup> However, even with the most up to date graphics cards and processors, PC users still had problems with the game not running smoothly and having significant input lag, making it impossible to fight enemies and properly control vehicles.<sup>58</sup> Many players were not even able to get the game to start after they downloaded it to their computers.<sup>59</sup>

Publishers and developers of the videogame, including subcontractors responsible for different aspects of the game’s production, promised to get the videogame’s bugs corrected as quickly as possible.<sup>60</sup> Even after “patches” were released by the companies to correct the videogame’s problems, many of the issues continued to plague users and continued to prevent the game from working properly.<sup>61</sup> Warner Bros. pulled the

55. See generally Ben Gilbert, *The PlayStation 4 is the Most Popular Game Console in the World (Still)*, TECH INSIDER (Jan. 5, 2015, 1:36 PM), <http://www.techinsider.io/playstation-4-sales-as-of-january-2016-2016-1>.

56. Rob Crossley, *A Call to End the Console Exclusive Arms Race*, GAMESPOT (Dec. 22, 2014), <http://www.gamespot.com/articles/a-call-to-end-the-console-exclusive-arms-race/1100-6424137/>.

57. Patrick Klepek, *Batman: Arkham Knight's PC Version is Far from 'Fixed'*, KOTAKU (Oct. 29, 2015, 3:30 PM), <http://kotaku.com/batman-arkham-knight-s-pc-version-is-far-from-fixed-1739462839>.

58. Alac Meer, *The Arkham Knight Re-Release Isn't Going Down Well*, ROCKPAPERSHOTGUN (Oct. 29, 2015, 10:26 AM), <https://www.rockpapershotgun.com/2015/10/29/batman-arkham-knight-problems/>.

59. Frank the Tank, *Batman: Arkham Knight has Stop Working Error*, STEAM (Oct. 29, 2015, 11:39 AM), <http://steamcommunity.com/app/208650/discussions/0/490124466459334548/>.

60. Tom Sykes, *Rocksteady "Working Like Crazy" To Help Fix Arkham Knight*, PC GAMER, <http://www.pcgamer.com/rocksteady-working-like-crazy-to-help-fix-arkham-knight/>.

61. Richard Leadbetter, *New Arkham PC Patch Doesn't Solve Underlying Issues*, EuroGamer (Nov. 26, 2015), <http://www.eurogamer.net/articles/digitalfoundry-2015-batman-arkham-knight-pc-performance-still-falls-short>.

[W]ith a third patch promising performance enhancements, we’re still unable to run Arkham Knight at a locked 1080p60. We re-tested GTX 970 performance, this time paired with a Core i7 6700K and 16GB of 2666MHz DDR4. Stutter is still fairly common, even though GPU utilisation lay between 75 to 85 per cent. The drop in performance does seem to be down to VRAM streaming issues, as dropping from high quality textures to normal sees a small but tangible improvement. The issue we have is that we should not be seeing any particular

videogame from digital stores, and offered its customers refunds for the game.<sup>62</sup> Unfortunately, only digital customers were entitled to a refund.<sup>63</sup> And if a PC user paid for extra, downloadable content that was sold as add-ons to the videogame after its release, they could not get a refund for that content (even though they were unable to play or use it, unlike Xbox One or PlayStation 4 users).<sup>64</sup> To all other customers who bought the physical disc at a big box store, Warner Bros. promised to try to fix the game's issues, but made no guarantees that it would and—to this day—problems continue to plague the game from properly running on PC.<sup>65</sup>

Following the game's release and the subsequent outcry from angry customers, the issue of whether Warner Bros. knew of these problems before the videogame's release arose. Some reports even suggested that people who worked on the videogame knew about these game-breaking problems upon release, but decided to publish it on the PC anyway.<sup>66</sup> Videogame critics also discussed how Warner Bros. had not provided them with a PC version of the game to review before the game's release, instead only providing them with console versions of the game.<sup>67</sup> The frustration surrounding the *Batman: Arkham Knight*'s release and ongoing problems did not go unnoticed. Giant Bomb, a popular videogame news and entertainment website, awarded *Batman: Arkham Knight* its 2015 "Hottest Mess" award.<sup>68</sup> In justifying the award, Jeff

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problem here, because according to the game's VRAM allocation meter, 4GB is more than enough memory to run the title maxed at 1080p.

*Id.*

62. David Murphy & Sean Buckley, *Warner Bros. Offers Refunds For 'Batman: Arkham Knight' on PC*, ENGADGET (Oct. 31, 2015), <http://www.engadget.com/2015/11/01/warner-bros-offers-refunds-for-batman-arkham-knight-on-pc/>; David Murphy, *Warner Bros. Offers More Refunds for Batman: Arkham Knight on PC*, PC MAG (Oct. 31, 2015), <http://www.pcmag.com/article2/0,2817,2494239,00.asp/>.

63. Buckley, *supra* note 73.

64. *Id.*

65. *Id.*

66. Patrick Klepek, *Sources: Warner Bros. Knew That Arkham Knight PC Was A Mess For Months*, KOTAKU (July 1, 2015), <http://kotaku.com/sources-warner-bros-knew-that-arkham-knight-pc-was-a-1714915219>.

67. Phil Savage, *Batman: Arkham Knight's PC Port Appears to be a Disaster*, PC GAMER (June 22, 2015), <http://www.pcgamer.com/batman-arkham-knights-launch-appears-to-be-a-disaster/>.

68. Giant Bomb Staff, *Game of the Year Awards Day 3 Recap*, GIANT BOMB (Dec. 30, 2015), <http://www.giantbomb.com/articles/giant-bombs-2015-game-of-the-year-awards-day-three/1100-5318/>.

[E]very year we crown the hottest mess in a variety of forms. In some years, it's games that were so broken that they required apologies from the publishers. In some years, it might be an entire company that has managed to bungle things on such a massive scale that they overshadow any one game or moment. This year's

Gertsman, Giant Bomb's editor-in-chief, stated that in "terms of an outright betrayal of consumer trust, [Batman:] Arkham Knight is the one."<sup>69</sup> Adding insult to injury, it is rumored that Warner Bros. is planning on releasing a special "Game of the Year" edition, allowing consumers to pay Warner Bros. for a second time for the chance that the game might actually work on their PC.<sup>70</sup>

Given the utter inability for this product to run properly it is not surprising that its EULA is not consumer-friendly, and gives the customer no means of seeking redress:

#### 5. DISCLAIMER OF WARRANTIES.

THE GAME IS PROVIDED TO YOU ON AN "AS IS" "AS AVAILABLE" BASIS WITHOUT REPRESENTATIONS OR WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, NON-INFRINGEMENT AND AVAILABILITY.

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winner has a little bit of everything. Actually . . . it has a lot of everything . . .

*Id.*

69. Giant Bomb Staff, *Giant Bomb's Game of the Year 2015, Day 3*, GIANT BOMB (Dec. 30, 2015), [http://v.giantbomb.com/podcast/Giant\\_Bomb's\\_Game\\_of\\_the\\_Year\\_2015\\_Day\\_Three-12-30-2015-8276229504.mp3](http://v.giantbomb.com/podcast/Giant_Bomb's_Game_of_the_Year_2015_Day_Three-12-30-2015-8276229504.mp3).

70. Saad Dada, *Game of the Year Edition: Batman: Arkham Knight's Second Chance on PC*, BIDNESS ETC. (Feb. 22, 2016), <http://www.bidnessetc.com/63941-game-of-the-year-edition-batman-arkham-knights-second-chance-on-pc/>.

THE GAME (INCLUDING WITHOUT LIMITATION THE GAME).<sup>71</sup>

Warner Bros., on the other hand, is entitled to damages for a consumer's breach of the EULA:

10. Remedies.

You acknowledge that WB Games may suffer irreparable damage if you breach any of the provisions governing license limitations or ownership. You therefore agree that if you do breach either of these provisions, in addition to provable damages and reasonable attorneys' fees, WB Games shall be entitled to enjoin such breach and to obtain specific performance of such provisions in any court of competent jurisdiction.<sup>72</sup>

Considering the evidence that Warner Bros. knew of the videogame's problems before its release, it is not surprising that Warner Bros. would seek to bar a private cause of action and class action treatment:

12. Dispute Resolution and Governing Law.

Binding Arbitration. Any dispute, controversy or claim related to this Agreement ("Dispute") (except those Disputes expressly excluded below) that cannot be resolved through informal negotiations shall be finally and exclusively resolved by binding arbitration. Any election to arbitrate by one party shall be final and binding on the other. YOU UNDERSTAND THAT ABSENT THIS PROVISION, YOU WOULD HAVE THE RIGHT TO SUE IN COURT AND HAVE A JURY TRIAL.<sup>73</sup>

The terms of this EULA are the industry standard.<sup>74</sup>

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71. Batman: Arkham Knight- End User License Agreement, [http://store.steampowered.com//eula/208650\\_eula\\_1](http://store.steampowered.com//eula/208650_eula_1).

72. *Id.*

73. *Id.*

74. See Benjamin Shickman, *The Current Usage and Enforcement of Arbitration Clauses Post-Stern: Have No Fear*, 25 U. FLA. J.L. & PUB. POL'Y 165, 167 (2014) (stating that the public view of arbitration clauses are contracts of adhesion where consumers have no choice but to consent to their use); See also Jordan Nahmias, *The EULA: What it Does, How it Works (And, What Does EULA Even Mean?)*, NAHMIA'S LAW (Nov. 23, 2011), <http://www.nahmiaslaw.com/the-eula-what-it-does-how-it-works-and-what-does-eula-even-mean/>.



### B. *Halo: The Master Chief Collection*

Microsoft and its original Xbox console was put on the gaming map in 2001 when the original *Halo: Combat Evolved* released as an Xbox exclusive.<sup>75</sup> Consumers of the videogame lauded it for its smooth frame rate, ability to handle local-multiplayer modes with sixteen players, and in-game content.<sup>76</sup> For years to come, similar success was replicated by *Halo 2*, *Halo 3*, and *Halo 4* for subsequent versions of the Xbox.<sup>77</sup> Hoping to capitalize on this success and test interest for a *Halo 5* release on the soon-to-be-released Xbox One, Microsoft and 343, a videogame developer and Microsoft subsidiary, decided to bundle all of these games together in a game called *Halo: The Master Chief Collection*.<sup>78</sup> Like other *Halo* games before it, the game was going to be exclusive to the Xbox One.<sup>79</sup> However, the game's release was a huge flop.<sup>80</sup>

The primary selling point of *Halo: The Master Chief Collection* was that all Xbox One users would be able to play any *Halo* game online with one another.<sup>81</sup> A player could hop from a *Halo 2* multiplayer match right into a *Halo 4* multiplayer match.<sup>82</sup> However, upon release, Xbox One users were not able to connect to online servers and had to wait hours in order to get into an online match.<sup>83</sup> When they were finally able to connect, the games lagged and did not run well.<sup>84</sup> Many users reported

75. Taylor Soper, *Halo's Success by the Numbers: 46 Million Games, \$3 Billion in Revenue*, GEEKWIRE (Nov. 1, 2012), <http://www.geekwire.com/2012/halos-success-numbers-46-million-games-3-billion-revenue/>.

76. See Joe Fielder, *Halo Review*, GAME SPOT (Nov. 9, 2011), <http://www.gamespot.com/reviews/halo-review/1900-2823816/>.

77. *Id.*

78. See Ryan McCaffrey, *The Real Reason Halo: The Master Chief Collection Exists*, IGN (June 9, 2014), <https://www.ign.com/articles/2014/09/09/the-real-reason-halo-the-master-chief-collection-exists>.

79. See Colin Campbell, *Halo: The Master Chief Collection*, POLYGON, <http://www.polygon.com/a/e3-2014/halo-the-master-chief-collection>.

80. *Id.*; see Paul Tassi, *The Nightmare Continues As 'Halo: The Master Chief Collection' Cancels Its Own Tournament*, FORBES (May 1, 2015, 12:13 PM), <http://www.forbes.com/sites/insertcoin/2015/05/01/the-nightmare-continues-as-halo-the-master-chief-collection-cancels-its-own-tournament/#3e8ad9662be8>.

81. Stuart Andrews, *Halo: Master Chief Collection Review*, TRUSTED REVIEWS (Nov. 7, 2014), <http://www.trustedreviews.com/halo-the-master-chief-collection-review>.

82. *Id.*

83. Kyree Leary, *Halo: Master Chief Collection Launch Not Going Very Well*, GAMERANT (Feb. 28, 2016), <http://gamerant.com/halo-master-chief-collection-connection-server-issues/> (stating that "launch day players eager to jump into the collection's online modes and relive the multiplayer of Halos past have unfortunately been met with matchmaking issues that leave them waiting in matchmaking lobbies for unreasonable spans of time. Oftentimes resulting in no results.").

84. *Id.*

that they were unable to connect into any online game whatsoever.<sup>85</sup> Publishers of the game released a standard issue press release following the release of a broken game, apologizing for the issues its consumers had with the game, and promising to fix these issues as soon as possible.<sup>86</sup>

Two and a half months after its release, users were still unable to connect online.<sup>87</sup> VG24/7, a popular videogame website, wrote that the game had "been available for two-and-a-half months and by any reasonable standard it doesn't work."<sup>88</sup>

The issues with the release of this game and ongoing problems were so bad that Microsoft and 343 had to cancel a large, national tournament series, touted as the Halo Championship Series with huge cash payouts for the game, because of community outrage.<sup>89</sup> Worried that this failure to launch would affect the release and interest in the upcoming Halo 5 game for the Xbox One, Microsoft promised that Halo 5 would not have any of the same problems that "Halo: The Master Chief Collection" had.<sup>90</sup> To date, many of the problems with the Master Chief Collection still<sup>3</sup> persist, and users are stuck playing only the offline-only functions of the<sup>4</sup> game.<sup>91</sup> Even as recently as March, 2016 users are still complaining on the official website that the game does not work and has yet to be repaired.<sup>92</sup>

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85. *Id.*

86. Bonnie Ross, *A Status Update from Bonnie Ross*, HALO (Nov. 24, 2014), <https://www.halowaypoint.com/en-us/community/blog-posts/a-status-update-from-bonnie-ross-on-halo-the-master-chief-collection> (stating that "[o]n Nov 11th [343 Industries] released *Halo: The Master Chief Collection*. The goal being to create a tribute to Halo fans around the world, and to celebrate the Master Chief's debut on Xbox One. With the initial release of Halo: The Master Chief Collection, however, [343 Industries has] not delivered the experience you deserve. I personally apologize for this on behalf of us all at 343 Industries. Our team is committed to working around the clock until these issues are resolved.").

87. Richard Stanton, *Halo: The Master Chief Disaster*, VG 24/7 (Jan. 26, 2015), <http://www.vg247.com/2015/01/26/halo-the-master-chief-disaster/> (stating that "over two months since release and Xbox One's big Christmas game is still a turkey.").

88. *Id.*

89. Pete Haas, *Halo 5 Won't Be Broken Like Master Chief Collection*, Microsoft Says, Cinema Blend (Apr. 28, 2016), <http://www.cinemablend.com/games/Halo-5-Won-t-Broken-Like-Master-Chief-Collection-Microsoft-Says-71658.html>.

90. *Id.*

91. Paul Tassi, *The Nightmare Continues As 'Halo: The Master Chief Collection' Cancels Its Own Tournament*, FORBES (May 1, 2015), <http://www.forbes.com/sites/insertcoin/2015/05/01/the-nightmare-continues-as-halo-the-master-chief-collection-cancels-its-own-tournament/#7fba5d6e2be8>.

92. StrikerMan780, *Force 343i to Fix the Deplorable State of Halo: The Master Chief Collection*, XBOX FEEDBACK (Feb. 26, 2016), <https://xbox.uservoice.com/forums/251647-gaming-achievements/suggestions/12485970-force-343i-to-fix-the-deplorable-state-of-halo-th>.

### C. *Drive Club*

It did not take long for Sony to join the “releasing broken games” club (which is not saying much; this club is not very exclusive these days). As part of advertising and marketing for the release of the PlayStation 4, Sony announced that PlayStation users could subscribe to its PlayStation Plus service and get a free copy of “Drive Club.”<sup>93</sup> “Drive Club” was advertised as the next big motorsport racing game.<sup>94</sup> Consumers of the game were promised the ability to hop onto online servers and race their friends.<sup>95</sup> Sony also promised up-to-date graphics like weather effects and a photo mode, but the released version of the game did not have any of those features.<sup>96</sup>

Much like the many problems that plagued Halo: The Master Chief Collection’s online multiplayer features, “Drive Club” failed to deliver on its multiplayer features, too.<sup>97</sup> Sony ignored customer efforts and inquiries about refunds.<sup>98</sup> Even “Drive Club’s” developer hinted that it would issue refunds by giving customers a different videogame for free, but there has been no official update on the status of these efforts.<sup>99</sup>

### D. *Battlefield 4*

Battlefield 4 promised to have a large and robust online multiplayer system on the PC with the ability to host 64 online players at once with

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93. Owen S. Good, *Driveclub Apologizes for Its Broken Game with Free DLC*, POLYGON (Nov. 15, 2014), <http://www.polygon.com/2014/11/15/7225825/driveclub-apologizes-for-its-broken-game-with-free-dlc>.

94. *Id.*

95. Matt Martin, *Driveclub Has Become the PlayStation 4’s Biggest Liability*, VG 24/7 (Oct. 23, 2014), <http://www.vg247.com/2014/10/23/driveclub-has-become-ps4s-biggest-liability/> (stating that “what should have been a standard-bearing racer for Sony’s console has turned into a jumble of broken promises, unfinished features and mediocre gameplay.”).

96. *Id.*

97. Jason Schreier, *Three Weeks Later, DriveClub Still Doesn’t Work Properly*, KOTAKU (Oct. 28, 2014), <http://kotaku.com/three-weeks-later-driveclub-still-doesnt-work-properly-1651731762> (stating that “so for twenty-one days now, the game has been essentially crippled.”).

98. Jason Schreier, *Big Game Launches. Has Server Problems. Again.*, KOTAKU (Oct. 13, 2014) <http://kotaku.com/big-game-launches-game-has-server-problems-again-1645713232>.

99. Eddie Makuch, *As Driveclub Issues Persist, Dev Says It’s Considering Player Compensation*, GAMESPOT (Oct. 13, 2014), <http://www.gamespot.com/articles/as-driveclub-issues-persist-dev-says-its-consideri/1100-6422916/> (“Rustchynsky also says that Evolution has not ruled out offering some kind of compensation for early adopters, though it remains to be seen if this would be in the form of free DLC or something else. He also had no update to provide regarding when the free PlayStation Plus version of Driveclub would be released, but said fans can expect a ‘new update’ on the game sometime later today.”).

huge maps in 1080p.<sup>100</sup> However, technical bugs plagued its release.<sup>101</sup> One report stated that consumers “have been reporting disconnection errors, freezes, crashes and a smattering of bugs.”<sup>102</sup> Issues with the videogame were so persistent and ongoing that the developers created a group called “Community Test Environment” where players would “test” versions of the game that sought to fix the botched release.<sup>103</sup> Developers promised that the next version Battlefield would not be plagued with the same problems.<sup>104</sup>

Battlefield 4’s EULA is not so consumer-friendly either:

#### 7. Disclaimer of Warranties.

EXCEPT FOR THE LIMITED WARRANTY ON RECORDING MEDIA, IF APPLICABLE, AND TO THE FULLEST EXTENT PERMISSIBLE UNDER APPLICABLE LAW, THE SOFTWARE IS PROVIDED TO YOU “AS IS,” WITH ALL FAULTS, WITHOUT WARRANTY OF ANY KIND, WITHOUT PERFORMANCE ASSURANCES OR GUARANTEES OF ANY KIND, AND YOUR USE IS AT YOUR SOLE RISK.

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100. Wesley Yin-Poole, *EA Addresses Unacceptable Battlefield: 4 Launch*, EUROGAMER (June 6, 2014), <http://www.eurogamer.net/articles/2014-06-19-ea-addresses-unacceptable-battlefield-4-launch>.

101. Brian Crecente, *Battlefield 4 Plagued With Problems*, POLYGON (Dec. 4, 2013), <http://www.polygon.com/2013/12/4/5175710/battlefield-4-troubleshooting-problems>.

102. Tom Senior, *Battlefield 4 Dogged by Major Launch Issues: Connection Errors, Glitches, Dodgy Netcode*, PC GAMER (Nov. 3, 2013), <http://www.pcgamer.com/battlefield-4-dogged-by-major-launch-issues-connection-errors-glitches-dodgy-netcode/>.

103. Steve Marinconz, *Battlefield 4 May Have Just Fixed That Thing You Hate*, KOTAKU (Oct. 1, 2014), <http://www.kotaku.com.au/2014/10/battlefield-4-may-have-just-fixed-that-thing-you-hate/>.

104. Christopher Gates, *How EA is Avoiding ‘Battlefield 4’ Issues With ‘Hardline’*, GAMERANT (2015), <http://gamerant.com/battlefield-4-issues-hardline/>.

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### E. *Assassin's Creed Unity*

*Assassin's Creed Unity* was the follow up to the highly successful and critically acclaimed *Assassin's Creed: Black Flag*.<sup>106</sup> However, technical bugs and glitches prevented both its single player and multiplayer functions from working properly.<sup>107</sup> On the first day of its release, players reported issues with the main character falling through the ground and ending their game, crashing when joining a co-op session, the main character getting caught inside of hay carts, and delays in reaching the main menu screen at game start.<sup>108</sup> There were also significant issues with slow frame rates, glitches during in-game animations, and, levitating background characters.<sup>109</sup>

Ubisoft prevented review websites from releasing their reviews for up to twelve hours after the videogame's launch, leaving many customers with no idea that the videogame was unplayable.<sup>110</sup> Commercials and advertisements for the game promised co-op multiplayer with a friend online, but the feature never worked.<sup>111</sup> In response to the outcry, Ubisoft promised that it would give purchasers of the game free content.<sup>112</sup>

105. Battlefield 4 EULA, available at [http://ecom.s3.amazonaws.com/EULA\\_BF4\\_ROW\\_PC+8+6+13.pdf](http://ecom.s3.amazonaws.com/EULA_BF4_ROW_PC+8+6+13.pdf).

106. Arthur Gies, *Assassin's Creed 4: Black Flag Review*, POLYGON (Oct. 29, 2013), <http://www.polygon.com/2013/10/29/4861080/assassins-creed-4-black-flag-review>.

107. Assassin's Creed Update Team, *Assassin's Creed Unity Live Update*, ASSASSIN'S CREED (Nov. 13, 2014), [http://assassinscreed.ubi.com/en-gb/news/news\\_detail.aspx?c=tcm:152-184353-16&ct=tcm:148-76770-32](http://assassinscreed.ubi.com/en-gb/news/news_detail.aspx?c=tcm:152-184353-16&ct=tcm:148-76770-32).

108. *Id.*

109. Luke McKinney, *7 Reasons 'Assassin's Creed' Is the Least Playable Game Ever*, CRACKED (Nov. 25, 2014), <http://www.cracked.com/blog/7-reasons-assassins-creed-least-playable-game-ever/>.

110. Ben Kuchera, *How Assassin's Creed Unity Weaponized Review Embargoes*, POLYGON (Nov. 11, 2014), <http://www.polygon.com/2014/11/11/7193415/assassins-creed-unity-review-embargo>.

111. McKinney, *Suprasupra* note 109.

112. Ben Kuchera, *Ubisoft Shipped a Broken Game You Can't Return, Free DLC Doesn't Make it Right*, POLYGON (Nov. 26, 2014), <http://www.polygon.com/2014/11/26/7295181/assassins-creed-unity-free-content-apology> (stating that "Ubisoft is going to offer warm platitudes

However, in order to accept the refund, users had to waive their rights to sue for purchasing the defective product:

You hereby irrevocably and unconditionally RELEASE, WAIVE, AND FOREVER DISCHARGE AND COVENANT NOT TO SUE Ubisoft Entertainment S.A., and each of its past, present and future divisions, parent companies, subsidiaries, affiliates, predecessors, successors and assigns, together with all of their respective past, present and future employees, officers, shareholders, directors and agents, and those who give recommendations, directions, or instructions or engage in risk evaluation or loss control activities regarding the Campaign (all for the purposes herein referred to as "Released Parties") FROM ANY AND ALL LIABILITY TO YOU, your assigns, heirs, and next of kin FOR ANY AND ALL CLAIMS, DEMANDS, CHARGES, LAWSUITS, DEBTS, DEFENSES, ACTIONS OR CAUSES OF ACTION, OBLIGATIONS, DAMAGES, LOSS OF SERVICE, COMPENSATION, PAIN AND SUFFERING, ATTORNEYS' FEES, AND COST AND EXPENSES OF SUIT, KNOWN OR UNKNOWN, SUSPECTED OR UNSUSPECTED, ARISING OUT OF OR RELATED TO THE PURCHASE, ACQUISITION, RENTAL, POSSESSION AND/OR USAGE, AND/OR THE INTENT TO PURCHASE, ACQUIRE, RENT, POSSESS AND/OR USE, THE ASSASSIN'S CREED UNITY VIDEO GAME AND/OR THE ASSASSIN'S CREED UNITY SEASON PASS ON ANY AND ALL PLATFORMS, AND/OR RELATED TO THE CAMPAIGN, WHETHER CAUSED BY THE NEGLIGENCE OF THE RELEASED PARTIES OR OTHERWISE.<sup>113</sup>

Future interviews regarding the videogame's release indicated that employees believed they released the videogame in the broken state due to (the lack of time in decision making and experimentation) a rushed development and production schedule.<sup>114</sup>

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and free content for people who paid \$60 or more for a game that everyone but the purchaser knew wasn't likely to work. If you want to know why players and the press don't often trust big publishers, this could be exhibits A through Z. The entire system has been manipulated to hide the fact the game was broken, and Ubisoft is trying to make up for that dishonesty in the least expensive ways possible.").

113. Owen S. Good, *Claim a Free Game and Give Up the Right to Sue Over Assassin's Creed Unity*, POLYGON (Dec. 20, 2014), <http://www.polygon.com/2014/12/20/7427437/assassins-creed-unity-free-game-lawsuit-class-action>.

114. See generally Anthony Taormina, *Assassin's Creed: Ubisoft Montreal Will Have More Dev Time on Future Games*, GAMERANT (Feb. 28, 2015), <http://gamerant.com/assassins-creed-montreal-development-time-annual-release/>.

## F. Other Anti-Consumer Videogames

Game	Publisher/Developer	Issue
Alien Colonial Marines	Sega/Electronic Arts	In-game bugs, enemies do not recognize player, and unreliable check-points well. <sup>115</sup>
Mortal Kombat X (PC)	Warner Bros./NetherRealm Studios	Character animations do not work, game will lock controls, random crashes, erased save games, and low graphics quality when compared to Xbox One. <sup>116</sup>  Developer has abandoned any additional updates to the PC version, and additional content will not be made available for PC users. <sup>117</sup>  Advertised versions of the PlayStation 3 and Xbox 360 versions were cancelled. <sup>118</sup>

115. Alex Rubens, *Review: Aliens: Colonial Marines is a Bad Movie Reference*, PC WORLD (Feb. 12, 2013), <http://www.pcworld.com/article/2027860/review-aliens-colonial-marines-is-a-bad-movie-reference.html>; Jim Sterling, *Review: Aliens Colonial Marines*, DESTRUCTOID (Feb. 12, 2013, 3:00 PM), <https://www.destructoid.com/review-aliens-colonial-marines-244276.phtml>.

116. Congo, *Why Mortal Kombat X on PC is Still Broken*, GAMEZONE (Apr. 30, 2015), <http://www.mweb.co.za/games/view/tabid/4210/article/19417/why-mortal-kombat-x-on-pc-is-still-broken.aspx>.

117. Wesley Yin-Poole, *Warner Accused of Abandoning Mortal Kombat X PC Players*, EUROGAMER, (Jan. 21, 2016), <http://www.eurogamer.net/articles/2016-01-21-warner-accused-of-abandoning-mortal-kombat-x-pc-players>; Rae Michelle Richards, *Mortal Kombat X PC Will Not Get Netcode Update or New DLC*, BROKEN JOYSTICK (Jan. 20, 2016), <http://www.brokenjoystick.com/news/2016/01/20/mortal-kombat-x-pc-will-not-get-netcode-update-or-new-dlc/>; Wesley Yin-Poole, *Warner Accused of Abandoning Mortal Kombat X PC Players*, EUROGAMER, (Jan. 21, 2016), <http://www.eurogamer.net/articles/2016-01-21-warner-accused-of-abandoning-mortal-kombat-x-pc-players>.

118. Ozzie Mieja, *Mortal Kombat X on Xbox 360 and PlayStation 3 Officially Cancelled*, SHACK NEWS (Aug. 28, 2015), <http://www.shacknews.com/article/91042/mortal-kombat-x-on-xbox-360-and-playstation-3-officially-cancelled>.

Street Fighter V	Capcom	Players report waiting hours for online matches and laggy servers. <sup>119</sup>
SimCity 4	Electronic Arts/Maxis	Inability to connect to servers when game can only be played after connection to servers. <sup>120</sup>
Street Fighter x Tekken	Sony	Game advertised the ability for two players at home to fight two other players over the Internet, but function was removed and described to customers as "unworkable," even though it had been done in prior games on the same system. <sup>121</sup>
Fortza Motorsport 5	Turn Studios/Microsoft Studios	10 Build of game advertised at gaming conferences much higher resolution and quality than released version. <sup>122</sup>
Watch Dogs; The Division; Rainbow Six Siege; Far Cry 4; and Far Cry 3	Ubisoft	Multiple examples of toned down graphic capabilities between advertised and released versions of games <sup>123</sup>

119. Nathan Brown, *Street Fighter V is a Long, Disappointing Way from Being Finished*, PC GAMER (Feb. 14, 2016), <http://www.pcgamer.com/street-fighter-v-is-a-long-disappointing-way-from-being-finished/>.

120. See generally Nathan Grayson, *SimCity vs The People: Why Apologies Aren't Enough*, ROCKPAPERSHOTGUN (July 3, 2013), <https://www.rockpapershotgun.com/2013/03/07/simcity-vs-the-people-why-apologies-arent-enough/>.

121. Angry Joe, *Capcom Issues Apology Over SFxT's Online Co-op*, Angry Joe Show, ANGRY JOE SHOW (Mar. 14, 2012), <http://angryjoeshow.com/2012/03/capcom-issues-apology-over-sfxts-lack-of-xbox-local-online-co-op/>.

122. Sehran Shaik, *Forza 5: E3 Build vs Final Build Comparison Screens, Graphics Downgraded Vastly, 1080p is Culprit?*, GAMEPUR (Nov. 25, 2013), <http://www.gamepur.com/feature/12902-forza-5-e3-build-vs-final-build-comparison-screens-graphics-downgraded-vast.html>.

123. Crowbeat, *Ubisoft Downgrades*, YOUTUBE (June 4, 2016), <https://www.youtube.com/watch?v=xNter0oEYxc>.



### III. RESTORING CONSUMER RIGHTS

Modern day videogame consumers need additional recourse and rights to tip the scales in their favor. The litany of issues described in the Part above should be ground enough to serve as a rallying cry for reform in the industry, but most of these complaints fall on deaf ears.<sup>124</sup> Litigation as a means of reform or change appears to be a hit-or-miss course of action. For example, a plaintiff sued the developer and publisher of a videogame called “Killzone: Shadow Fall” for, *inter alia*, negligent representation and fraudulent inducement.<sup>125</sup> The basis of his complaint was that advertisements for the videogame promised that both its offline and online functions would display and play at 1080p, but it was soon discovered after the videogame’s release that the multiplayer functions of the game were incapable of displaying at 1080p.<sup>126</sup> Despite a lawsuit, the case was eventually dismissed following a stipulation between the parties.<sup>127</sup> The terms of the dismissal (and settlement) are under seal.<sup>128</sup> Litigation is also ongoing over the release of Alien: Colonial Marines and Battlefield 4, so, as of today, it is difficult to determine the success of those avenues of recourse.<sup>129</sup>

The Federal Trade Commission (FTC) has been successful in suing at least one videogame corporation for anti-consumer practices. In 2014, the FTC sued Sony for the fraudulent misrepresentation of several features it promised that its handheld console, the PlayStation Vita, would have.<sup>130</sup> Among several others, Sony marketed to consumers that they could use their Vita handhelds to play games from their PlayStation 3 without a television, but that feature never worked.<sup>131</sup> That case has since settled

124. *Supra* text accompanying note 8.

125. Samit Sarkar, *Court Dismisses Lawsuit Surrounding Killzone: Shadow Fall Graphics*, POLYGON (May 5, 2015), <http://www.polygon.com/2015/5/5/8555459/killzone-shadow-fall-resolution-lawsuit-dismissed-sony>.

126. *Id.*

127. *Id.*

128. *Id.*

129. Andy Chalk, *Gearbox Dropped from Aliens: Colonial Marines Lawsuit*, PC GAMER (May 28, 2015), <http://www.pcgamer.com/gearbox-dropped-from-aliens-colonial-marines-lawsuit/>; Eddie Makuch, *Class-action Lawsuit Commenced Over Buggy Battlefield 4, EA Calls It Meritless*, GAMESPOT (Dec. 18, 2013), <http://www.gamespot.com/articles/class-action-lawsuit-commenced-over-buggy-battlefield-4-ea-calls-it-meritless-update/1100-6416790/> (stating that the “official class-action claim shows that various Electronic Arts senior executives sold thousands of shares ahead of Battlefield 4’s release.”); Jason Schrier, *The Legal Battle Over Aliens: Colonial Marines Just Got Juicy*, KOTAKU (Sept. 3, 2014), <http://kotaku.com/the-legal-battle-over-aliens-colonial-marines-just-got-1630197749>.

130. Bridget Small, *Sony’s Ads Shouldn’t Play Games*, FEDERAL TRADE COMMISSION CONSUMER INFORMATION (Nov. 25, 2014), <https://www.consumer.ftc.gov/blog/sonys-ads-shouldnt-play-games>.

131. Joe Fingas, *Claim Your PlayStation Vita Settlement Credit Now*, ENGADGET (Apr. 5,

and purchasers of the Vita can claim cash or bundles of other games due to the terms of the settlement.<sup>132</sup>

Videogame and other software consumers in the United Kingdom have additional protection from EULAs in the form of the Consumers Rights Bill. In terms of digital downloads, the bill provides customers in the United Kingdom, regardless of contract, the right for a refund if the digital content they purchase does not work properly or as advertised.<sup>133</sup>

A EULA for United Kingdom customers references these rights:

7.2. Nothing in this License shall limit or exclude the liability of either you or EA for: death or personal injury resulting from negligence; or fraud or fraudulent misrepresentation; or breach of the terms implied by the relevant provisions of the applicable sale of goods and consumer protection laws in your country of residency; or deliberate default or willful misconduct.<sup>134</sup>

Clauses like the one above would not ever appear in EULAs drafted to American customers without a similar form of protection. Ideally, an American version of the Consumer Rights Bill would extend to all types of videogame and software purchases.

Steam, a popular online store for purchasing videogames (that also owns a publishing arm called Valve), announced a pro-consumer policy, and is now allowing refunds for any reason:

“You can request a refund for nearly any purchase on Steam—for any reason. Maybe your PC doesn’t meet the hardware requirements; maybe you bought a game by mistake; maybe you played the title for an hour and just didn’t like it.”

“It doesn’t matter. Valve will, upon request via [help.steampowered.com](http://help.steampowered.com), issue a refund for any reason, if the request is made within fourteen days of purchase, and the title has

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2015), <http://www.engadget.com/2015/04/05/playstation-vita-settlement-credit/>; Owen Good, *Free Games, Cash and Credit Now Available in PlayStation Vita Class Action Settlement*, POLYGON (Apr. 5, 2015), <http://www.polygon.com/2015/4/5/8348301/free-games-cash-and-credit-now-available-in-playstation-vita-class>.

<sup>132</sup>. Good, *supra* note 131.

<sup>133</sup>. DEPARTMENT FOR BUSINESS AND INNOVATION SKILLS, WHAT ARE MY RIGHTS UNDER THE BILL WHEN BUYING DIGITAL CONTENT?, <http://discuss.bis.gov.uk/consumer-rightsbill/what-are-my-rights-under-the-draft-bill-when-buying-digital-content/#1>.

<sup>134</sup>. *Electronic Arts Software User License Agreement*, BATTLEFIELD 4, [http://ecom.s3.amazonaws.com/EULA\\_BF4\\_ROW\\_PC+8+6+13.pdf](http://ecom.s3.amazonaws.com/EULA_BF4_ROW_PC+8+6+13.pdf).

been played for less than two hours. There are more details below, but even if you fall outside of the refund rules we've described, you can ask for a refund anyway and we'll take a look."<sup>135</sup>

Steam's policy is the first of its kind in the industry. Unsurprisingly, many developers and publishers have complained that Steam's policy could undermine their efforts at growing their business.<sup>136</sup> The solutions to the issues discussed in this article are not complicated: Congress must tackle the issue and provide consumers an additional method of protection, and courts should re-examine how they analyze EULAs. Leaving the FTC with the burden of curbing deceptive practices in the industry will not work quickly enough.

## CONCLUSION

Publishers and developers in the videogame industry are more than happy to see consumers and policymakers rest on their laurels when it comes to addressing this problem. As long as courts are eager to enforce draconian EULAs that leave consumers without a remedy, as long as consumers are willing to pay money for games before their release,<sup>137</sup> and as long as consumers do not have an American equivalent of the Consumer Right Bill, videogame publishers and developers will never have the reason, incentive, or motivation to market, build, and support a videogame properly the first time around. No other American industry is given this much room to mislead consumers and then avoid responsibility for its mistakes. It is clear that only a major shift in how courts, policymakers, and consumers think about the videogame industry will lead to an opportunity to correct the industry's anti-consumer race to the bottom.

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135. See *Refund Policy*, STEAM, [http://store.steampowered.com/steam\\_refunds/](http://store.steampowered.com/steam_refunds/). See also Andy Chalk, *New Steam Refund Policy Can Be Used for Any Reason*, PC GAMER (June 1, 2015), <http://www.pcgamer.com/new-steam-refund-policy-lets-you-get-your-thatmoney-back-for-any-reason/>; Rob Zacny, *Steam Refunds: What Developers Think, Two Months On*, PC GAMES (2015), <http://www.pcgamesn.com/steam-refunds-what-developers-think-two-months-later>.

136. Nathan Grayson, *Steam Refunds Could Cause Some Big Problems*, KOTAKU (June 2, 2015), <http://steamed.kotaku.com/steam-refunds-could-cause-some-big-problems-1708523970>.

137. See Luke Plunkett, *Stop Preordering Video Games*, KOTAKU (June 25, 2015), <http://kotaku.com/stop-preordering-video-games-1713802537>.