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Video Games and the Federal Trade Commission Act: An Analysis of the Practices of Video Game Developers and Their Effects on Players

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VIDEO GAMES AND THE FEDERAL TRADE COMMISSION ACT: AN ANALYSIS OF THE PRACTICES OF VIDEO GAME DEVELOPERS AND THEIR EFFECTS ON PLAYERS

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INTRODUCTION

Video games have become an increasingly popular hobby for a swiftly growing range of people.¹ Children and adults of all ages purchase and play games for a multitude of reasons including mental stimulation, improving problem solving, relaxation, and stress relief.²

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1. Compare Dmitri Williams et al., *Who Plays, How Much, and Why? Debunking the Stereotypical Gamer Profile*, 13 J. OF COMPUT.-MEDIATED COMM’N 993, 993 (2008), <https://academic.oup.com/jcmc/article/13/4/993/4583542> (“40% of adults are now regular players, compared to 83% of teenagers.”); Ent. Software Ass’n, 2020 ESSENTIAL FACTS ABOUT THE VIDEO GAME INDUSTRY 5 (July 2020), https://www.theesa.com/wp-content/uploads/2021/03/Final-Edited-2020-ESA_Essential_facts.pdf (reporting the total number of video gamers in the United States in 2020 was 214 million), with Ent. Software Ass’n, 2021 ESSENTIAL FACTS ABOUT THE VIDEO GAME INDUSTRY 4 (August 2021), <https://www.theesa.com/wp-content/uploads/2021/08/2021-Essential-Facts-About-the-Video-Game-Industry-1.pdf> (reporting the total number of video gamers just one year later as 227 million).

2. 2020 ESSENTIAL FACTS ABOUT THE VIDEO GAME INDUSTRY, *supra* note 1, at 4, 7; 2021 ESSENTIAL FACTS ABOUT THE VIDEO GAME INDUSTRY, *supra* note 1, at 6.

A majority of parents with young gamers not only enjoy playing games themselves, but also enjoy the benefits of playing games with their children, which include family fun and an opportunity to relate to and socialize with their kids.³ Therefore, video games provide mental and social benefits to people of all ages. As a majority of children in the U.S. play video games, and children are the group most susceptible to developers' practices, greater affirmative action should be taken to curb the unfair or deceptive practices of corporations in the video game industry.⁴ The Federal Trade Commission ("FTC") should be the entity to take such critical and necessary action because its main purpose is to protect businesses and consumers from anticompetitive and deceptive conduct.⁵

The purpose of this Note is to propose that the FTC exercise its broad authority under § 45 of the Federal Trade Commission Act ("FTC Act") to address the seemingly innocuous conduct of the video game industry. To that end, this Note is divided into two sections. The first section reviews administrative and judicial opinions interpreting the history and scope of the FTC. It also notes how the Wheeler-Lea Amendment expanded the Commission's power to include consumer protection. The second section identifies specific acts and practices used by video game developers (hereinafter "VGDs") to demonstrate how they fall within the ambit of the FTC Act, either as novel or established violations.⁶ The second section also applies the most relevant caselaw to the practices of the industry to analyze the applicability of FTC action.

3. 2021 ESSENTIAL FACTS ABOUT THE VIDEO GAME INDUSTRY, *supra* note 1, at 11.

4. See *Video Games*, DIGITAL WELLNESS LABS, <https://digitalwellnesslab.org/parents/video-games/> (last visited Jan. 16, 2022) (discussing recent studies and reporting that a majority of children aged eight to eighteen years old play video games for more than one hour per day); MATTHEW McCaffrey, THE MACRO PROBLEM OF MICROTRANSACTIONS: THE SELF-REGULATORY CHALLENGES OF VIDEO GAME LOOT BOXES 7 (2019) ("Legislators around the world have attacked publishers like Electronic Arts" alleging predatory practices.).

5. See 15 U.S.C. § 45(a)(2) (empowering and directing the Commission to "prevent persons, partnerships, or corporations . . . from using unfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce"); Lonnie E. Griffith, et al., *Purpose of Federal Trade Commission Act*, 87 C.J.S. TRADEMARKS, ETC. § 383 (Nov. 2021) ("The Federal Trade Commission Act is intended to afford a preventive remedy . . . and its purpose is the protection of the public . . . from unfair or deceptive practices by those engaged in trade or commerce."); Fed. Trade Comm'n v. Cassoff, 38 F.2d 790, 791 (2d Cir. 1930) ("The purposes of the Federal Trade Commission Act and the enforcing power of the Commission are directed to the prevention of fraud upon the purchasing public.").

6. See Fed. Trade Comm'n v. Sperry & Hutchinson, Co., 405 U.S. 233, 244 n.5 (1972) (listing the factors the Commission considers in "determining whether a practice that is neither in violation of the antitrust laws nor deceptive is nonetheless unfair").

I. THE HISTORY AND SCOPE OF THE FTC

In the late 1800's when the United States was rapidly industrializing, the largest businesses in major industries—steel, sugar, and oil—organized themselves into corporate trusts to maintain control of their relative markets and to prevent the growth of new, rival businesses.⁷ As a result of these actions, Congress passed a number of laws deterring anticompetitive practices to combat the price increases and quality decreases that occurred, beginning with the Sherman Act in 1890.⁸ The Sherman Act “bars ‘every contract, combination . . . or conspiracy in restraint of trade’ and makes it unlawful to ‘monopolize,’ ‘attempt to monopolize’ or ‘combine or conspire . . . to monopolize.’”⁹

This broad, ambiguous language left interpretation of the Sherman Act's terms to the courts, and the laissez-faire attitude of the Supreme Court at the time, led to weak enforcement and minimal success in reducing anticompetitive activity.¹⁰ In 1911, the first Sherman Act case to reach the Supreme Court, *Standard Oil Co. of N.J. v. United States*, led to the Court creating the “rule of reason” standard which required the government to demonstrate an actual anticompetitive effect in order to establish that a violation of the Sherman Act occurred.¹¹ Proponents of the antitrust legislation were dissatisfied

7. See *FTC Fact Sheet: Antitrust Laws: A Brief History* 1, Fed. Trade Comm'n (2012), http://www.consumer.ftc.gov/sites/default/files/games/off-site/youarehere/pages/pdf/FTC-Competition_Antitrust-Laws.pdf (“[G]iant businesses known as ‘trusts’ controlled whole sections of the economy, like railroads, oil, steel, and sugar.”); Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation*, 81 *FORDHAM L. REV.* 2279, 2315-17 (2013) (“The creation of the Standard Oil Trust is usually regarded as the beginning of the trust movement.” Prior to the passage of federal antitrust legislation, groups of competitors in at least five other industries created national trusts including: The National Lead Trust, the Sugar Refineries Company, and the American Cotton Oil Trust.); Franklin D. Jones, *Historical Development of the Law of Business Competition*, 36 *YALE L.J.* 207, 217 (1926) (describing how the Sugar Refineries Company and Standard Oil Company used the trust vehicle to “obtain[] a monopoly of production”).

8. See *FTC Fact Sheet*, *supra* note 7. See also Sherman Act, Pub. L. No. 51-647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7).

9. STEPHANIE W. KANWIT, 1 *FED. TRADE COMM'N.* § 3:2 (2021-2022 ed.) (quoting 15 U.S.C. §§ 1, 2).

10. *Id.* (discussing these and other factors that contributed to the lack of enforcement of the Sherman Act, as well as the causes and results of the Sherman Act's weakness).

11. See *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 62-63 (1911) (establishing the rule of reason as the standard for Sherman Act violations); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977) (to determine whether a practice has an actual anticompetitive effect, “the factfinder weighs all of the circumstances of a case.”); *Bd. of Trade City of Chicago v. United States*, 246 U.S. 231, 238 (1918) (listing several relevant factors considered in finding an actual anticompetitive effect including: the condition of the business before and after engaging in the allegedly anticompetitive conduct, the restraining nature of the conduct, and its actual and probable effects).

both with this Supreme Court decision and prior precedent applying the Sherman Act, thus, in 1914 the Clayton and Federal Trade Commission Acts were promulgated.¹² The Clayton Act prohibited specific types of anticompetitive conduct, while the FTC Act created the Federal Trade Commission and gave it the power to restrain “unfair methods of competition.”¹³ Although the statute as originally enacted made no reference to consumer protection, the Commission quickly recognized, and the courts agreed, that deception of consumers is harmful to competition.¹⁴ The scope of the Commission’s power to protect consumers, however, was incorrectly limited early in the agency’s lifetime by two Supreme Court decisions: *Federal Trade Commission v. Gratz* and *Federal Trade Commission v. Raladam Co.*¹⁵

A. *The Wheeler-Lea Amendment*

Although evidence shows that the drafters of the FTC Act intended for the Commission “to determine what practices are unfair,”¹⁶ the Supreme Court, in its first FTC case, *Federal Trade Commission v. Gratz*, held that “[i]t is for the courts, not the commission, to ultimately determine as matter of law” what constitutes an unfair method of com-

12. DEE PRIDGEN ET AL., *Statutory Underpinnings and History of the FTC, in CONSUMER PROTECTION AND THE LAW* § 8:2 (2020-2021 ed.) (“Congressional advocates were dissatisfied with the Supreme Court’s ‘rule of reason’ approach to enforcing the Sherman Act. It was hoped the FTC, as an administrative body, could provide the public with perhaps more enthusiastic and consistent application of the general proscription against restraints of trade.”).

13. FTC Fact Sheet, *supra* note 7 (Congress “gave the Federal Trade Commission the authority to investigate and stop unfair methods of competition.”); 15 U.S.C. § 45(a)(1), (2) (Subsection (1) declares that “[u]nfair methods of competition in or affecting commerce” are unlawful. Subsection (2) empowers the Commission “to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce.”).

14. See *Sears, Roebuck & Co. v. Fed. Trade Comm’n*, 258 F. 307, 311 (7th Cir. 1919) (affirming an FTC order against Sears for falsely advertising to customers that its prices were less than wholesale because it had access to economies of scale unavailable to competitors. These economies of scale did not exist, and the court found that this deception of consumers worked an indirect harm on competitors); *Fed. Trade Comm’n v. Winsted Hosiery Co.*, 258 U.S. 483, 493 (1922) (finding that labeling products that were not made substantially of wool as ‘natural wool’ caused harm to honest competitors because “when misbranded goods attract customers by means of the fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods”).

15. *Fed. Trade Comm’n v. Gratz*, 253 U.S. 421, 427 (1920) (holding that courts are to determine what constitutes an unfair method of competition and interpreting the FTC Act as including only those competitive practices that were illegal at common law); *Fed. Trade Comm’n v. Raladam Co.*, 283 U.S. 643, 653-54 (1931) (holding that the Commission must show actual injury to competitors).

16. S. REP. NO. 63-597, at 13 (1914).

petition.¹⁷ The *Gratz* Court also restricted the Commission to those methods of competition that were unlawful at common law by construing the FTC Act as “inapplicable to practices never heretofore regarded as” unfair.¹⁸ By 1931, the year *Federal Trade Commission v. Raladam Co.* was decided, the Supreme Court established that it would interpret the FTC Act narrowly.¹⁹ Subsequently, *Raladam* heightened the Commission’s standard of proof, requiring it to show that the practice caused actual harm to competitors before it could issue a cease and desist order.²⁰ *Raladam* drew significant public backlash, and due to the backlash, Congress effectively overruled the decision in 1938 by passing the Wheeler-Lea Amendment.²¹

This amendment prohibited “unfair or deceptive acts or practices” in addition to unfair methods of competition.²² The House and Senate Reports on the Wheeler-Lea Amendment both declare that the language was drafted intentionally to allow the Commission “to restrain an unfair act before it had become a method or practice.”²³ Thus, although the power of the Commission was initially restricted by the judiciary, Congress made it expressly clear that the Commission was intended to protect consumers by punishing not only established methods and practices, but also individual acts. Consistent with this intent, subsequent Supreme Court decisions granted the Commission greater

17. *Gratz*, 253 U.S. at 427.

18. *Id.* (“The words ‘unfair method of competition’ are . . . clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly.”).

19. See *KANWIT*, *supra* note 9, at § 3:4 (explaining the holding in *Gratz* and later cases that apply it).

20. *Raladam*, 283 U.S. at 654 (“[O]ne of the facts necessary to support jurisdiction to make the final order to cease and desist is the existence of competition; and the Commission cannot, by assuming the existence of competition, if in fact there be none, give itself jurisdiction to make such an order.”).

21. See *KANWIT*, *supra* note 9, at § 3:5 (“As a result of public criticism of the [*Raladam*] decision, Congress amended the FTCA to enable the FTC to protect consumers directly against deception rather than basing all action on protection of competitors alone.”). *PRIDGEN ET AL.*, *supra* note 12 (“The *Raladam* decision was the subject of extensive public criticism, and in 1938, Congress amended the FTC Act and effectively overruled the Supreme Court.”).

22. Wheeler-Lea Act, ch. 49, 52 Stat. 111 (1938) (codified as amended at 15 U.S.C. § 45(a)(1)). *Fed. Trade Comm’n v. Raladam Co.*, 283 U.S. 643, 652-53 (1931) (holding that the FTC lacks jurisdiction to restrain misleading advertisements without an actual showing of injury to existing competitors.).

23. S. REP. NO. 75-221, at 4 (1937); H.R. REP. NO. 75-1613, at 3 (1937) (suggesting that without the amendment the FTC would be unable to intervene where there was no competition or where all competitors acted reprehensibly).

leeway and power to define and punish violations of the FTC Act.²⁴ The scope of the Commission's power and authority have been adjusted over time through additional federal statutes.²⁵ Although some of these statutes have limited the Commission's power, the Wheeler-Lea Amendment ensured that the Commission would never be as limited as it was during its first decades.

B. *The Scope of the Commission*

Today, the FTC Act prohibits “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.”²⁶ If the Commission finds that an individual or business is acting unfairly or deceptively, it has the authority to institute proceedings against the entity, if such sanctions “would be to the interest of the public.”²⁷ The Commission has broad discretion to determine whether a proceeding is in the interest of the public, but the interest served must be specifically identified and substantial as shown by the facts in each case.²⁸ Once jurisdiction is established, the Commission must prove that the challenged practice is either unfair or

24. See *Raladam Co.*, 316 U.S. at 149 (affirming an order of the Commission against Raladam for essentially the same conduct that was deemed permissible in 1920); *Fed. Trade Comm'n v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966) (rejecting the Court's interpretation in *Gratz* and holding that the Commission has the power “to arrest trade restraints in their incipency without proof that they amount to an outright violation” of another antitrust law).

25. See *Magnuson-Moss Warranty-Federal Trade Commission Improvement Act*, Pub. L. No. 93-637, § 201, 88 Stat. 2193, 2193 (1975) (expanding the agency's jurisdiction to acts or practices in “or affecting” interstate commerce); *Federal Trade Commission Amendments Act of 1994*, Pub. L. No. 103-312, § 9, 108 Stat. 1691, 1695 (1994) (limiting the agency's jurisdiction to declare an act or practice unlawful on the grounds that such act or practice is unfair unless absent likelihood of substantial injury).

26. 15 U.S.C. § 45(a)(1) (2006). See *Griffith, et al.*, *supra* note 5 (“[T]he Commission may consider established public policies as evidence to be considered with all other evidence.”).

27. 15 U.S.C. § 45(b). See *Raladam*, 283 U.S. at 649 (holding that the identification of a public interest is a “necessary prerequisite.”); *Fed. Trade Comm'n v. Klesner*, 280 U.S. 19, 28 (1929) (holding that an action to prevent one shop owner from operating a store with the exact same name as a nearby shop is “essentially private.”).

28. See *Klesner*, 280 U.S. at 28 (explaining that a proceeding may be in the public interest “because, although the aggregate of the loss entailed may be so serious and widespread as to make the matter one of public consequence, no private suit would be brought to stop the unfair conduct, since the loss to each of the individuals affected is too small to warrant it”); *Guziak v. Fed. Trade Comm'n*, 361 F.2d 700, 704 (8th Cir. 1966) (“[T]he Commission has broad discretion in determining whether a proceeding brought by it is in the public interest and [] each case must be determined upon its own facts.”); *Regina Corp. v. Fed. Trade Comm'n*, 322 F.2d 765, 768 (3d Cir. (1963) (“[I]t is in the public interest to stop any deception at its incipency.”).

deceptive, and neither knowledge nor intent is required.²⁹ The Second Circuit Federal Court of Appeals has held that the purpose of the FTC Act is not to punish businesses, but to safeguard consumers, thus, “a deliberate effort to deceive is not necessary to make out a case.”³⁰ All that the Commission must prove is that the activity has tendency or capacity to deceive, and such tendency exists “when there is a likelihood or fair probability” of deception.³¹

Concerning the first aspect, the Commission, in its 1983 Policy Statement on Deception, articulated three elements necessary to every deception case: (1) “a representation, omission or practice that is likely to mislead the consumer;” (2) the deceptiveness of the practice must be analyzed from the perspective of a reasonable consumer; and (3) the practice must be material to the consumer’s decision to engage the product or service.³² Additionally, the Commission may not declare an act or practice unlawful unless “the act or practice causes or is likely to cause substantial injury to consumers, which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”³³ The next section analyzes whether the acts of certain companies in the video game industry—or whether certain widespread practices—could be construed as deceptive within the standard set forth above.

II. PROBLEMATIC PRACTICES IN THE VIDEO GAME INDUSTRY

There are a variety of practices utilized within the video game industry that could be considered unfair or deceptive.³⁴ This section focuses on the practices that are both prevalent and likely to deceive

29. See *KANWIT*, *supra* note 9, at § 4:3 (“[N]either knowledge that a representation is deceptive nor intent to deceive is an element of a § 5 violation.”); *Fed. Trade Comm’n v. Algoma Lumber Co.*, 291 U.S. 67, 81 (1934).

30. *Gimbel Bros. v. Fed. Trade Comm’n*, 116 F.2d 578, 579 (2d Cir. 1941).

31. *Fed. Trade Comm’n v. Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963); *see also Fed. Trade Comm’n v. Colgate-Palmolive Co.*, 380 U.S. 374, 391-92 (1965); *Sears, Roebuck & Co. v. Fed. Trade Comm’n*, 258 F. 307, 311 (7th Cir. 1919); *Fed. Trade Comm’n v. Lead-Click Media, LLC*, 838 F.3d 158, 168 (2d Cir. 2016).

32. FTC POLICY STATEMENT ON DECEPTION, 103 F.T.C. 110, 174-75 (1984), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

33. See *PRIDGEN ET AL*, *supra* note 12 (“The relevant legal standard is whether the challenged practice has a ‘tendency or capacity to deceive,’ or, according to the 1983 Policy Statement, is ‘likely to mislead.’”).

34. 15 U.S.C. § 45(n).

34. See generally Elad Botwin, *Deception Unknown: A Hard Look at Deceptive Trade Practices in the Video Game Industry*, 32 *LOY. CONSUMER L. REV.* 115, 122-28 (2019) (describing several actions brought by the FTC against video game companies for deceptive practices).

consumers, including some of the most common misrepresentations in advertising, promotion, and technological demonstrations. Video games are like cars in that both run on engines and systems, and both are advertised with numerous selling points. To understand the factors of a game that are material to consumers' purchasing decisions, the basic structure of video games must first be understood. Games run on engines, which employ systems that control each aspect of the game such as lighting, weather, and non-playable character ("NPC") activity.³⁵ Although many games may run on the same engine, such as the proprietary RE Engine owned by Capcom, each game's systems are unique, allowing for drastic differences in visuals and gameplay between games running on the same engine.³⁶ The systems most often advertised to entice consumers, leading to deception, are those relating to the visual and gameplay mechanics of a game.³⁷ These visual and gameplay advertisements usually show consumers a more polished product than what is actually delivered.³⁸

In fact, one of the largest issues facing gamers today is the lack of trustworthiness in the advertisements and promotional statements made prior to a game's release.³⁹ Games are marketed based on nu-

35. See Maverick Baker, *How Do Game Engines Work?*, INTERESTING ENGINEERING (Nov. 02, 2016), <https://interestingengineering.com/how-game-engines-work>.

36. See, e.g., Chris Carter, *Capcom Really Loves Its RE Engine, Will Keep Using It Beyond Resident Evil and Devil May Cry 5*, DESTRUCTOID (May 5, 2019), <https://www.destructoid.com/stories/capcom-really-loves-its-re-engine-will-keep-using-it-beyond-resident-evil-and-devil-may-cry-5-554285.phtml>; see also Liam Doolan, *Yes, Monster Hunter Rise Is Running On Capcom's RE Engine*, NINTENDOLIFE (Sept. 19, 2020), https://www.nintendolife.com/news/2020/09/yes_monster_hunter_rise_is_running_on_capcoms_re_engine.

37. See Jeremy Peel, *Developers don't want to show gameplay at E3 anymore, and who can blame them?*, VG247 (June 13, 2019), <https://www.vg247.com/2019/06/13/e3-gameplay-trailers/> (explaining a possible reason for why VGDs who have traditionally included gameplay and visual quality demonstrations in their promotional showcases are moving away from the practice in favor of fully animated or CGI videos that are "like the trailers before a movie – plenty of sizzle and not a lot of meat."); see also Ritwik Mitra, *The 20 Most Embarrassing Video Game Graphics Of All Time (And The 10 Best)*, THEGAMER (Apr. 11, 2019), <https://www.thegamer.com/video-games-embarrassing-best-graphics/> (summarizing the major gameplay appeals and drawbacks of ten games that released with inferior graphics compared to their contemporaries and ten games whose graphics were praised); see also Ent. Software Ass'n, 2018 ESSENTIAL FACTS ABOUT THE VIDEO GAME INDUSTRY 11 (Apr. 2018), https://www.theesa.com/wp-content/uploads/2019/03/ESA_EssentialFacts_2018.pdf (stating that quality of graphics is top factor influencing decisions to purchase video games).

38. *Id.*

39. See Ciaran Utting, *Game Trailers that Lied to Your Face*, SVG (June 6, 2018, 6:18 PM), <https://www.svg.com/125206/game-trailers-that-lied-to-your-face/>; Brendan Sinclair, *When do deceptive playable ads help, and when do they hurt?*, GAMEINDUSTRY.BIZ (Jan. 28, 2020), <https://www.gamesindustry.biz/articles/2020-01-28-when-do-deceptive-playable-ads-help-and-when-do-they-hurt> (interviewing the chief design officer of an app monetization

merous, independent features. However, several common types of features relating to the graphics and gameplay mechanics are both widely promoted and widely relied upon by gamers when making purchasing decisions.⁴⁰ Importantly, these categories encompass thousands of individual game features.⁴¹ Gameplay mechanics are the rules and tools of the game with which the player interacts. Graphical systems that influence the choice to purchase a game include dynamic reflections, global illumination, and particle effects. Examples of mechanical systems that impact players' purchasing choices include destructible environments, artificial intelligence (AI) complexity, and branching storylines.⁴²

The FTC acted in the past when products appeared to deceive users and failed to deliver the features that were advertised, as they were advertised. The FTC can and should act again by recognizing the major visual and gameplay features that make an individual game appealing and acting against VGDs whose released games fail to meet the expectations created by their advertisements.⁴³

business on the benefits and drawbacks of misleading mobile game advertisements. The ads “appealed to a much larger audience, so it worked for them. It drove a lot more downloads. But when users found out that mechanic is not reflected in the actual game, some went to the store and gave it one-star; there are lots of bad reviews.”). *The Deceptive Marketing of Video Games*, PCINVASION (July 16, 2016), <https://www.pcinvasion.com/the-deceptive-marketing-of-video-games/> (discussing the issues of hidden sponsorships and undisclosed paid endorsements in the context of YouTubers and streamers who contract with VGDs to play and promote their games).

40. See Megan Rae, *15 Awesome Games RUINED By Bad Graphics*, THEGAMER (May 31, 2017), <https://www.thegamer.com/15-awesome-games-ruined-by-bad-graphics/> (listing several games that were beloved for various gameplay mechanics but were visually unappealing); see also Joseph Langdon, *Visually Stunning Video Games That Are Simply Garbage*, RANKER (Aug. 7, 2019), <https://www.ranker.com/list/bad-video-games-with-good-graphics/joesph-langdon> (listing several games that attracted players by displaying exceptional graphics but received mixed critical reviews and poor consumer ratings for the lack of engaging gameplay).

41. For the purpose of this paper, graphical features will be limited to mean only those systems within the game's engine that contribute to the visual aesthetic.

42. See Tim Schiesser, *Metro Exodus Ray Tracing Benchmarked*, TECHSPOT (Feb. 15, 2019), <https://www.techspot.com/article/1793-metro-exodus-ray-tracing-benchmark/>; see also Phill Cameron, *7 games worth studying for their excellent sound design*, GAMASUTRA (May 16, 2018), https://www.gamasutra.com/view/news/318157/7_games_worth_studying_for_their_excellent_sound_design.php

43. The FTC has acted in the past against advertisements whose claims were purportedly deceptive. See *In the Matter of Ideal Toy Corporation*, 64 F.T.C. 297, 301 (1964) (finding that a toy maker's representations that a robot would move upon voice commands spoken into a microphone were deceptive. The movements the toy actually made were dictated by a switch and motion was activated by blowing on the microphone, not speaking into it.); see also *Fed. Trade Comm'n v. F.A. Martocchio Co.*, 87 F.2d 561, 562 (8th Cir. 1937) (finding that the practice of selling push cards through which children could potentially win

A. Visual Misrepresentations

In-engine and in-game trailers often demonstrate whether a game can employ complex graphical systems, and if so, how it deploys them and the featured mechanics.⁴⁴ Trailers and playable demos for games like *Watch Dogs* and *Aliens: Colonial Marines* were heavily criticized when the final products were clearly visually inferior to the shown trailers.⁴⁵ However, the reasons for the visual criticism differ between the two games.⁴⁶

When it first released at E3⁴⁷ in 2012, the *Watch Dogs* trailer was praised for its advanced graphics systems; and although the quality of the version fans received was on par with other games of the time, it was noticeably lower than what was previously presented by *Watch Dogs* itself.⁴⁸ In a side-by-side comparison video of the trailer for *Watch Dogs* and gameplay footage of the final released game in 2014,

a small, medium, or large candy bar constituted a lottery and therefore was against public policy for encouraging children to gamble).

44. See Chris Stobing, *Why Do Game Trailers Look So Much Better Than the Actual Game?*, HOW-TO-GEEK (Feb. 9, 2016, 6:35 PM), <https://www.howtogeek.com/240566/why-do-game-trailers-look-so-much-better-than-the-actual-game/> (explaining the difference between CGI, in-engine, and in-game trailers. Full CGI trailers are made entirely outside of the game's engine, as opposed to, In-engine trailers that are made within the game's engine but without any of the mechanics that govern players. In-game trailers are the most accurate to the final release comparatively, but many in-game trailers still use processing "features not available to normal gamers, or require[] processing power no gaming PC would be capable of."); see also Xbox, *Assassin's Creed Valhalla: First Look Gameplay Trailer*, YOUTUBE (May 7, 2020), <https://www.youtube.com/watch?v=ach9vZJyF24> (demonstrating the availability of ray-tracing, dense particle effects, and dynamic illumination in an in-engine trailer. The top six comments criticize the trailer for dubbing itself a gameplay trailer when it is merely an in-engine cinematic.); C.f. PlayStation, *Destruction AllStars - Announcement Trailer*, YOUTUBE (June 11, 2020), <https://www.youtube.com/watch?v=NNO1k5NCDOk> (showing a combination of CGI animation and in-engine footage), with PlayStation, *Destruction AllStars - Gameplay Trailer*, YOUTUBE (Nov. 5, 2020), <https://www.youtube.com/watch?v=6kP3G5vO49A> (weaving in-engine animations and transitions between scenes of in-game footage).

45. Utting, *supra* note 39; See Paul Tassi, *An Attempt To Understand Watch Dogs' Graphics Downgrade*, FORBES (Mar 7, 2014, 11:17 AM), <https://www.forbes.com/sites/insertcoin/2014/03/07/an-attempt-to-understand-watch-dogs-graphics-downgrade/?sh=91255f949b1d> ("While it's understandable that Ubisoft may not be able to deliver the exact same product shown at E3, they would be wise to avoid purposefully overdressing their footage if they know they can't possibly hope to replicate its quality in the final product.").

46. *Id.*

47. E3 is the Electronic Entertainment Expo, a video game showcase in which VGDs, publishers, and manufacturers gather to introduce their new products to the public and the press. See also *The Video Game Industry: E3*, ENTERTAINMENT SOFTWARE ASSOCIATION, <https://www.theesa.com/industry/e3/> (last visited Oct. 11, 2021).

48. See Utting, *supra* note 39; Thomas Morgan, *Does Watch Dogs deliver on its stunning E3 2012 reveal?*, EUROGAMER (May 27, 2014), <https://www.eurogamer.net/articles/digitalfoundry-2014-watch-dogs-tech-analysis>

the disparities and visual misrepresentations were evident.⁴⁹ The trailer features both dynamic reflections and particle effects that were heavily scaled back in the final game.⁵⁰ The game's developer, Ubisoft, represented to consumers in 2012 that *Watch Dogs* would deliver the visual fidelity of the E3 trailer in the final console release but ultimately failed to do so.⁵¹ Based on the amount of pre-orders for the game, this representation by Ubisoft mislead consumers, mainly because the sophisticated graphics, as advertised, were material to the consumers' decision to purchase the game.⁵² It stands that the FTC acted in the past when producers have outwardly misrepresented certain qualities of their products by not disclosing relevant drawbacks and the FTC should act now when VGDs overrepresent the visual qualities their game is capable of without disclosing the technological limitations that consumers may face.⁵³

One such misrepresentation was present in *Sterling Drug Inc. v. FTC*, where the producer of Midol advertised the product as fast acting with an "exclusive formula," but failed to state the product was aspirin-based.⁵⁴ The court affirmed the Commission's finding that the term "exclusive formula" implied the active ingredient was something other than aspirin, and the failure to provide information necessary to correct that implication was a deceptive act likely to deceive consum-

49. Digital Foundry, *Was Watch Dogs Graphically Downgraded? E3 2012 vs PC Ultra Comparison*, YOUTUBE (June 8, 2014), <https://www.youtube.com/watch?v=SX4HTUuCy3k>.

50. *Id.* David Berton, *Was there really a Watch Dogs graphics downgrade?*, EUROGAMER (June 8, 2014), <https://www.eurogamer.net/articles/digitalfoundry-2014-was-there-really-a-watch-dogs-graphics-downgrade> ("Mist and volumetric fog are key components of the E3 reveal's visual make-up, but they appear to be substantially pared back in the final game - and it's telling that the theatre interior, which used similar tech extensively, sees the effect almost completely removed.")

51. See Ubisoft, *Watch Dogs Ubisoft E3 2012 Press Conference*, YOUTUBE (June 5, 2012), <https://www.youtube.com/watch?v=7JcujYbctPk> (showing the game's creative director on stage at a press release, playing the version of the game demonstrated at E3 using a PlayStation controller); see also Phil Iwaniuk, *Did Ubisoft mislead gamers about Watch Dogs' next-gen graphics?*, TECHRADAR (March 18, 2014), <https://www.techradar.com/news/gaming/consoles/did-ubisoft-mislead-gamers-about-watch-dogs-next-gen-graphics-1234788> (Watch Dogs "was coming to 'consoles and PC' and looked way too good for PS3 and 360.")

52. See Stephanie Mlot, *Ubisoft Sees Record 'Watch Dogs' Pre-Orders*, PCMAG (May 23, 2014), <https://www.pcmag.com/news/ubisoft-sees-record-watch-dogs-pre-orders> ("[T]he video game is now the most pre-ordered new IP in Ubisoft's history, and the second-highest pre-ordered Ubisoft game ever."); Iwaniuk, *supra* note 48 ("The vast majority of those pre-orders aren't held by PC gamers with the kind of rig capable of running that E3 2012 build . . . Watch Dogs was the second most pre-ordered game of 2013.")

53. See *Simeon Mgmt. Corp. v. Fed. Trade Comm'n*, 579 F.2d 1137, 1146 (9th Cir. 1978) (holding that advertisements for a weight loss clinic that used the drug HCG and represented that its program was "safe and effective" were deceptive absent disclosure of the drug's lack of FDA approval).

54. *Sterling Drug, Inc. v. Fed. Trade Comm'n*, 741 F.2d 1146, 1154 (9th Cir. 1984).

ers.⁵⁵ Similarly, in *Simeon Management Corp. v. FTC*, the operators of weight loss clinics advertised that their program was safe, although the ads failed to state that the injection of the drug HCG was part of the treatment.⁵⁶ HCG is a prescription drug that has received FDA approval for some uses, not including weight loss, and the FDA “found that there is no substantial evidence that HCG is safe or effective for such use.”⁵⁷ The court affirmed the Commission’s finding of deception where the advertisements claimed the program was safe and effective, the program used a drug that was not proven to be safe or effective for the stated use, and the advertisements did not disclose the use of that drug.⁵⁸ Similarly, Ubisoft’s failure to disclose that the graphics displayed in promotional materials were impossible to replicate on home consoles is deceptive in the same way that failure to disclose a drug’s active ingredient or FDA approval is deceptive: it deceived a substantial number of consumers regarding facts that were relied upon by purchasers.⁵⁹

Moreover, in *Aliens: Colonial Marines*, the VGD displayed and allowed players to test a demo of the game in 2012 that portrayed an atmosphere of horror and suspense reflective of the source material through the dynamic use of lighting, shadows, and particles.⁶⁰ Even so, the final product was heavily criticized for its visual misrepresentations due to the final product’s inability to replicate the suspenseful

55. *Id.*

56. *Simeon Mgmt. Corp.*, 579 F.2d at 1141.

57. *Id.* at 1140-41.

58. *Id.* at 1146.

59. See Thomas Morgan, *Does Watch Dogs deliver on its stunning E3 2012 reveal?*, EUROGAMER (May 27, 2014), <https://www.eurogamer.net/articles/digitalfoundry-2014-watch-dogs-tech-analysis> (“[T]he 2012 reveal was in fact running on PC hardware, although Watch Dogs’ creative director Jonathan Morin states both next-gen consoles [PS4 and Xbox One] are on par with the PC’s ‘high’ settings, one notch down from the top-most ‘ultra’.” Thus, when the game released for both the older consoles that it was announced for, Xbox 360 and PS3, and the newer console generations, neither generation was able to run Watch Dogs at settings on par with those demonstrated two years prior. Worse yet, players on the older systems were unable to display even similar results.). See Fed. Trade Comm’n v. NPB Advertising, Inc., 218 F.Supp.3d 1352, 1358 (M.D. Fla. 2016) (citing Fed. Trade Comm’n v. Washington Data Resources, 856 F.Supp.2d 1247, 1272 (M.D. Fla. 2012) (“A representation is material if a reasonable prospective consumer likely would rely on the representation.”).

60. Cychu1, *Aliens Colonial Marines E3 2012 Demo vs Retail PC Graphics Comparison*, YOUTUBE (Feb. 13, 2017), <https://www.youtube.com/watch?v=1EW2PsCGA7g> (showing a side-by-side comparison of the gameplay demonstration video shown at E3 and the final release); GameSpot, *Grab your Pulse Rifle, Marine - Aliens: Colonial Marines demo*, YOUTUBE (June 8, 2012), <https://www.youtube.com/watch?v=1zw-31iDusc> (demonstrating the player-versus-player (PVP) aspect of the game that consumers were allowed to test at E3); See Utting, *supra* note 39.

atmosphere prevalent in the movie and demo.⁶¹ The lighting in the demo was more reactive to the surrounding world than in the final game. In the released version of the game, some textures and animations are absent, and a particle effect prevalent in the demo, volumetric fog, is completely absent from the released version.⁶² Although no individual visual effect may have been material enough for its absence to constitute a deceptive act, taken in their entirety they create the suspenseful atmosphere that fans expected from the franchise, and the absence of that atmosphere is a material misrepresentation.⁶³

To determine whether an advertisement is deceptive from the perspective of a reasonable consumer, the FTC “interprets the meaning of advertisements by judging the overall or net impression.”⁶⁴ In *Aronberg v. FTC*, the court recognized that statements made in advertisements, when read analytically, guaranteed nothing more than relief from pain associated with delayed menstruation, as distinguished from a remedy for the cause of the delay.⁶⁵ However, the court found that the “ultimate impression” left upon consumers by the statements made was that the product was, if not a complete cure, then a “substantial[] aid in removal of the cause.”⁶⁶ Just as the FTC found that the overall effect of Aronberg’s advertisements implied the product could do more than it actually could, the *Aliens: Colonial Marines* demos implied that the game would feel more authentic than it actually did, leading to visual misrepresentations. Therefore, the FTC can and should act when VGDs misrepresent the visual qualities their

61. See Utting, *supra* note 39 (Stating that the game “looked nothing like the preview, completely devoid of any creepy atmosphere.”); PlayStation LifeStyle, *Versus - Aliens: Colonial Marines Reveal vs. Reality*, YOUTUBE (July 17, 2015), <https://www.youtube.com/watch?v=YZU02DSbgb4> (comparing the look and feel of the demo and the released game. Ashworth states at 3:09 that despite the game’s flaws, it would not be “as terrible if the demo didn’t set the bar so high.”).

62. Cychu1, *supra* note 57; PlayStation Lifestyle, *supra* note 58 (“The lighting effects combined with the fog and smoke really stood out to me personally and made it all the more noticeable when they were absent from the actual release.”).

63. See *Newton Tea & Spice Co. v. United States*, 288 F. 475, 479 (6th Cir. 1923) (stating that advertisements are intended to “produce an impression upon the ordinary purchaser.”); Utting, *supra* note 39.

64. DEE PRIDGEN ET AL., *Net Impression*, in CONSUMER PROTECTION AND THE LAW § 10:11 (2020-2021 ed.) See *Kalwajtys v. Fed. Trade Comm’n*, 237 F.2d 654, 656 (7th Cir. 1956) (The Commission should “ascertain the impression that is likely to be created upon the prospective purchaser.”) (citing *Aronberg v. Fed. Trade Comm’n*, 132 F.2d 165, 167 (7th Cir. 1942)).

65. *Aronberg v. Fed. Trade Comm’n*, 132 F.2d 165, 167 (7th Cir. 1942).

66. *Id.* at 168.

game is capable of, especially without disclosing the technological limitations that consumers may face.⁶⁷

B. *Gameplay Misrepresentations*

In-game trailers purporting to show gameplay mechanics can also be misrepresentative when those mechanics are absent or significantly different in the final game. Recent⁶⁸ games like *Crackdown 3* and *Cyberpunk 2077* have been attacked for reducing or removing gameplay mechanics that were present in prior games and trailers. Due to these gameplay misrepresentations, the developer of *Cyberpunk*, CD Projekt Red, faced four separate class action lawsuits and saw its stock price fall over 50% from 2020 to 2021.⁶⁹ Like *Watch Dogs* and *Aliens: Colonial Marines*, discussed in the previous section, these games created expectations in consumers as to how the games will look, feel, and play, and the core deception in the games' advertisements is their failure to meet the expectations created, not by the consumer, but by the games developers.⁷⁰

The *Crackdown* series of games are known and beloved for their fully-destructible environments, and although the game's team announced in 2017 that complete destructibility would be limited to multiplayer mode, this promise was also misrepresented in the gameplay footage shown prior to launch.⁷¹ The developer's gameplay

67. See *Simeon Mgmt. Corp. v. Fed. Trade Comm'n*, 579 F.2d 1137, 1146 (9th Cir. 1978) (holding that advertisements for a weight loss clinic that used the drug HCG and represented that its program was "safe and effective" were deceptive absent disclosure of the drug's lack of FDA approval).

68. These game releases are recent relative to the writing of this Note. *Crackdown 3* released on February 15, 2019, and *Cyberpunk 2077* released on December 10, 2020.

69. See Richard Leadbetter, *Crackdown 3 Wrecking Zone: what happened to the 'power of the cloud'?*, EUROGAMER (Feb. 20, 2019), <https://www.eurogamer.net/articles/digitalfoundry-2019-crackdown-3-wrecking-zone-what-happened-to-the-power-of-the-cloud>; Sean Hollister, *Cyberpunk 2077 developer CD Projekt will pay just \$1.85 million in proposed class-action settlement*, THE VERGE (Dec. 16, 2021, 2:36 AM), <https://www.theverge.com/2021/12/16/22839181/cyberpunk-2077-cd-projekt-1-85-million-proposed-class-action-settlement>.

70. See Colin Campbell, *Crackdown 3 is another open-world shooter*, POLYGON (Feb. 1, 2019, 9:00 AM), <https://www.polygon.com/2019/2/1/18201025/crackdown-3-preview-windows-pc-xbox-one-terry-crews> ("When this game was first shown in 2014, it was touted as a marvel of cloud gaming, a fully destructible world in which all things would be possible In the single-player campaign, environmental destructibility hardly exists.").

71. *Id.* ("In the multiplayer component, [environmental destructibility is] reduced to little more than blowing holes in barriers and walls.") See Wesley Yin-Poole, *Clearing up confusion surrounding Crackdown 3 destruction*, EUROGAMER (JUNE 19, 2017), <https://www.eurogamer.net/articles/2017-06-19-clearing-up-confusion-surrounding-crackdown-3-destruction> ("It turns out Microsoft decided to focus on Crackdown 3's campaign at E3, and

misrepresentations led consumers to believe that, in the multiplayer mode, every bullet would logically interact with the geometry, and that buildings would realistically fall in real time once the structural supports were destroyed.⁷² In the final game however, geometric breaks were predetermined, rather than reacting to the player's shots, and the structural supports were indestructible, meaning the building as a whole could not be brought down.⁷³ The net impression of the gameplay trailers, in light of the franchise's established reputation, likely deceives consumers and is similar to the defendant's conduct in *FTC v. Washington Data Resources*.⁷⁴

In *Washington Data Resources*—a suit by the FTC against several corporations and individuals—the defendants engaged in marketing and selling mortgage loan modification services and solicited customers via postcards purporting to be from a local attorney.⁷⁵ Individuals who called the number on the card were pitched the loan modification program, called Fresh Start, from a sales script; and they were always approved for the program regardless of their financial circumstances.⁷⁶ The district court granted judgment in favor of the FTC, finding that the effect of the postcards and the statements in the script were sufficiently likely to mislead customers despite a “no guarantee” disclaimer located in the loan agreement.⁷⁷ Just as the process of the solicitation via postcard and sales pitch was misleading because it created an expectation of significant modification in homeowners that was not overcome by the disclaimer; the gameplay trailer for *Crackdown 3*

the dedicated server-powered destruction is limited to multiplayer.”); IGN, *Crackdown 3: Gameplay Demo - X018*, YOUTUBE (Nov. 10, 2018), <https://www.youtube.com/watch?v=B4OWp53-yBc> ([s]howing a multiplayer match of the game in which the bullets and geometry interact realistically; [s]tructures fall as their bases are destroyed.).

72. THE RED DRAGON, *Crackdown 3 2015 vs 2019 Gameplay - Power of the Cloud Revealed*, YOUTUBE (Feb. 10, 2019), https://www.youtube.com/watch?v=ULmkyqFoMhU&feature=emb_title.

73. *Id.*

74. Fed. Trade Comm'n v. Washington Data Resources, 856 F. Supp. 2d 1247, 1275 (M.D. Fla. 2012) (citing Giant Food, Inc. v. FTC, 322 F.2d 977, 986 (D.C. Cir. 1963)) (“Disclaimers or qualifications in any particular ad are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression. Anything less is only likely to cause confusion by creating contradictory double meanings.”); FTC v. Gill, 71 F. Supp. 1030, 1044 (C.D. Cal. 1999).

75. *Id.* at 1259.

76. *Id.* at 1268 (quoting portions of the script that purported to guarantee a reasonable interest rate: “The best part about the New Start Workout Program is that you will have a mortgage payment with a fixed interest rate that fits within your current budget.”).

77. *Id.* at 1275 (“Fresh Start inconspicuously buried the ‘no guarantee’ language at the end of paragraphs on the first page of the six-page ‘Application for Legal Services.’ Even assuming a timely disclaimer, the ‘no guarantee’ language fails to sufficiently change the deceptive ‘net impression.’”).

was misleading because the net impression of the prior *Crackdown* games created an expectation in players that *Crackdown 3* would have environmental destructibility mechanics, and the trailer not only failed to disclose the cutbacks made to these mechanics, but falsely promoted improvements in these mechanics over the previous iterations in the series.⁷⁸

Cyberpunk 2077 is a unique game in that players complained of a wide range of both visual and gameplay misrepresentations.⁷⁹ The game was announced for release on the PlayStation 4 (“PS4”) and Xbox One generation of consoles, and pre-orders became available for purchase in June of 2019.⁸⁰ However, development was continuously delayed and the game was not released until after the PlayStation 5 (“PS5”) and Xbox One X were commercially available.⁸¹ Once released, the PS4 and Xbox One versions of the game were unplayable for many users.⁸² In addition, players across all platforms complained of crashes, glitches, and numerous bugs within hours of the game’s release.⁸³ Thus, both visual and gameplay systems that players expected to see working in the game were nonfunctional.⁸⁴

78. See THE RED DRAGON, *supra* note 68; Campbell, *supra* note 66.

79. Patricia Hernandez, *Cyberpunk 2077 on PS4 and Xbox One seems to have major problems*, POLYGON (Dec. 9, 2020, 11:13 PM), <https://www.polygon.com/2020/12/9/22166912/cyberpunk-2077-base-ps4-xbox-one-bugs-issues-glitches-performance-trees-bushes>.

80. *Cyberpunk 2077 — release date, pre-orders, new trailer!*, CD PROJEKT RED (June 9, 2019), <https://www.cdprojekt.com/en/media/news/cyberpunk-2077-release-date-pre-orders-new-trailer/>.

81. Mikhail Klimentov, *Cyberpunk 2077’ delayed again, fueling speculation around next-gen console release dates*, THE WASHINGTON POST (June 18, 2020, 1:22 PM), <https://www.washingtonpost.com/video-games/2020/06/18/cyberpunk-2077-delayed-again-fueling-speculation-around-next-gen-console-release-dates/>.

82. See Hernandez, *supra* note 75 (“[A] player complain[ed] because a car appeared out of nowhere, causing them to crash. Another player [on] Xbox One had to restart their game after trying to fast forward through dialogue — something that happened more than once during the broadcast.”); Mike Isaac & Kellen Browning, *Cyberpunk 2077 Was Supposed to Be the Biggest Video Game of the Year. What Happened?*, THE NEW YORK TIMES (last updated Dec. 20, 2020), <https://www.nytimes.com/2020/12/19/style/cyberpunk-2077-video-game-disaster.html> (“These videos depict a game that is virtually unplayable: rife with errors, populated by characters running on barely functional artificial intelligence, and largely incompatible with the older gaming consoles meant to support it.”); Tim Deves (@TimDeves), TWITTER (Dec. 9, 2020, 10:22 PM), <https://twitter.com/TimDeves/status/1336873976572891137>.

83. See Crowbcats, *overpromise, sell, underdeliver Cyberpunk 2077*, YOUTUBE (Jan. 17, 2020), <https://www.youtube.com/watch?v=omyoJ7onNrg&t=7s>; smileybs (@smileybeef), TWITTER (Dec. 9, 2020, 8:03 PM), <https://twitter.com/smileybeef/status/1336838915622318080>; ucellymdewitt, *This game is unfinished and total disaster with graphics and texture applying*, REDDIT (Dec. 9, 2020, 7:29 PM), https://www.reddit.com/r/cyberpunkgame/comments/ka4h5w/this_game_is_unfinished_and_total_disaster_with/.

84. Compare GameSpot, *Cyberpunk 2077 — Official Gun Combat Gameplay Trailer*, YOUTUBE (Aug. 10, 2020), <https://www.youtube.com/watch?v=AQs86BLjFoM> (Showing the

More than any other example, heretofore presented, *Cyberpunk 2077* demonstrates how curbing the practices of VGDs is in the public interest, considering that millions purchased the game based solely on the developer's reputation and representations.⁸⁵ As the Commission has "broad discretion" to determine whether a proceeding would be in the public interest,⁸⁶ it should use its authority to address developers' misrepresentations for the following reasons. First, the capacity of the promotions to deceive⁸⁷ is evidenced by the actual deception of eight million players into purchasing the game based solely on the representations contained within the promotions.⁸⁸ Second, the representations were deceptive from the perspective of a reasonable consumer, as evidenced by the volume of purchasers before and after the release and initial backlash.⁸⁹ Lastly, the representations were material to the eight million decisions to purchase, because they were the only basis upon which those individuals could make their decision.⁹⁰ The deceptive visual and gameplay misrepresentations made by developers has caused consumers to suffer substantial injury because each one paid full price or more⁹¹ for an incomplete game, and the harm incurred was not reasonably avoidable by them prior to release. Thus, the Commission can and should use its broad discretion to reasonably determine

wide variety of guns available to the player for combat.), with Wesley Yin-Poole, *Cyberpunk 2077 is a mess on PS4 and Xbox One*, EUROGAMER (Dec. 12, 2020), <https://www.eurogamer.net/articles/2020-12-10-cyberpunk-2077-is-super-rough-on-ps4-and-xbox-one-and-the-memes-have-already-begun> ("While some indoor battles run well at 30fps, they can drop to 25fps. . . [T]here's also hitching - big hiccups in the action where a new object or texture needs to load in. This can make it a challenge to shoot or drive.").

85. See Nick Statt, *Cyberpunk 2077 has sold more than 13 million copies, despite launch disaster and refunds*, THEVERGE (Dec. 22, 2020, 2:54 PM), <https://www.theverge.com/2020/12/22/22195728/cyberpunk-2077-sales-copies-sold-launch-refunds#:~:text=because%20the%20studio%20promised%20the,cycle%20in%20single%2Dday%20sales>. ("Because the studio promised the game would run well on current-generation consoles, it was able to accumulate more than 8 million preorders for *Cyberpunk 2077*."); Isaac & Browning, *supra* note 78 ("Eight million people pre-ordered copies, sight unseen, ahead of its December release.").

86. Fed. Trade Comm'n. v. Klesner, 280 U.S. 19, 28, 30 (1929).

87. See generally Fed. Trade Comm'n v. Colgate-Palmolive Co., 380 U.S. 374, 391-92 (1965); Montgomery Ward & Co. v. Fed. Trade Comm'n, 379 F.2d 666, 670 (7th Cir. 1967).

88. Isaac & Browning, *supra* note 78. Statt, *supra* note 81.

89. See Statt, *supra* note 81 ("Video games require extensive first-hand experience on a variety of platforms for the full extent of a product's overall quality to become clear. Without that knowledge ahead of time, millions of people purchased *Cyberpunk 2077*, only to discover its flaws later . . .").

90. See Isaac & Browning, *supra* note 78. See also, Statt, *supra* note 81.

91. See Rob Dwiar, *Cyberpunk 2077 price guide: with the game out in the wild getting the right price is paramount*, GAMESRADAR (Dec. 10, 2020), <https://www.gamesradar.com/cyberpunk-2077-price/> (stating that the collector's edition of the game has maintained its \$250 price tag, despite the negative public reviews).

that the game's promotional statements and videos were deceptive and misleading because *Cyberpunk 2077* was announced for PS4 and Xbox One, and was undoubtedly unable to run on those systems.

Just as the FTC has determined that “[a] representation that a medicine is ‘for’ or a ‘treatment for’ a disorder is equivalent to labeling it ‘as a cure or remedy’” is deceptive when the product does not provide at least substantial relief of the buyer's ailment, such as in *Aronberg*; the FTC should determine that promoting a game as ‘for’ a certain generation of consoles is deceptive when the game is incapable of performing basic functions on that generation of hardware.⁹²

CONCLUSION

Video games are likely to continue to grow in popularity as new players are born and today's players continue to play as they age, leading the industry to grow concomitantly.⁹³ To protect players, harmful practices prevalent in the industry, as previously outlined, should be identified and curbed. The FTC has wide latitude to address these practices by taking action against the VGDs that engage in them.⁹⁴ Under the standards set forth by the FTC, it is likely that many of the common visual and mechanical misrepresentations made by VGDs would fall within the FTC's jurisdiction to regulate.⁹⁵ The public interest requirement is met because video games are played by a large percentage of individuals of all ages throughout the U.S.⁹⁶ The other elements, that there be a representation that is both likely to mislead a reasonable consumer and material to the decision to purchase the product can also be satisfied.⁹⁷ Many players often rely on the visual and gameplay representations made by VGDs when choosing whether to purchase a game, and those representations tend to mislead when players are incapable of experiencing the graphics or mechanics that

92. *Aronberg v. Fed. Trade Comm'n*, 132 F.2d 165, 168 (7th Cir. 1942) (citing *Hall v. United States*, 267 F. 795, 798 (5th Cir. 1920)).

93. *See Report: Gaming revenue to top \$159B in 2020*, REUTERS (May 11, 2020, 10:20 PM), <https://www.reuters.com/article/esports-business-gaming-revenues/report-gaming-revenue-to-top-159b-in-2020-idUSFLM8jkJMI>.

94. 15 U.S.C. § 45(a)(1), (b).

95. FTC POLICY STATEMENT ON DECEPTION, 103 F.T.C. 110, 174-75 (1984), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf.

96. Ent. Software Ass'n, 2021 ESSENTIAL FACTS ABOUT THE VIDEO GAME INDUSTRY 4 (August 2021), <https://www.theesa.com/wp-content/uploads/2021/08/2021-Essential-Facts-About-the-Video-Game-Industry-1.pdf>

97. FTC POLICY STATEMENT ON DECEPTION, 103 F.T.C. 110, 174-75 (1984), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf. *See* PRIDGEN ET AL, *supra* note 12

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were shown.⁹⁸ Although the law is often slow to change, the Federal Trade Commission currently has broad authority to determine deceptive advertising practices, and it should use that authority to set clear standards for acceptable and unacceptable representations by VGDs before greater harm is done to consumers.

98. See Utting, *supra* note 39.
