

DECEPTION UNKNOWN: A HARD LOOK AT DECEPTIVE TRADE PRACTICES IN THE VIDEO GAME INDUSTRY

*Elad Botwin**

The video game industry is rapidly growing and reaching more people, adults and children alike, across the world. There have been only a handful of legal actions regarding deceptive trade practices by companies in the video game industry. There has been only one government ruling that has substantively reviewed a game over representations regarding its features – the United Kingdom’s Advertising Standards Authority (ASA) ruling on the game No Man’s Sky in November 2016. The dearth of legal action in this area and the shortfalls in the ASA investigation boil down to a fundamental lack of rules and guidance for determining materiality for products with many distinguishable features. This issue exists because the video game industry poses a novel situation in which games sell on a multitude of features that consumers each consider when deciding whether to purchase games. Accordingly, a game with many misleading representations about various features may not be material simply because no individual misrepresentation alone is important enough (not material) to a consumer’s overall purchasing decision, despite consumers decrying the misrepresentations. Therefore, this article proposes the creation of a materiality test that will enable plaintiffs and regulators to delve into individual misrepresented features of a game, sort them, and evaluate them together for materiality based on the overall net impression presented to consumers. Consumers look at the overall product and consider most features advertised to make their purchasing decisions – the law should follow a similar perspective for scrutinizing video games for deceptive practices and advertising.

* Mr. Botwin is a project attorney at UnitedLex Corporation, and received his *juris doctor* from the Stetson University College of Law, where he also received a masters of business administration.

INTRODUCTION

The video game industry is rapidly growing and reaching more people, adults and children alike, across the world. There have been only a handful of legal actions regarding deceptive trade practices by companies in the video game industry. There has been only one government ruling that has substantively reviewed a game over representations regarding its features – the United Kingdom’s Advertising Standards Authority (ASA) ruling on the game *No Man’s Sky* in November 2016. The dearth of legal action in this area and the shortfalls in the ASA investigation boil down to a fundamental lack of rules and guidance for determining materiality for products with many distinguishable features. This issue exists because the video game industry poses a novel situation in which games sell on a multitude of features that consumers each consider when deciding whether to purchase games. Further, while most products, including those thoroughly covered by the Federal Trade Commission (FTC), are bought by consumers to satisfy objective purposes, video games are bought for a subjective purpose – entertainment. This means a game with many misleading representations about various features may not be material simply because no individual misrepresentation alone is important enough (not material) to a consumer’s overall purchasing decision, despite consumers decrying the misrepresentations. Therefore, this article proposes the creation of a materiality test that will enable plaintiffs and regulators to delve into individual misrepresented features of a game, sort them, and evaluate them together for materiality based on the overall net impression presented to consumers. This test could encourage more responsible advertising and marketing of video games by establishing precedential rules for deceptive trade practices in the industry.

This article is arranged into 6 parts. Part One introduces the issues and explains the importance and history of deceptive trade practices in the video game industry. Part Two examines the applicable law at state and federal levels, as well as the applicable law in Europe. Part Three explores practical issues for consideration in the law. Part Four analyzes the video game *No Man’s Sky* in relation to deceptive trade practices. Part Five proposes and details a materiality test for

2019]

Title

111

deceptive trade practices under FTC rules. Finally, Part Six is the conclusion.

THE IMPORTANCE OF DECEPTIVE TRADE PRACTICES LAW IN THE VIDEO GAME INDUSTRY

Deceptive trade practices law in the video game industry is not merely important for purposes of protecting consumers under the FTC's general mission.¹ It is significant in protecting children, who play and are generally exposed to video games by a significant percentage. A study by the NPD Group in 2009 found that 82 percent of American children play video games.² A 2016 study also conducted by the NPD Group determined that a significant number of children play games on multiple devices.³ Further, according to a 2018 report by the Entertainment Software Board, about 17 percent of people who play video games are males under 18 while 11 percent of people who play video games are females under 18.⁴ Many adults who are video game consumers today started playing as children. The children of the 2009 NPD Group study aged by almost 10 years and many of them are now adults 18 and over in the 2018 ESA study. This principle will always hold – today's children are tomorrow's adult consumers and parents. It is in the public interest to regulate advertising in the video game industry as fairly and effectively as possible as is expected for other industries. It is important to ensure that future generations will not be burdened with a situation in which they cannot determine what is deceptive and cannot turn to the government and legal system to enforce the rule of law.

Another reason why enforcing and promulgating rules related to deceptive trade practices in the video games industry is important because deception is a permanent issue. Business practices can change and adapt but there will always be a time when a company acts

¹ FED. TRADE COMM'N, *What We Do* <https://www.ftc.gov/about-ftc/what-we-do>.

² *Among American Kids Ages 2-17, 82 Percent Report They Are Gamers*, THE NPD GROUP, (Dec. 2, 2009), https://www.npd.com/wps/portal/npd/us/news/press-releases/pr_091202/.

³ *Avid Omni Gamers Close to Surpassing Free & Mobile Gamers as the Largest Gamer Segment in the U.S.*, THE NPD GROUP, (Sep. 12, 2016), <https://www.npd.com/wps/portal/npd/us/news/press-releases/2016/the-mpd-group-reports-on-gamer-segmentation/>.

⁴ *Essential Facts About the Computer and Video Game Industry*, Entertainment Software Association 4-6 (2018), https://www.theesa.com/wp-content/uploads/2019/03/ESA_EssentialFacts_2018.pdf.

deceptively. Ideally, a company could disclaim as many of its misleading statements and representations as possible, including making disclaimers shortly before a game's release in order to come clean or admit that promises made cannot be kept. However, video game companies care greatly about maximizing their sales during the first few days or weeks after a video game is released. Many games make most of their sales in this short time frame.⁵ To illustrate this point, many companies have invested in clever anti-piracy measures over the years to prevent or mitigate early sales losses to piracy.⁶ The problem with making too many disclaimers is that they will sow the seeds of doubt, reduce hype for the upcoming game, and thereby indirectly hurt sales. Companies can take risks and let claims be misrepresented in order to improve profits. Some companies' games perform well despite popular disappointment and/or controversy.⁷ While most companies are responsible with their practices in selling most games, there will always be times when people and companies are deceptive. The FTC should have a set of rules that will enable effective FTC action and give plaintiffs the tools to advance lawsuits in court when deception has occurred.

THE HISTORY OF DECEPTIVE TRADE PRACTICES IN THE VIDEO GAME INDUSTRY

Over the last decade, in addition to several cases brought by the FTC, there have been other legal actions initiated regarding video

⁵ Felix Richter, *Video Games Beat Blockbuster Movies Out of the Gate*, STATISTA, (Nov. 6, 2018), <https://www.statista.com/chart/16000/video-game-launch-sales-vs-movie-openings/>.

⁶ Tech Rules, *Spyro Had One of the Coolest Anti-Piracy Measures Ever | Tech Rules*, YOUTUBE (Apr. 6, 2019), <https://youtu.be/4GYSeXlr5sY?t=259>; Vadim M, *GTA IV - Hidden Anti-Piracy Measures - Feat. Spoofer*, YOUTUBE (Mar. 3, 2019), <https://www.youtube.com/watch?v=GGzwrjggwOk>; Julia Bourke, *Game over? How video game piracy protection is failing*, RED POINTS, (Sep. 4, 2017), <https://blog.redpoints.com/en/game-over-how-video-game-piracy-protection-is-failing>.

⁷ For example, despite the public relations nightmare arising out of disappointment and alleged misleading representations, No Man's Sky sold very well – to the tune of a reported 43.2 million dollars within the first 5 months of its release. Colin Campbell & Charlie Hall, *How much money did Steam's best-sellers earn in 2016?*, POLYGON, (Jan. 6, 2017), <https://www.polygon.com/2017/1/2/14144802/steam-best-sellers-2016-sale>. Valve also reported that the game sold well on Steam. Owen Good, *Steam announces its best sellers of 2016*, POLYGON, (Jan. 2, 2017), <https://www.polygon.com/2017/1/6/14184200/steam-top-selling-games-2016>.

2019] *Title* 113

game companies and deceptive trade practices.

A. FTC Notice, Authority, and Remedies

First, the FTC's authority to pursue deceptive trade practices lawsuits and to formulate remedies will be explored. Additionally, how the FTC takes notice of potentially deceptive practices will be explained. The substantive laws, cases, and FTC rules affecting deceptive trade practices will be explained and discussed later in Part Two.

1. How and When Does the FTC Take Notice of Deceptive Trade Practices?

The FTC has a system in place for directly receiving consumer complaints.⁸ This includes a phone number that consumers may reach and a web page on the FTC's website that helps consumers formulate and submit complaints.⁹

I had the privilege of speaking with Mary K. Engle, Associate Director of the FTC Bureau of Consumer Protection's Advertising Practices Division about the FTC and deceptive trade practices in the video game industry generally.¹⁰ I asked about how the FTC can take notice of business practices and advertisements that may warrant investigation for deception. She stated that the FTC can take notice in a wide variety of ways outside of receiving complaints directly by phone or on its website. For example, the FTC receives complaints from competitors, notice from Congress, seeing press coverage, social media, and members of the Commission seeing advertising that they believe needs to be examined.

2. FTC Authority to Enforce Against Deceptive Trade Practices

The FTC may determine that a practice is deceptive through either adjudication or rulemaking. However, the FTC must sue a company in federal court in order to enforce civil penalties or consumer redress for violations of FTC orders to cease and desist or trade regulation rules.

The FTC has the authority to challenge practices that it claims to be deceptive in court. The FTC has the authority to seek preliminary

⁸ FED. TRADE COMM'N, *How to File a Complaint* <https://www.consumer.ftc.gov/media/video-0054-how-file-complaint>.

⁹ *Id.*

¹⁰ This conversation was by phone on May 1, 2019.

and permanent injunctions to remedy “any provision of law enforced by the Federal Trade Commission.”¹¹ When the FTC believes a company “is violating or is about to violate” deceptive trade practices law, the FTC may file suit in federal district court to enjoin the company’s allegedly unlawful conduct.¹² The court’s decision usually depends on an FTC administrative proceeding that determines whether the conduct is unlawful.¹³ When contested by a defendant, courts evaluate whether an FTC ruling is substantiated with sufficient evidence and that the FTC order arising from the ruling is not vague or excessive in breadth.¹⁴ Under certain “proper cases,” the FTC has the authority to ask a court to grant a permanent injunction.¹⁵ Proper cases are those where the FTC handles a “straightforward violation . . . that required no application of the FTC’s expertise to a novel regulatory issue through administrative proceedings.”¹⁶

3. Remedies by the FTC

The Federal Trade Commission has many remedies available against companies that have committed deceptive acts or practices. It may issue cease and desist orders against deceptive trade practices.¹⁷ It also has the power to make companies correct their former misleading and deceptive statements in future advertisements.¹⁸

In addition to its injunctive powers, the FTC may seek civil penalties of up to \$10,000 for violations of final cease and desist orders.¹⁹ For continuous advertising campaigns, such as those that last for weeks or months, the FTC will consider each day of deceptive advertising to be a separate violation.²⁰ The FTC may also sue to enforce payment of those violation penalties.²¹

Another remedial approach by the FTC is working with

¹¹ 15 U.S.C. § 53(b) (1994).

¹² 15 U.S.C. § 53(a) (1994).

¹³ 15 U.S.C. § 53(a)(2) (1994).

¹⁴ *Kraft, Inc. v. FTC*, 970 F. 2d 311, 318 (7th Cir. 1992); *American Home Products Corp. v. FTC*, 695 F. 2d 681, 710 (2nd Cir. 1982).

¹⁵ 15 U.S.C. 53(b)(2) (1994).

¹⁶ *FTC v. Affiliate Strategies, Inc.*, 849 F. Supp. 2d 1085, 1104 (D. Kansas 2011), quoting *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1028 (7th Cir.1988).

¹⁷ 15 U.S.C. § 45(b), (c), (g) (2006).

¹⁸ *Warner Lambert Co. v. Federal Trade Commission*, 562 F.2d 749, 762 (D.C. Cir. 1977).

¹⁹ 15 U.S.C. § 45(m)(1) (2006).

²⁰ 15 U.S.C. § 45(m)(1)(C) (2006).

²¹ 15 U.S.C. § 45(m)(1)(A) (2006).

2019] *Title* 115

companies to reach a fair settlement on the issue. The FTC can settle with a company to indemnify consumers, pay damages to the FTC, correct future advertising, and agree to not engage in the same deceptive behavior again.²²

B. FTC Rulings

The FTC has brought a number of lawsuits regarding certain deceptive trade practices by video game companies. Some concerned paid endorsements while others involved capabilities of products.

In my conversation with Mary K. Engle of the FTC's Bureau of Consumer Protection, she stated that the FTC has brought several cases against companies in the video game industry (information on all of which can be found online on the FTC's website and will be summarized in the following sections). She added that any current FTC investigations would be nonpublic. Regarding current activity relevant to the video game industry, the FTC held an event on August 7, 2019 – a public workshop on loot boxes.²³ This workshop, featuring legal experts, psychologists, and other leaders in the video game industry, concerned loot boxes, a form of microtransaction in the video game industry that is alleged to be similar to casino slot machines and other forms of gambling. However, this area is currently outside of the scope of this article as there are no requirements in the United States to disclose the contents and the odds of winning items when opening loot boxes. When it becomes law or industry standard to disclose the contents and chances behind loot boxes, instances of deception may occur if a company misrepresents or omits such material information.

A. Ulimeyes

The FTC has ruled on the advertised features of a video game before. Ulimeyes was a mobile video game app that its owners claimed to improve its users' vision.²⁴ The app sold for between \$5.99 and \$9.99, with ads claiming that the app would "Turn Back The Clock

²² See, e.g. the settlements for FTC actions on deceptive trade practices within the video game industry, *infra* note 24; *infra* note 35; *infra* note 38; *infra* note 41.

²³ FED. TRADE COMM'N, *Inside the Game: Unlocking the Consumer Issues Surrounding Loot Boxes* (Aug. 7, 2019), <https://www.ftc.gov/news-events/events-calendar/inside-game-unlocking-consumer-issues-surrounding-loot-boxes>.

²⁴ FED. TRADE COMM'N, *FTC Approves Final Order Prohibiting "Ulimeyes" Manufacturer from Making Deceptive Claims that the App Can Improve Users' Vision* (Feb. 23, 2016), <https://www.ftc.gov/news-events/press-releases/2016/02/ftc-approves-final-order-prohibiting-ultimeyes-manufacturer>.

On Your Vision.”²⁵ According to the FTC, the app was “based on a series of visual exercises related to reading speed, contrast sensitivity and low light conditions among other elements.”²⁶ The ads further purported that the app’s effectiveness was backed by scientific research as well as studies conducted by one of Ultimeye’s co-owners.²⁷ The ads did not disclose the co-owner’s affiliation with Ultimeyes.²⁸ The FTC alleged that the research and scientific studies did not prove Ultimeyes would improve vision and further claimed the marketers’ failed to disclose the affiliations between the studies and the co-owner.²⁹ The FTC found the claims to be deceptive, issued an administrative complaint, and ultimately settled the charges with the marketers and owners of the app.³⁰ The settlement prohibited the owners from misrepresenting any scientific research and required them to pay \$150,000 to the FTC.³¹

2. Paid Endorsements

The FTC has ruled on paid endorsements as a deceptive trade practice twice in the past 5 years. These paid endorsements involve companies contracting with video game reviewers, mainly YouTube content creators, to positively review videos of upcoming games and related products without revealing the paid nature of the endorsement.

Machinima & Xbox One

In 2013, prior to the release of the Xbox One video game console, Machinima, the owner of a prevalent YouTube network, paid gaming bloggers and others to publish positive written and reviews of the Xbox One.³² However, Machinima did not require them to disclose the fact they were paid by Machinima to make the reviews.³³ The FTC

²⁵ FED. TRADE COMM’N, *FTC Charges Marketers of ‘Vision Improvement’ App With Deceptive Claims* (Sep. 17, 2015), <https://www.ftc.gov/news-events/press-releases/2015/09/ftc-charges-marketers-vision-improvement-app-deceptive-claims>.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Federal Trade Commission, *supra* note 27.

³¹ *Id.*

³² FED. TRADE COMM’N, *FTC Approves Final Order Prohibiting Machinima, Inc. from Misrepresenting that Paid Endorsers in Influencer Campaigns are Independent Reviewers* (Mar. 17, 2016), <https://www.ftc.gov/news-events/press-releases/2016/03/ftc-approves-final-order-prohibiting-machinima-inc>.

³³ *Id.*

2019]

Title

117

found this paid endorsement without disclosure scheme to be deceptive, ultimately making a settlement agreement in which the parties were required to make clear and prominent disclosures if they chose to make paid endorsements in the future.³⁴

Warner Bros. & Middle-Earth: Shadow of Mordor

A similar situation happened with Warner Bros. when it was advertising an upcoming game, Middle-Earth: Shadow of Mordor.³⁵ In the fall of 2014, Warner Bros. paid “influencers” to post positive gameplay videos on YouTube and other social media without disclosing the influencers’ arrangement with Warner Bros.³⁶ The FTC investigated this and reached an outcome similar to the one with Machinima.³⁷

2. PS Vita

The Sony PS Vita is a handheld device that is a successor to the Sony PSP. Sony advertised the PS Vita as being able to remotely play any game on a PlayStation 3 via 3G connection.³⁸ However, only a few PS3 games actually worked with the PS Vita’s remote play feature, and even fewer worked properly.³⁹ Even Killzone 3, which was featured in the PS Vita ads, lacked PS Vita support.⁴⁰ Further, employees of Deutsch LA, the advertising agency that made the ads, posted positive reviews of the PS Vita from their personal Twitter accounts without disclosing that they worked at the company that made the PS Vita ads.⁴¹ Considering these findings, the FTC found that Sony

³⁴ *Id.*

³⁵ FED. TRADE COMM’N, *FTC Approves Final Order Requiring Warner Bros. to Disclose Payments to Online Influencers* (Nov. 26, 2016), <https://www.ftc.gov/news-events/press-releases/2016/11/ftc-approves-final-order-requiring-warner-bros-disclose-payments>.

³⁶ FED. TRADE COMM’N, *Warner Bros. Settles FTC Charges It Failed to Adequately Disclose It Paid Online Influencers to Post Gameplay Videos* (Jul. 11, 2016), <https://www.ftc.gov/news-events/press-releases/2016/07/warner-bros-settles-ftc-charges-it-failed-adequately-disclose-it>.

³⁷ *Id.*

³⁸ FED. TRADE COMM’N, *Sony Computer Entertainment America To Provide Consumer Refunds To Settle FTC Charges Over Misleading Ads For PlayStation Vita Gaming Console* (Nov. 25, 2014), <https://www.ftc.gov/news-events/press-releases/2014/11/sony-computer-entertainment-america-provide-consumer-refunds>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ FED. TRADE COMM’N, *FTC Approves Final Orders Related to False*

and Deutsch LA's advertising were deceptive.⁴²

3. Aliens: Colonial Marines

Aliens: Colonial Marines is a first-person shooter that is a canonical sequel to the famous 1986 James Cameron film, *Aliens*.⁴³ It was advertised as having a campaign where one could play alone with AI companion characters or with other players, as well as multiplayer.⁴⁴ It experienced a long and interrupted development cycle, beginning with its announcement in 2006 and finally concluding with its release almost seven years later in February 2013.⁴⁵ The game proved to be greatly disappointing to consumers and was seen by many as deceptive.⁴⁶ The E3 2011⁴⁷ gameplay video of *Aliens: Colonial Marines* contained graphics, alien AI behavior, and other features that were misrepresented in comparison to the final released game.⁴⁸ In the United Kingdom, the ASA deemed the trailer footage for the game to be misleading and required disclaimers.⁴⁹ Two plaintiffs in California initiated a class action lawsuit against the game's developers and

Advertising by Sony Computer Entertainment America and Its Ad Agency Deutsch LA for PS Vita Game Console (Mar. 31, 2015), <https://www.ftc.gov/news-events/press-releases/2015/03/ftc-approves-final-orders-related-false-advertising-sony-computer>.

⁴² *Id.*

⁴³ *Aliens: Colonial Marines Collection*, STEAM, https://store.steampowered.com/app/49540/Aliens_Colonial_Marines_Collection/ (last visited Sep. 23, 2019); Ryan Lamble, *Aliens: Colonial Marines - What Went Wrong?* Den of Geek!, (Jul. 18, 2018) <https://www.denofgeek.com/us/games/alien/274947/aliens-colonial-marines-what-went-wrong>.

⁴⁴ See Lamble, *supra* note 43.

⁴⁵ Lamble, *supra* note 43.

⁴⁶ *Id.*; Arthur Gies, *Aliens: Colonial Marines Review: The Worse Species*, POLYGON (Feb. 12, 2013), <https://www.polygon.com/2013/2/12/3978652/aliens-colonial-marines-review-the-worse-species>.

⁴⁷ GameSpot, *Aliens: Colonial Marines E3 Demo with Randy Pitchford*, YOUTUBE (Oct. 3, 2011), <https://www.youtube.com/watch?v=wKiemSUKczA>.

⁴⁸ VideoGamerTV, *What the hell happened to Aliens: Colonial Marines? (FIXED)* YOUTUBE (Feb. 13, 2013), <https://www.youtube.com/watch?v=6lGXDM3LGnk>; Gies, *supra* note 50; CVG, *Aliens: Colonial Marines - How it SHOULD have looked?* YOUTUBE (Feb. 14, 2013) https://www.youtube.com/watch?v=g1orK2qj_9k.

⁴⁹ Alexa Corriea, *Aliens: Colonial Marines trailers deemed misleading in UK, get disclaimers*, POLYGON, (Apr. 3, 2013), <https://www.polygon.com/2013/4/3/4178120/aliens-colonial-marines-trailers-misleading>.

2019]

Title

119

publishers.⁵⁰ Among other causes of action, the lawsuit sued under California Business and Professions Code § 17500, the state's equivalent to deceptive trade practices under federal law and the FTC.⁵¹ The court, however, never issued an opinion on the merits of the case because the case lost class action status and the remainder of further proceedings between the remaining plaintiffs and defendants are unclear.⁵²

3. Fallout 76

Fallout 76 is the most recent (as of 2019) installment in the popular Fallout series.⁵³ However, it was released in November 2018 with a myriad of technical and graphical issues that proved to be so severe that in November 2018, a Washington, D.C. class action law firm announced an investigation into the game's publisher and developer, Bethesda, when players who bought Fallout 76 were unable to get refunds for the game.⁵⁴ The firm expanded their investigation a

⁵⁰ Griffin McElroy, *Gearbox and Sega falsely advertised Aliens: Colonial Marines with press demos, according to lawsuit (update)*, Polygon, (Apr. 30, 2013), <https://www.polygon.com/2013/4/30/4287382/aliens-colonial-marines-lawsuit-class-action-sega-gearbox>; *Locke v. Sega of America, Inc.*, 2013 WL 3486429, (N.D. Cal. 2013). The complaint can be found on truthinadvertising.org. *Perrine-Sega FAC final for filing*, TRUTH IN ADVERTISING, <https://www.truthinadvertising.org/wp-content/uploads/2013/05/Perrine-v-Sega-amd-cmpt.pdf> (last visited Nov. 3, 2019).

⁵¹ *Locke*, *supra* note 50; Cal. Bus. & Prof. § 17500 (1999), https://leginfo.ca.gov/faces/codes_displaySection.xhtml?lawCode=BPC§ionNum=17500 (last visited Sep. 23, 2019); *Consumer Protection in the States, Appendix B, State-by-State Summaries of State UDAP Statutes*, NATIONAL CONSUMER LAW CENTER, 16-18 (Jan. 10, 2009), <http://www.nclc.org/images/pdf/udap/analysis-state-summaries.pdf>.

⁵² Andy Chalk, *Gearbox dropped from Aliens: Colonial Marines lawsuit*, PC GAMER, (May 29, 2015), <https://www.pcgamer.com/gearbox-dropped-from-aliens-colonial-marines-lawsuit/>; Andy Chalk, *Gearbox boss says Colonial Marines lawsuit was like "Mafia-style extortion,"* PC GAMER, (Jul. 10, 2015), <https://www.pcgamer.com/gearbox-boss-says-colonial-marines-lawsuit-was-like-mafia-style-extortion/>.

⁵³ *Fallout (Series)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Fallout_\(series\)](https://en.wikipedia.org/wiki/Fallout_(series)) (last visited Sep. 23, 2019).

⁵⁴ There are two incarnations of Bethesda, which are both subsidiaries of Zenimax Media, Inc. *About ZeniMax Media*, ZENIMAX MEDIA INC., <https://www.zenimax.com/about> (last visited Sep. 23, 2019). Bethesda Softworks is the publisher. *Publishers*, ZENIMAX MEDIA INC., <https://www.zenimax.com/publishing> (last visited Sep. 23, 2019). Bethesda Game Studios is the developer. *Studios*, ZENIMAX MEDIA INC., <https://www.zenimax.com/studios> (last visited Sep. 23, 2019); Bruno Ortega,

few days later in the wake of an issue with the Fallout 76: Power Armor Edition.⁵⁵ It was sold as including a canvas carrying bag among other products.⁵⁶ Instead of canvas bags, consumers received nylon bags, sparking consumer backlash and prompting the law firm's expansion of its investigation.⁵⁷ Bethesda's remediation of its conduct over the bag issue will be discussed in Part Three.

4. ASA Rulings

The Advertising Standards Authority (ASA) is a regulatory organization in the United Kingdom that handles an area of law similar to deceptive trade practices in the United States, which it refers to as misleading advertising. The ASA has handled several cases regarding pricing.⁵⁸ It has also handled a case on a game called No Man's Sky, which will be analyzed in Part Four.

No Man's Sky

No Man's Sky is an open world space and planetary exploration game developed by Hello Games, a British company.⁵⁹ The game is well regarded today but had a tumultuous past that will be focused on in this article.⁶⁰ No Man's Sky was released in August 2016 amid massive popular anticipation.⁶¹ However, the game turned out to be a major disappointment to many consumers on release as features

Bethesda Game Studios Deceptive Trade Practices Investigation, MIGLIACCIO & RATHOD LLP, (Nov. 26, 2018), <http://www.classlawdc.com/2018/11/26/bethesda-game-studios-deceptive-trade-practices-investigation/>. This investigation by Migliaccio & Rathod LLP is still active, and the firm has initiated legal action. *infra* note 157.

⁵⁵ *Infra* note 157.

⁵⁶ *Id.*

⁵⁷ *Id.*; *Fallout 76 200\$ Collectors Edition Comes With Nylon Bag Instead of Canvas* *x-post* */r/gaming*, REDDIT, (Nov. 28, 2018), https://www.reddit.com/r/fo76/comments/a19jr6/fallout_76_200_collectors_edition_comes_with/eaoaoqc/.

⁵⁸ *See e.g. ASA Ruling on Valve Corporation t/a Steam*, ADVERTISING STANDARDS AUTHORITY, (Nov. 4, 2015), <https://www.asa.org.uk/rulings/valve-corporation-a15-305647.html>; *ASA Adjudication on Valve Corporation t/a Valve S.A.R.L.*, ADVERTISING STANDARDS AUTHORITY, (Apr. 15, 2015), <https://www.asa.org.uk/rulings/valve-corporation-a14-287061.html>.

⁵⁹ Stephen Tolio, *The Unexpected Success Of No Man's Sky*, KOTAKU, (Apr. 9, 2019), <https://kotaku.com/the-unexpected-success-of-no-man-s-sky-1833920840>.

⁶⁰ *Id.*

⁶¹ *Id.*

2019]

Title

121

promised were found to either be misrepresented or outright missing in the game.⁶² The controversy was significant enough that the ASA investigated Hello Games for misleading marketing and advertising, but ultimately issued a ruling that held that Hello Games had not violated UK regulations.⁶³ The ASA ruling and Hello Games' representations will be examined in depth later in this article.

DECEPTIVE TRADE PRACTICES LAW (AND SIMILAR LAW ABROAD)

A. US Federal Law – The FTCA and FTC Policy Statement on Deception

The Federal Trade Commission Act (FTCA) prohibits unfair and deceptive trade practices that affect commerce.⁶⁴ The statute gives the Federal Trade Commission (FTC) the authority to enforce this law.⁶⁵ The statute empowers the FTC to seek and enforce administrative remedies against companies found to be engaging in unfair or deceptive trade practices. However, private plaintiffs cannot sue under the FTCA – they must allege a violation under a similar state law. These state laws will be covered in the following section. The FTC has one test for finding an act or practice to be unfair and another separate test for finding an act or practice to be deceptive. This three-part test for deceptive trade practices under federal law is not explicitly stated in the FTCA but rather within the 1983 FTC Policy Statement on Deception.⁶⁶ The three elements for deceptive trade practices are that (1) there must be a representation, omission, or practice that misleads or is likely to mislead consumers, (2) the act or practice must be considered from the perspective of the reasonable consumer, and

⁶² *Id.*

⁶³ Wesley Yin-Poole, *Advertising Standards rules No Man's Sky Steam page did not mislead consumers*, EUROGAMER, (Nov. 30, 2016) <https://www.eurogamer.net/articles/2016-11-30-advertising-standards-rules-no-mans-sky-steam-page-did-not-mislead-consumers>; see also Advertising Standards Authority, *ASA Ruling on Valve Corporation and Hello Games Ltd t/a Steam*, asa.org.uk, (Nov. 30, 2016), <https://www.asa.org.uk/rulings/valve-corporation-and-hello-games-ltd-a16-351045.html>. [Hereinafter ASA Ruling].

⁶⁴ 15 U.S.C. § 45(a)(1) (1994).

⁶⁵ 15 U.S.C. § 45(a)(2) (1994).

⁶⁶ *Federal Trade Commission Policy Statement on Deception*, 103 F.T.C. 174 (1984). This statement is available online on the FTC's website. FED. TRADE COMM'N, *FTC Policy Statement on Deception* (Oct. 14, 1983) https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf [Hereinafter Deception Statement]; see also *Kraft*, 970 F.2d at 314.

(3) the representation, omission, or practice must be material.⁶⁷

Federal courts will defer to the FTC for determining whether an act or practice is deceptive.⁶⁸ Even when a practice is found to be deceptive, it cannot be deemed unlawful by the FTC unless it “(1) is likely to cause substantial injury, typically monetary, to consumers, (2) cannot be reasonably avoided by consumers, and (3) is not outweighed by countervailing benefits to consumers or to competition.”⁶⁹ This test is for unfair trade practices, an area of law similar to deceptive trade practices, but is not within the scope of this article.⁷⁰ An act or practice does not need to be made with intent to deceive to be deceptive – the practice only needs to have misled customers acting reasonably under the circumstances.⁷¹ The FTC’s evidential standard of proof for deceptive trade practices allegations is “essentially identical” to the substantial evidence standard seen under the Administrative Powers Act (APA).⁷² This article will analyze how the law on deceptive trade practices would work when applied in the video game industry. With this focus on deceptive trade practices, this article will examine the three elements required to find an act or practice to be deceptive. How the three elements apply in the video game industry will also be discussed.

1. Element One: A representation, omission, or practice that misleads or is likely to mislead consumers.

The FTC must find that a representation, omission, or practice occurred before determining if a company has committed deceptive trade practices.⁷³ Representations subject to scrutiny may consist of express or implied claims or promises; these claims or promises can be written or oral.⁷⁴ When a claim is express, the representation itself establishes the meaning.⁷⁵ For implied claims, the FTC will examine

⁶⁷ *Deception Statement*, *supra* note 66.

⁶⁸ *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965).

⁶⁹ 15 U.S.C. § 45(n) (1994), *FTC v. LeadClick Media, LLC*, 838 F. 3d 158, 168 (2nd Cir. 2016).

⁷⁰ Federal Trade Commission, *FTC Policy Statement on Unfairness*, [ftc.gov](https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness), (Dec. 17, 1980), <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness>.

⁷¹ *FTC v. Verity Int’l, Ltd.*, 443 F.3d 48, 63 (2nd Cir. 2006).

⁷² *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 454 (1986), citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

⁷³ *Deception Statement*, *supra* note 66 at 2.

⁷⁴ *Id.*

⁷⁵ *Id.*

2019]

Title

123

various related factors to determine the claim's meaning.⁷⁶ The FTC's examination for implied claims involves evaluating factors such as the entire document containing the representation, juxtaposing various phrases in the document to find meaning, considering the nature of the claim, and accounting for the nature of the transaction.⁷⁷ Courts also take this approach.⁷⁸ Further, for implied claims, the FTC will require evidence regarding consumer expectations in the course of its analysis.⁷⁹ It admits extrinsic evidence that reasonable consumers would consider in reference to a claim.⁸⁰ This extrinsic evidence may include expert opinion, consumer testimony (particularly in cases involving oral representations), copy tests, surveys, or any other forms of reliable consumer interpretation evidence.⁸¹

There is no requirement to find actual deception. If the FTC finds that a practice is likely to mislead consumers, that is sufficient to find that a practice is deceptive.⁸² The likelihood of advertising or other practices to mislead is judged by viewing it as a whole, as opposed to "emphasizing isolated words or phrases apart from their context."⁸³ Courts can look at "the overall net impression" created by statements made by a company to find a claim deceptive.⁸⁴ An omission of material information may be deceptive when disclosing the omitted information to a consumer will prevent them from being misled.⁸⁵ This includes situations when statements and claims made by a company contained no falsehoods.⁸⁶ There is no intent requirement for deceptive trade practices claims.⁸⁷ Good faith does not immunize a company from misleading behavior.⁸⁸ The FTC lists the following as typical forms of deceptive trade practices: misleading cost or price claims, bait-and-switch techniques, offering to provide a product or service that is not in fact available, omitting material limitations or conditions

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (3rd Cir. 1976).

⁷⁹ *Deception Statement*, *supra* note 66 at 2.

⁸⁰ *Id.*

⁸¹ *Id.* at 8 n.8.

⁸² *Beneficial Corp.*, 542 F.2d at 617.

⁸³ *Id.*

⁸⁴ *Affiliate Strategies, Inc.*, 849 F. Supp. 2d at 1104, citing *Beneficial Corp.*, 542 F.2d at 617.

⁸⁵ *Deception Statement*, *supra* note 66 at 2; *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1030 (7th Cir. 1988).

⁸⁶ *Deception Statement*, *supra* note 66 at 2.

⁸⁷ *FTC v. Bronson Partners, LLC*, 564 F. Supp. 2d 119, (D. Connecticut 2008), quoting *World Travel Vacation Brokers, Inc.*, 861 F.2d at 1029.

⁸⁸ *Id.*

from an offer, selling a product unfit for the purposes for which it is sold, and failing to provide promised services.⁸⁹

Element One in Video Games

Finding misleading representations is the easiest part of a deceptive trade practices analysis for video games. Many times, a feature is represented and depicted in interviews, trailers, or gameplay. In this situation, the marketing material and the actual game only need to be juxtaposed to find a misleading difference. A finding that a reasonable person would be likely to be misled materially is more complicated.

2. Element Two: The act or practice must be considered from the perspective of the reasonable consumer.

The act or practice must be likely to mislead a reasonable consumer under the circumstances.⁹⁰ The test is whether a consumer's interpretation or reaction to a representation, omission, or practice is reasonable.⁹¹ When evaluating a particular practice, the FTC will examine how reasonable consumers are likely to respond by considering the totality of the practice.⁹²

When a product is targeted to a particular audience, the reasonable consumer in a deceptive trade practice analysis is a reasonable member of the target audience.⁹³ Further, when representations or marketing practices cater to a specific audience, such as children, the elderly, or the financially unsophisticated, the representation will be reviewed from the point of view of a reasonable member of that group.⁹⁴

In situations when a representation conveys two or more meanings to reasonable consumers and one of the meanings is found to be misleading, the representation can be deemed deceptive.⁹⁵

Additionally, consumers' reactions or interpretations can be considered to be reasonable even if "it is not shared by a majority of consumers in the relevant class or by particularly sophisticated

⁸⁹ *Deception Statement*, *supra* note 66 at 2.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 3.

⁹³ *Id.* at 2.

⁹⁴ *Id.* at 3.

⁹⁵ *Id.*

2019]

Title

125

consumers.”⁹⁶ If the FTC finds that a significant minority of relevant consumers were materially misled, then the materially misleading act or practice will be found to be deceptive.⁹⁷ But the FTC will not advance cases involving “obvious exaggerated or puffing representations” that ordinary consumers would not take seriously.⁹⁸ Exaggerated claims that are taken seriously by consumers are actionable.⁹⁹

Written disclosures may be insufficient in correcting a misleading statement or representation, particularly when consumers are directed away from qualifying limitations in the text or are advised that reading the representation disclosures is unnecessary.¹⁰⁰ Also, the FTC generally sees that oral disclosures or fine print is insufficient to remedy the misleading effects of headlines or prominent written representations.¹⁰¹ Finally, a deceptive act or practice cannot be remedied by subsequent truthful disclosures.¹⁰²

Element Two in Video Games

When the FTC or court determines that a game was targeted toward a specific audience, there is a degree of flexibility for the FTC or a court in determining the target audience for a video game. Depending on the game and its marketing, one could establish the reasonable person standard as to either the general public, the average video game consumer, regular gamers, hardcore gamers, or fans of a particular genre or franchise. It should be understood the people who regularly play video games generally have a greater understanding of video game concepts and how they work; they are generally less likely to be misled than members of the general public.¹⁰³ The same idea should apply for hardcore gamers and those who are intimately familiar with a genre or franchise. Further, the more narrow and more involved in gaming the target audience is, the greater likelihood that they will be less likely to be misled by claims, especially due to

⁹⁶ *Id.* at 10 n.20.

⁹⁷ *Id.*; *POM Wonderful, LLC v. FTC*, 777 F.3d 478, 490 (D.C. Cir. 2015).

⁹⁸ *Id.* at 4.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See generally Ben Kuchera, *Is it illegal to release misleading game trailers or screenshots?*, Polygon, (Oct. 14, 2016) <https://www.polygon.com/2016/10/14/13289128/bullshots-no-mans-sky-marketing>; Super Bunnyhop, *Are Bullshots Illegal?*, YOUTUBE, (Oct. 14, 2016), <https://www.youtube.com/watch?v=wPQr4NoRsbQ>.

cynicism and caution from deceptive acts made by video game companies in the past.¹⁰⁴ There is one extremely important consideration that can be raised to preclude a standard above the average video game consumer – children. Games may not be targeted to children in a way to warrant basing a reasonable person standard on children, but many children are video game consumers, even if through the consent and supervision of their parents.¹⁰⁵ This plays into the FTC rule that consumers’ reactions or interpretations can be considered to be reasonable even when they are not shared by a majority of consumers in the relevant class or by particularly sophisticated consumers.”¹⁰⁶ For this reason, the reasonable interpretations of children or parents may suffice over those of gamers who may be less likely to be misled.

3. Element Three: The representation, omission, or practice must be material.

A misrepresentation, omission, or practice is material when it is likely to affect a consumer’s choice or conduct regarding a product or service, such as a decision to purchase.¹⁰⁷ The FTC states that material information is information that is important to consumers.¹⁰⁸ When inaccurate or omitted information is material, injury is likely.¹⁰⁹ The FTC sees materiality and injury as different words for the same concept— consumers suffer some form of injury or monetary loss because they relied on materially misleading information.¹¹⁰

The FTC presumes certain types of claims to be material, but “will always consider relevant and competent evidence offered to rebut presumptions of materiality.”¹¹¹ When express claims are made with respect to a product or service, the claims will be presumed to be material.¹¹² With express claims, the FTC will take special caution to

¹⁰⁴ See *Id.*; Gaby Ferreira, *Let’s Climb On The Hate Train: Are Gamers Too Negative?*, (May 4, 2017), <https://fiveminutediscussions.com/2017/05/04/are-gamers-too-negative/> (discussing gamers’ cynicism generally and the underlying reasons for negativity and cynicism).

¹⁰⁵ See *Essential Facts About the Computer and Video Game Industry*, *supra* note 4 at 8-9.

¹⁰⁶ *Deception Statement*, *supra* note 66 at 10, n.20,.

¹⁰⁷ *Id.* at 5.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 6.

¹¹¹ *Id.* at 14 n.47.

¹¹² *Id.* at 5.

2019]

Title

127

ensure materiality exists in such cases.”¹¹³ While intent to deceive is not a requirement in a deceptive trade practice analysis, the materiality of an implied claim will be presumed if it can be shown that a company intended that the consumer draw certain conclusions based upon the claim.¹¹⁴ In other words, an implied claim intended by a company is material.¹¹⁵ Omissions will be presumed to be material when the company knew or should have known that consumers needed the omitted information to make an informed choice about the product or service.¹¹⁶

Furthermore, the FTC presumes certain categories of claims to be material. Depending on the circumstances, the FTC may presume information pertaining to the central characteristics of a product or service to be material.¹¹⁷ The FTC has found information about purpose, safety, efficacy, or cost of a product or service to be material.¹¹⁸ The FTC also considers information about durability, performance, warranties or quality likely to be material.¹¹⁹ Additionally, the FTC considers claims or omissions material when they “significantly” concern health, safety, or similar areas of high concern to consumers.¹²⁰ Claims will also be presumed to be material when a company makes claims knowing that they are false.¹²¹

When the FTC cannot find materiality based on the above methods of analysis, it may require evidence that a claim or omission is likely to be considered important by consumers.¹²² The FTC will accept evidence such as facts indicating a product or service with a represented feature costing more than a comparable product without the feature, “a reliable survey of consumers, or credible testimony” for purposes of finding materiality.¹²³

Element Three in the Video Game Industry

The issues posed by the video game industry affecting elements 1 and 2 are not particularly novel and are easily addressed under the

¹¹³ *Id.* at 14 n.48.

¹¹⁴ *Id.* at 5.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

existing rules. However, assessing representations about features in a video game poses a unique and colossal problem for finding materiality.

It should be reiterated that “a misleading claim or omission in advertising will violate [the law], however, only if the omitted information would be a material factor in the consumer’s decision to purchase the product.”¹²⁴ “A claim is material if it is likely to affect consumer behavior. ‘Is it likely to affect the average consumer in deciding whether to purchase the advertised product—is there a material deception, in other words?’”¹²⁵ The FTC Statement on Deception also cites to the American Law Institute’s Restatement on Torts, Second. Regarding materiality, the Restatement explains that material information does not necessarily have to affect the finances of a transaction; “There are many more-or-less sentimental considerations that the ordinary man regards as important.”¹²⁶ This is where the core difficulties with deceptive trades practices applied to video games when the represented features of a game are in question for deception.

The issue that arises with video games is that they contain objective representations and features that are questions of law, but the importance and relevance of features to consumers’ decision to buy are subjective and therefore questions of fact. Video games are advertised as a unique product complete with a suite of various features that gives it a unique style, feel, and identity. Each of the features may be represented separately, at different times, and in different media.

Video games are a particular kind of product that can’t be assessed in the same manner as other products. Video games are entertainment products with artistic expressions through ideas, graphics, models, artwork, dialogue, and methods of interaction. Consumers buy video games as a discretionary purchase to acquire a product because they want to have a unique entertainment experience that no other product can exactly provide. Products usually assessed by the FTC have a more objective, ascertainable function, such as food products, appliances, financial services, marketing services, medicine, prescription and over the counter drugs, tools, and other physical products. Materiality is easily presumed or inferred because these products have clear functions that are represented or supposed to produce clear outcomes (air conditioning provides cooling, food and

¹²⁴ *Id.* 14 n.44, citing *American Home Products Corp.*, 98 F.T.C. 136, 368 (1981), *aff’d*, 695 F.2d 681 (3rd Cir. 1982).

¹²⁵ *Id.*, (quoting *Statement of Basis and Purpose, Cigarette Advertising and Labeling Rule, 1965*, pp. 86-87. 29 FR 8325 (1964)).

¹²⁶ *Id.* at 14 n.45.

2019]

Title

129

drugs affect health needs, financial services affect consumers' wealth). Even entertainment products that have been reviewed by the FTC, such as televisions and the PS Vita, are similar to other products. These devices do not entertain consumers on their own, rather, they have an objective outcome of giving the consumers the means of accessing entertainment, such as TV shows, movies, news, sports, and video games. The material information for these products is their capabilities to host entertainment features, not the entertainment itself.

Video games cannot be compared to these types of products. Video games have objective and ascertainable functions, but provide an outcome of entertainment that consumers appreciate differently in a subjective manner. It is this subjective level of preference by consumers that makes it unrealistic for an analysis and unfair to video game companies to presume materiality on just one feature. Further, each feature will either be material or not material to consumer's decision to buy. If it is not material, it is not deceptive. However, a misleading representation should still affect the overall impression created by a product's advertising, even if it is not material.

If materiality cannot be found based on a particular representation, then the question becomes whether a company's overall practices in advertising a game were misleading. In this situation, it is unfair to presume materiality on overall marketing for a product – substantiation of materiality by evidence or other means is necessary. This is where there is a chasm in the law. There are no rules or guidance on how to determine if the overall impression created by many misrepresentations in the course of marketing practices is material and misleading. What happens when none of the misleading representations are deceptive on their own and presumptions of materiality either cannot apply, are rebutted, or can't be applied because it is unclear which representations are material? There must be a way to bridge this chasm in the law.

These issues will be examined further in a later part before proposing a materiality test to address the issues.

B. US State Law – 'Little FTC Acts'

Every state has its own laws on deceptive trade practices.¹²⁷ Further, many states have adopted the FTCA as their own laws, known as "Little FTC Acts."¹²⁸ While these state laws cover the elements that

¹²⁷ Carolyn L. Carter, *A 50-State Report on Unfair and Deceptive Acts and Practices Statutes*, NAT'L CONS. LAW CTR. (Feb. 2009), https://www.nclc.org/images/pdf/udap/report_50_states.pdf.

¹²⁸ See Justin Hakala, *Follow-On State Actions Based on the FTC's*

the federal law does, the state laws often expand on the FTCA and add in private causes of action, allowing individuals and organizations to file suit for deceptive trade practices.¹²⁹ In most states, state courts and federal courts in the jurisdiction have either followed or adopted the FTC's standards for deceptive trade practices.¹³⁰

C. European Union and United Kingdom Law

Other countries around the world also have laws that protect against deceptive trade practices, often under a different name. The elements under some foreign laws are remarkably similar to those under American federal and state law.

The European Union has overarching legislation similar to the FTCA and state deceptive trades practices, known as the Unfair Commercial Practices Direction (UCPD).¹³¹ Article 6 of the UCPD defines "misleading actions," which bears great similarity to deceptive trade practices as stated in the FTC Policy Statement.¹³² Article 6 of the UCPD has the following definition for misleading action:

"A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, . . . and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise."¹³³

The UCPD also covers "misleading omissions" in Article 7.¹³⁴ However, further examination of the EU law is beyond the scope of this article. On the other hand, its provisions are similar to those in the United Kingdom. British law will be more relevant in this article as the November 2016 ruling on No Man's Sky by the United Kingdom's Advertising Standards Authority (ASA) will be examined.

Enforcement of Section 5, WAYNE STATE UNIV. LAW SCH., WORKING PAPER GRP., (Oct. 9, 2008), https://www.ftc.gov/sites/default/files/documents/public_comments/section-5-workshop-537633-00002/537633-00002.pdf.

¹²⁹ *Id.* at 2; Carter, *supra* note 127.

¹³⁰ *Id.*; See Zlotnick v. Premier Sales Grp., Inc., 480 F.3d 1281, 1284 (11th Cir. 2007) (quoting PNR, Inc. v. Beacon Prop. Mgmt., Inc., 842 So. 2d 773, 777 (Fla. 2003). Courts in Florida have taken this approach. See also, FLA. STAT. § 501.204.

¹³¹ *Guidance on the Implementation/Application of Directive 2005/29/EC on Unfair Commercial Practices*, COM (2016) 320 final (May 25, 2016); <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016SC0163>.

¹³² *Id.*; Deception Statement, *supra* note 66.

¹³³ *Guidance on Unfair Commercial Practices*, *supra* note 131 at 51.

¹³⁴ *Id.* at 61.

2019]

Title

131

The Consumer Protection from Unfair Trading Regulations 2008 is a law passed by the British Parliament that include provisions concerning misleading actions, the equivalent of deceptive trade practices.¹³⁵ It implements provisions of the European Parliament's UPCD.¹³⁶ Part 2, Section 5 of the law covers "misleading actions."¹³⁷ A representation by a British business is misleading "if it contains false information and is therefore untruthful . . . or if it or its overall presentation in any way deceives or is likely to deceive the average consumer . . . even if the information is factually correct; and it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise."¹³⁸

Section 6 of the law covers misleading omissions, stating that a British business practice is misleading when material information is hidden or omitted and "as a result it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise."¹³⁹ The section defines material information as "the information which the average consumer needs, according to the context, to take an informed transactional decision."¹⁴⁰

The Advertising Standards Authority (ASA) has rules similar to this law, stating that "marketing communications must not materially mislead or be likely to do so."¹⁴¹ The ASA carries a similar materiality definition, "Material information is information that the consumer needs to make informed decisions in relation to a product."¹⁴² "Whether the omission or presentation of material information is likely to mislead the consumer depends on the context, the medium and, if the medium of the marketing communication is constrained by time or space, the measures that the marketer takes to make that information available to the consumer by other means."¹⁴³

As stated previously, the basic tenants and elements of the British law are highly similar to American law.

¹³⁵ *The Consumer Protection from Unfair Trading Regulations 2008*, s 5 (Eng), https://www.legislation.gov.uk/uksi/2008/1277/pdfs/uksi_20081277_en.pdf.

¹³⁶ *Id.* at 49.

¹³⁷ *Id.* at s 5.

¹³⁸ *Id.* at s 5(2).

¹³⁹ *Id.* at s 6(1).

¹⁴⁰ *Id.* at s 6(3)(a).

¹⁴¹ ADVERT. STANDARDS AUTH., *The UK Code of Non-broadcast Advertising and Direct & Promotional Marketing* 16, <https://www.asa.org.uk/uploads/assets/uploaded/bd9575a1-cd07-48e7-979b4cbec70dd31f.pdf> (last visited Sep. 23, 2019) [hereinafter CAP Code].

¹⁴² *Id.*

¹⁴³ *Id.*

OTHER ISSUES

A. Refunds

Most online storefronts that sell video games have refund policies. Some offer a wider window for obtaining refunds than others. Physical retail stores typically have refund policies as well. Yet, how do refund policies affect deceptive trade practices law? The effect may not be significant, particularly because the law focuses on whether a company's representations are likely to mislead and attempt to prevent such future behavior. However, refund policies could potentially be raised as a mitigating factor to reduce or preclude monetary damages or penalties. On the other hand, this defense could be rebutted by showing that players had to play for an amount of time beyond the refund policy window to discover that they were misled. Ultimately, refund policies may not be a significant issue, but it is still one that courts and regulators should be aware of.

B. Post-Release

An important point is that the window for deceptive trades practices claims usually closes shortly after a game is released to the public. The materiality of representations made about games diminishes and is ultimately extinguished after release. Depending on the circumstances, this can happen weeks or even days after a game's release. This happens because after a game is released, consumers provide feedback. Critics and players make reviews of the game while others upload video playthroughs of a game. Once the reviews and gameplay videos have come out in the days or weeks after a game's release, the company's representations lose their materiality as consumers can see the full game for themselves and see assessments of the game made by hundreds, if not thousands of people. Even if representations made before release are misleading, the availability of other, newer information will make those representations unlikely to mislead reasonable consumers under the circumstances.

C. Remediating a Clear Violation – Fallout 76 and the Nylon Bag Fiasco

Prior to the release of *Fallout 76*, Bethesda offered the *Fallout 76* Power Armor Edition for two hundred dollars. The Power Armor Edition consisted of a physical copy of *Fallout 76*, plus several collectible items, including a map, figurines, and a wearable T-51b

2019]

Title

133

Power Armor helmet, which was featured in Fallout games.¹⁴⁴ Another item that was included and is the subject of this section was a carrying bag for the T-51b helmet, bearing a West-Tek logo¹⁴⁵ Currently, the Power Armor Edition is being advertised as including a *nylon* carrying bag, including the disclaimer “Bag is not correct representation of product.”¹⁴⁶ Before and shortly after the release of Fallout 76, the Power Armor Edition was advertised as including a *canvas* carrying bag.¹⁴⁷

When customers ordered the Power Armor Edition and received the products from Bethesda, they were surprised to find that the canvas carrying bag they paid to receive was actually made of nylon.¹⁴⁸ When customers complained to Bethesda about the discrepancy, Bethesda’s customer support claimed that the nylon bags were sent due to a shortage of canvas.¹⁴⁹ Eventually, after widespread outrage and attention (including the announcement of an investigation by a Washington, D.C. law firm), Bethesda decided to compensate customers who bought the Power Armor Edition 500 Atoms.¹⁵⁰ Atoms are an in-game currency for an in-game item shop in Fallout 76.¹⁵¹ Five hundred atoms roughly equates to five dollars.¹⁵² Bethesda further produced replacement canvas bags for Power Armor Edition buyers.¹⁵³

¹⁴⁴ *Fallout 76 Power Armor Edition*, BETHESDA, <https://gear.bethesda.net/products/fallout-76-power-armor-edition#imageThumb> (last visited Nov. 3, 2019); Chris Plante, *Fallout 76 Power Armor Edition includes a wearable helmet*, POLYGON, (Jun. 10, 2018), <https://www.polygon.com/e3/2018/6/10/17447714/fallout-76-power-armor-edition-contents-release-date>.

¹⁴⁵ BETHESDA, *supra note 144*. West-Tek is a fictional defense contractor in the *Fallout* series; see *West Tek*, NUKAPEDIA, https://fallout.fandom.com/wiki/West_Tek (last visited Sep. 23, 2019).

¹⁴⁶ BETHESDA, *supra note 144*

¹⁴⁷ YongYea, *Potential FTC Violations of Bethesda’s Fallout 76 Duffel Bag Scam*, YOUTUBE (Nov. 29, 2018), <https://www.youtube.com/watch?v=I9S8nBqMfOY>.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*, Ortega, *supra note 66*; *Fallout 76 200\$ Collectors Edition Comes With Nylon Bag Instead of Canvas x-post /r/gaming*, *supra note 70*.

¹⁵⁰ *Id.*, Fallout (@Fallout), Twitter, (Nov. 28, 2018 7:21 PM), <https://twitter.com/Fallout/status/1067981880597843968> FALLOUT.

¹⁵¹ Christopher Livingston, *You can now purchase Fallout 76 Atoms with real money, and here’s what it costs*, PC GAMER, (Nov. 13, 2018), <https://www.pcgamer.com/fallout-76-atoms-prices/>.

¹⁵² *Id.*

¹⁵³ Shabana Arif, *UPDATE: Bethesda to Replace Nylon Bags with Promised Canvas Bags for Owners of Fallout 76’s \$200 Power Armor Edition*, IGN, (Dec. 3, 2018), <https://www.ign.com/articles/2018/12/03/fallout-76s-200-power-armor->

Finally, the company updated the Power Armor Edition to be advertised as having a nylon carrying bag instead of a canvas one.¹⁵⁴

1. Did Bethesda commit deceptive trade practices? If so, were the company's remediating actions sufficient and appropriate?

Bethesda's actions as to the Nylon Bags neatly fits with the definition of bait and switch.¹⁵⁵ The company made a representation that the Power Armor Edition would include a canvas carrying bag for the T-51b helmet. A reasonable consumer, with no other information to refer to, would more than likely be misled in buying the product. While the bag was only a part of the Power Armor Edition, the bag would be material to a consumer in determining whether they are willing to pay \$200 for the product. The bag could also be distinguished as a separate physical product for purposes of an analysis. However, the circumstances provide a window into self-correcting action for video game companies. Bethesda's remediating action seemed to successfully address its legal misgivings. The company corrected the information on their website to correctly represent the bag's material, eventually provided canvas bags, and provided players with free in-game currency. Whether in-game currency can be interpreted as a form of compensation is a question outside the scope of this article. The damage that the company has suffered to date (September 23, 2019) was to its reputation as opposed to a result of legal action.¹⁵⁶ On the other hand, legal action has commenced and therefore the sufficiency of Bethesda's remediating actions as relevant to a potential case may be ruled upon.

After speaking to representatives at the law firm Migliaccio & Rathod LLP and inquiring about the status of its investigation, I was informed that the firm has filed a complaint in federal court regarding Bethesda's practices regarding Fallout 76; *Dobson v. Zenimax Media*

edition-shipped-with-bag-of-cheaper-quality-than-promised.

¹⁵⁴ The picture depicting the canvas bag is still visible on the storefront as of May 1, 2019. *Fallout 76 Power Armor Edition*, BETHESDA, <https://gear.bethesda.net/products/fallout-76-power-armor-edition#imageThumb> (last visited Sep. 23, 2019).

¹⁵⁵ The FTC Statement on Deception states that "in bait and switch cases, a violation occurs when the offer to sell the product is not a bona fide offer." *Deception Statement*, at 9 n.14, citing Bait and Switch Policy Protocol, December 10, 1975; Guides Against Bait Advertising, 16 C.F.R. 238.0 (1967); 32 FR 15.540.

¹⁵⁶ Cody Gravelle, *Fallout 76 Is The Most Disappointing Game Of 2018*, SCREEN RANT, (Dec. 28, 2018), <https://screenrant.com/fallout-76-most-disappointing-game-2018/>.

2019]

Title

135

*Inc. et al.*¹⁵⁷ The firm is also initiating arbitration actions, with plans to initiate several more.¹⁵⁸

NO MAN'S SKY – THE NO MAN'S LAND OF PROMISES

The company Hello Games and its landmark game, No Man's Sky, are seen as a redemption story in the video game industry.¹⁵⁹ From its tumultuous and massively controversial release, Hello Games has continued to diligently work on No Man's Sky and forge it into a successful game that is well regarded by its players.¹⁶⁰ The company, led by Sean Murray, appears to have learned from its experiences and continues to deliver new content, bringing it closer to its original vision while adding a plethora of features that were not envisioned, let alone advertised, before the game's initial release.¹⁶¹ Most recently, Hello Games released No Man's Sky Beyond on August 14, 2019, a free major update for the game.¹⁶²

¹⁵⁷ *Dobson v. Zenimax Media Inc. et al* is the name of the case. The case number is 2:19-cv-01094-TLN-EFB. The complaint was filed on June 14, 2019, in the United States District Court Eastern District of California. The most recent filing as of November 3, 2019 dates a July 22, 2019 waiver of service filing. A docket overview of the case is publicly available on Justia's website. *Dobson v. Zenimax Media Inc. et al*, JUSTIA, <https://dockets.justia.com/docket/california/caedce/2:2019cv01094/356813> (last visited Nov. 3, 2019) (I made this phone call to Migliaccio & Rathod LLP on May 1, 2019. I asked about the status of the firm's investigation and was informed that the investigation is still active and that there are plans to file a complaint in California and initiate separate arbitration proceedings. I made a second phone call to the firm on August 12, 2019, in which I was informed a complaint had been filed.)

¹⁵⁸ *Id.*

¹⁵⁹ Tolio, *supra* note 59.

¹⁶⁰ See MZK, *Why YOU Should Play No Man's Sky In 2019*, YOUTUBE, (Apr. 21, 2019). <https://www.youtube.com/watch?v=BC1Sd-kVWMg> (summarizes the content, support, and updates that No Man's Sky has received since 2016, up to April 2019); see also The Leaderboard, *No Man's Sky - Then Vs Now - Evolution Of No Man's Sky | The Leaderboard*, YOUTUBE (Aug. 19, 2018), <https://www.youtube.com/watch?v=KcDvreJTxuM>.

¹⁶¹ MZK, *supra* note 160; see also IGN, *Sean Murray Tells You Everything in No Man's Sky Beyond*, YOUTUBE (Aug. 9, 2019) <https://www.youtube.com/watch?v=zAo7b4HjtjQ> (Sean Murray remarks about No Man's Sky progress prior to the release of No Man's Sky Beyond); Tolio, *supra* note 59.

¹⁶² *Beyond: Introducing Update 2.0*, NO MAN'S SKY, <https://www.nomanssky.com/beyond-update/> (last visited Sep. 23, 2019); See also *Beyond – Release Date Confirmed*, NO MAN'S SKY, (Aug. 2, 2019), <https://www.nomanssky.com/2019/08/beyond-date-announce/>.

This article, however, will focus on the darkest chapter of No Man's Sky because of the legal precedents that arose from that time. The British Advertising Standard Authority's (ASA) investigation is the only one in the world that has substantively reviewed a video game over its represented features. The release of No Man's Sky in August 2016 was disastrous.¹⁶³ The game did not live up to the monumental hype generated by a combination of consumer excitement and Hello Games' marketing.¹⁶⁴ As more people played the game, backlash ensued as it became apparent that Hello Games made many misrepresentations about features of the game.¹⁶⁵ The consumer backlash to this was compounded by technical issues with the game, including frequent crashing in the PlayStation 4¹⁶⁶ and lackluster performance on PC.¹⁶⁷ Shortly afterward, the ASA announced an investigation of Hello Games and No Man's Sky. The ASA had jurisdiction for this investigation because Hello Games is a company based in the United Kingdom. Further, unlike most large video game companies outside the US, Hello Games was a small company that did not have an American subsidiary that would be within the jurisdiction of the FTC or a U.S. court. This section about No Man's Sky and further analysis in the next section concerns the darkest chapter of No Man's Sky when it was first sold and released in August 2016. It will not involve nor assess the game's state and features in subsequent years, including the current year of 2019.

A. The ASA Investigation and Ruling¹⁶⁸

The ASA announced its investigation into Hello Games and No Man's Sky in September 2016. The ASA also named Valve

¹⁶³ Tolio, *supra* note 59.

¹⁶⁴ *Id.*

¹⁶⁵ Brendan Caldwell, *The Broken Promise Of No Man's Sky And Why It Matters*, ROCK PAPER SHOTGUN, (Aug. 17, 2016), <https://www.rockpapershotgun.com/2016/08/17/broken-promises-of-no-mans-sky/>; SmashBits Animations, *If No Man's Sky was Honest with Us (Animation)*, YOUTUBE (Nov. 12, 2016), https://www.youtube.com/watch?v=_ITSmPZBMwI (a video echoing consumer outrage at the time with its lampooning of the game and Sean Murray).

¹⁶⁶ Crowbcat, *New disappointment discovered : No Man's Sky (2016)* YOUTUBE (Aug. 16, 2016), <https://youtu.be/A8P2CZg3sJQ?t=698> [hereinafter Crowbcat]; AngryJoeShow, *No Man's Sky Angry Review*, YOUTUBE (Aug. 21, 2016), <https://youtu.be/uTTPlqK8AnY?t=1840> [hereinafter Angry Joe Show].

¹⁶⁷ AngryJoeShow, *supra* note 166, at 29:52-30:40.

¹⁶⁸ The following section "The ASA Investigation and Ruling" cites the ruling in its entirety. *ASA Ruling*, *supra* note 63.

2019]

Title

137

Corporation, an American company, that owns the Steam Store that No Man's Sky was available for sale on. The scope of the investigation was limited to the videos, screenshots, and text representations made on the Steam page for No Man's Sky. Valve explained its refund policy and that video game developers and publishers had complete control over the content they display on the store pages for games. As a result, the ASA's focus shifted to Hello Games, the developer of No Man's Sky and the creator of the advertising material featured on Steam. Hello Games was given an opportunity to respond to the ASA and the complaints it received. The ASA then assessed the facts it gathered from the Steam page, Hello Games, third parties, and its own testing within No Man's Sky. The ASA's investigation of Hello Games concluded in November 2016, ultimately holding that Hello Games did not violate British advertising laws. The ruling is publicly available online, on the ASA's website.

1. Hello Games' Response and Defense¹⁶⁹

Hello Games' main defense in the ASA investigation was procedural generation, meaning that the screenshots and videos reviewed by the ASA almost never appear exactly in the game for players. However, Hello Games stressed that players would encounter similar features demonstrated in the promotional materials. No Man's Sky is and was marketed as having a procedurally generated universe rather than one that was manually developed. The company argued that each user has their own individual experience, beginning the game on a unique, procedurally generated planet in different parts of the in-game universe. Following this point, Hello Games established that "it would be difficult to recreate the exact scenes from the ad." The company further claimed that all material features called into question by the complaints appear in the NMS universe in abundance and that the content in question would be "commonly experienced by all users who played NMS for an average period of time." The company added that "there was a low probability that anyone playing the game as intended would fail to encounter all these features in some form within an average play-through."

In its defense, Hello Games thoroughly explained features and concepts of No Man's Sky that were under review by the ASA. This included faction features, warping mechanics, and graphical performance. Hello Games also furnished a large amount of footage to the ASA, including a four hour long playthrough video, starting from

¹⁶⁹ This section cites the ASA ruling in its entirety. *ASA Ruling, supra* note 63.

the beginning of the game. The ASA also stated that Hello Games provided links to third party videos made by No Man's Sky players and published to video sharing websites, like YouTube. Further, Hello Games gave the ASA a copy of No Man's Sky, which the ASA utilized to test some features of the game.

2. Interface and Aiming System Changes¹⁷⁰

The ASA found that the No Man's Sky interface and aiming system had undergone "cosmetic changes" since the gameplay videos were recorded. However, it found these changes immaterial "as they were superficial and incidental components in relation to the core gameplay mechanics and features."

*Water and Structures*¹⁷¹

The complaints that the ASA received alleged that the depiction of bodies of water and structures did not appear in the game. Hello Games provided the ASA with footage of buildings and structures that were of a "similar type." The ASA reviewed the Hello Games footage and found that it showed bodies of water "broadly consistent" with those shown in the videos featured on Steam.

3. Large-Scale Space Battles¹⁷²

Hello Games conceded to the ASA that larger battles "were more unusual" and provided footage the ASA regarded as showing a similar type of battle. The ASA concluded that the similarities were not materially different and therefore not misleading.

4. Behavior of Player Ships, Non-Player Ships, and Sentinels¹⁷³

The ASA considered complaints that alleged that the behavior of player ships, non-player ships, and sentinels. Hello Games provided footage to the ASA showing ships and the player's vessel behaving in a similar manner to that depicted in the ad. The ASA found that a part of the trailer showing a ship flying underneath a rock formation could not be replicated in the game. Despite this finding, the ASA determined that it was not misleading in the context of the video as a whole because it was a "brief shot within a wider sequence." The ASA mentioned sentinels only once by name and did not comment on them.

¹⁷⁰ This section cites the ASA ruling in its entirety. *ASA Ruling, supra* note 63.

¹⁷¹ This section cites the ASA ruling in its entirety. *ASA Ruling, supra* note 63.

¹⁷² This section cites the ASA ruling in its entirety. *ASA Ruling, supra* note 63.

¹⁷³ This section cites the ASA ruling in its entirety. *ASA Ruling, supra* note 63.

2019]

Title

139

5. Large Animal Behavior¹⁷⁴

In the one of the trailers, a large animal is shown stampeding and smashing through large trees. The ASA did not observe this particular kind of behavior of large animals smashing trees in the footage provided by Hello Games or in gameplay. The ASA found this discrepancy to be immaterial and therefore not misleading because it is “a fleeting and incidental scene” that would be unlikely to influence a consumer’s decision to purchase the game.

6. Graphics¹⁷⁵

Another complaint that the ASA addressed was the allegation that Hello Games exaggerated the quality of in-game graphics. The ASA stated that the graphics would be determined by the power of the computer used by the consumer and believed that most consumers buying the game on PC via Steam would be aware of graphical limitations imposed by their computer’s hardware. The ASA proceeded to review Hello Games and third-party footage to determine what graphics the game could produce. The ASA ultimately ruled that the graphics capabilities were not exaggerated and Hello Games’ screenshots and videos were therefore not misleading.

7. Warping Speeds¹⁷⁶

Another issue addressed by the ASA was the complaint that warping between systems in the game was not as fast as shown in the video. The ASA considered that variations in consumers’ computer would affect the speed of warping. Hello Games provided footage to the ASA which showed a warp that was a couple of seconds longer than the one in the ad. However, this was construed with the understanding that the warp was to a more complex system that would take more time to load. Ultimately, the ASA held that the differences in warp times between the video, Hello Games’s footage, and its own tests were not significant enough to be “materially misleading.”

8. Warping as a Loading Screen¹⁷⁷

On the Steam page, Hello Games represented warping as

¹⁷⁴ This section cites the ASA ruling in its entirety. *ASA Ruling, supra* note 63.

¹⁷⁵ This section cites the ASA ruling in its entirety. *ASA Ruling, supra* note 63.

¹⁷⁶ This section cites the ASA ruling in its entirety. *ASA Ruling, supra* note 63.

¹⁷⁷ This section cites the ASA ruling in its entirety. *ASA Ruling, supra* note 63.

enabling players to “[f]ly smoothly from deep space to planetary surfaces, with no loading screens, and no limits.” Warping was also shown in the gameplay video. Various complaints received by the ASA alleged that the game’s warping sequence was in fact, a cleverly disguised loading screen when going into new solar systems. The ASA held that warping did not represent an interruption to the gameplay experience as a loading screen would because warping “was contiguous and consistent with the preceding and following gameplay sequences.”

9. Trade Convoys Traveling between Stars¹⁷⁸

The ASA sought to find substantiation for the claim that “trade convoys travel between stars.” In the game, players can travel through space between solar systems and visit planets within those systems in their own spacecraft; the ASA wanted Hello Games to substantiate the claim that trade ships and convoys would also travel between star systems in a similar manner. The ASA reported that Hello Games provided footage showing trade ships “‘warping’ into systems after travelling between solar systems.” The ASA found this footage as substantiation of the claim and concluded that trade convoy feature existed in the game.

10. Factions Vying Over Territory¹⁷⁹

The ASA also checked the claim “factions vie over territory” for substantiation. From its research as well as Hello Games explanation and footage, the ASA held that consumers would understand the factions system in game would consist of more than one faction present in the game, factions holding specific territory, game aspects related to territorial tensions and faction activities. The ASA that players could interact with three different factions, which occupied specific areas, and could take part in opposing faction fleet battles (awarding the player improved reputation with the faction the player sided with). The ASA reported it understood that players could interact with three different factions, which occupied specific areas, and could take part in battles between opposing factions. The ASA also considered Hello Games’ explanation that faction features were part of the story and manifested itself through “the player’s journey” and “interactions” with the three factions. The ASA concluded that the

¹⁷⁸ This section cites the ASA ruling in its entirety. *ASA Ruling, supra* note 63.

¹⁷⁹ This section cites the ASA ruling in its entirety. *ASA Ruling, supra* note 63.

2019]

Title

141

description of faction features did not materially differ from the faction feature in the game.

11. The ASA's Conclusion¹⁸⁰

In its conclusion, the ASA stated that the videos and screenshots shown on the Steam page and that Hello Games would aim to show No Man's Sky in the best possible light. The ASA held that “*the overall impression* of the [Steam Store] ad was consistent with gameplay and the footage provided [emphasis added]”. As a result, the ASA ruled that Hello Games' advertising did not breach the British CAP Code with respect to Code's provisions regarding misleading advertising, substantiation, or exaggeration.

B. Shortfalls in the ASA Ruling

Before examining the shortfalls of the ruling, the greatest limitation of the ASA investigation is rooted in the scope of its authority. The ASA limited the scope of its investigation to only the representations on the Steam Store page because the ASA does not have the authority to consider “marketing communications” made in the forms and origins of media in which most of the representations about No Man's Sky were made.¹⁸¹

Even under the limited scope of the investigation conducted by the ASA, there were some glaring deficiencies. Some regard features that were misrepresented to both consumers *and* the ASA, while others concern issues with Hello Games' main defense.

1. Impeaching the Credibility of the Procedural Generation Defense

As stated before, Hello Games' main defense in the ASA investigation was procedural generation – everything in a player's experience is randomized and therefore features not being the same between the ads and actual game is not misleading nor material.¹⁸² However, there was information found within the week of NMS's release that potentially impeaches the credibility of the procedural generation defense. As reported on several online media outlets, Hugo Peters, a member of a group called NeoGAF, delved into the files of No Man's Sky in a process known as data mining.¹⁸³ Peters and the

¹⁸⁰ This section cites the ASA ruling in its entirety. *ASA Ruling*, *supra* note 63.

¹⁸¹ *CAP Code*, *supra* note 141, at 5-9.

¹⁸² *ASA Ruling*, *supra* note 63.

¹⁸³ Dragonbane, *GAFer is data mining through No Man's Sky (PC)*, NEOGAF,

other data miners discovered a file entitled “E32015.” It contained assets used in the gameplay video shown at E3 2015.¹⁸⁴ In the video, Sean Murray stated that he was picking a planet at random before proceeding to visit it in the gameplay video. However, the “E32015” folder contains a subfolder entitled “TRIGGERS” with trigger programs within.¹⁸⁵ This raises the possibility that the planet and events on the planet shown in the E3 2015 video were planned, as opposed to being procedurally generated. This discovery calls into serious question the credibility of Hello Games’ procedural generation defense – the footage Hello Games used in its advertising as well as the footage provided to the ASA carries the possibility of having consisted of manually developed planets and events, as opposed to being procedurally generated as purported. It should be noted that this data mining discovery was made within the week of *No Man’s Sky*’s release in August 2016¹⁸⁶ – it is contemporaneous to the ASA investigation that was closed in November 2016.¹⁸⁷

2. Misrepresented Features and Features Not Considered

Some features that the ASA ruled upon were still misrepresented by Hello Games, such as the nature of faction features, large space battles, and trade convoy travelling. Further, due to the ASA’s limited scope of authority and the investigation being limited in scope to the Steam Store page, the ASA did not investigate nor consider a plethora of representations made by Hello Games in various mediums, including gameplay videos, gameplay with commentary videos, trailers, and interviews. Several representations that were not assessed by the ASA will be examined in the following section.

(Aug. 14, 2015), <https://www.neogaf.com/threads/gafer-is-data-mining-through-no-mans-sky-pc.1263009/> [hereinafter NeoGAF]; Jason Schreier, *No Man’s Sky Data Miners Discover Some Weird Stuff*, KOTAKU (Aug. 15, 2016), <https://kotaku.com/no-mans-sky-data-miners-discover-some-weird-stuff-1785302482>; Mat Paget, *No Man’s Sky Dataminer Finds Poop and Xbox One Reference*, GAMESPOT, (Aug. 15, 2016), <https://www.gamespot.com/articles/no-mans-sky-dataminer-finds-poop-and-xbox-one-refe/1100-6442644/>.

¹⁸⁴ Kindra Pring, *Everything to Know About the No Man’s Sky Data Mine*, TECHRAPTOR (Aug. 15, 2016), <https://techraptor.net/content/everything-know-no-mans-sky-data-mine>.

¹⁸⁵ *Id.*; NEOGAF, *supra* note 183, at 4.

¹⁸⁶ The posts on the thread are dated August 14, 2016. NEOGAF, *supra* note 183, at 1.

¹⁸⁷ The ASA ruling was published on November 30, 2016. *ASA Ruling*, *supra* note 77.

2019]

Title

143

C. Representations by Hello Games not assessed by the ASA

Hello Games made many representations about No Man's Sky in the years and months preceding its release, particularly across several interviews and videos. As discussed above, many of these sources were not considered by the ASA, which reviewed the game on the merits of features represented on the Steam Store page. However, these representations not covered by the ASA were well documented by consumers, most prominently on Reddit.¹⁸⁸ It is important to see what features Hello Games was representing to consumers across these mediums and which represented features were actually present in the initial release of the game.

1. Space Flight and Combat

Hello Games made several representations about the features of space combat in No Man's Sky prior to its release. These included the ability for the player to destroy space stations and fleets, the appearance of large fleets, freighter movement, and non-player character (NPC) fleet battles. In two different interviews, Sean Murray spoke about destroying space stations and fleets.¹⁸⁹ Neither ability was available to players who bought No Man's Sky.¹⁹⁰ Large fleets were depicted on several instances in both gameplay videos and brief trailer shots.¹⁹¹ However, players reported only encountering a few large

¹⁸⁸ u/Cymen30, *Where's the No Man's Sky we were sold on? A BIG list of things that are missing with sources, links and quotes. Also, dubious advertisement (x-post from r/nomansskythegame)*, REDDIT, (Aug. 16, 2016), https://www.reddit.com/r/Games/comments/4y1h9i/wheres_the_no_mans_sky_we_were_sold_on_a_big_list/ [hereinafter NMS Reddit List].

¹⁸⁹ PlayStation, *PlayStation E3 2014 | No Man's Sky | Live Coverage (PS4)*, YOUTUBE (Jun. 10, 2014), <https://www.youtube.com/watch?v=U9muD249qNM&feature=youtu.be&t=10m46s>; *GI Show – No Man's Sky's Sean Murray Answers Community Questions*, YOUTUBE, 22:07-22:17 (Mar. 21, 2016), <https://www.youtube.com/watch?v=GjKTJblJpw0&feature=youtu.be&t=27m7s>.

¹⁹⁰ *NMS Reddit List*, *supra* note 188; Pyrocynical, *No Man's Lie*, YOUTUBE, 2:35-2:55, (Aug. 19, 2016), <https://youtu.be/3Wgolc1rRro?t=155> [hereinafter Pyrocynical].

¹⁹¹ HelloGamesTube, *No Man's Sky gameplay E3 2014*, YOUTUBE, 1:44-2:09 (Jun. 9, 2014), <https://www.youtube.com/watch?v=MZO40WBNA60&feature=youtu.be&t=1m44s>; IGN, *No Man's Sky: A Tour of 5 New Planets - IGN First*, YOUTUBE, 0:11-0:16 (Jul. 17, 2015), <https://www.youtube.com/watch?v=ytPJWfrsU0g&feature=youtu.be&t=11s>; HelloGamesTube, *No Man's Sky: Infinite Worlds*, YOUTUBE, 1:02-1:06 (Jun. 9

ships at a time and nowhere near the fleet sizes represented.^{192,193} In one of the trailers, freighters are shown conspicuously moving through space.¹⁹⁴ However, freighters appeared as static objects in the game.¹⁹⁵ In the gameplay video at E3 2015, the game showed a large fleet battle between factions.¹⁹⁶ Players were unable to stumble upon any battles like this in the game.¹⁹⁷

In the area of space/atmospheric flight, Hello Games made several representations regarding the existence of differentiation in characteristics and function of player's ships, including the ability to perform certain maneuvers like landing on an asteroid or flying under rock formations. In an interview, Sean Murray claimed that players could land their ships on asteroids.¹⁹⁸ This was not possible in the game.¹⁹⁹ Across a few interviews and gameplay videos, Hello Games represented that there would be differentiation in player ships.²⁰⁰ Ships would handle and perform differently, based on their focus of either science/exploration, trade, or combat.²⁰¹ However, every ship performed and functioned the same, with the only differences being cosmetic and in the amount of inventory slots on a ship.²⁰² Ship

2014),

<https://www.youtube.com/watch?v=0APP5WcX8v8&feature=youtu.be&t=1m2s>.

¹⁹² *NMS Reddit List*, *supra* note 188.

¹⁹³ *Pyrocynical*, *supra* note 190, at 2:53-3:51.

¹⁹⁴ HelloGamesTube, *No Man's Sky*, YOUTUBE, 1:11-1:19 (Dec. 8 2013), <https://www.youtube.com/watch?v=RRpDn5qPp3s&feature=youtu.be&t=1m11s>.

¹⁹⁵ *NMS Reddit List*, *supra* note 188; *Angry Joe Show*, *supra* note 166, at 13:00-13:27.

¹⁹⁶ PlayStation, *No Man's Sky - New E3 2015 Gameplay I PS4*, YOUTUBE, 0:34-1:03 (Jun. 22, 2015), <https://www.youtube.com/watch?v=v5sBbjkyzU&feature=youtu.be&t=34s>.

¹⁹⁷ *NMS Reddit List*, *supra* note 188.

¹⁹⁸ Game Informer, *70 Rapid-Fire Questions About No Man's Sky*, YOUTUBE, 5:08-5:12 (Dec. 13, 2014), <https://www.youtube.com/watch?v=n0uYnwqlsIU&feature=youtu.be&t=5m8s> [hereinafter 70 Questions].

¹⁹⁹ *NMS Reddit List*, *supra* note 188; *Pyrocynical*, *supra* note 190, at 2:14-2:35.

²⁰⁰ Game Informer, *A Behind-The-Scenes Tour Of No Man's Sky's Technology*, YOUTUBE, 24:02-24:30 (Dec. 5, 2014), <https://www.youtube.com/watch?v=h-kifCYToAU&feature=youtu.be&t=24m2s>; *No Man's Sky: IGN, 21 Minutes of New Gameplay - IGN First*, YOUTUBE, 7:45-17:59, (Apr. 11, 2016), <https://www.youtube.com/watch?v=D-uMFHoF8VA&feature=youtu.be&t=17m45s> [hereinafter 21 Minutes].

²⁰⁰ *21 Minutes*, *supra* note 199, at 14:38-15:00.

²⁰¹ *Id.*

²⁰² *NMS Reddit List*, *supra* note 188; *Pyrocynical*, *supra* note 190, at 8:01-9:46; *Angry Joe Show*, *supra* note 166, at 11:00-12:32.

2019]

Title

145

specialization was only added in March 2017 with the Path Finder Update.^{203,204} Flight in the game was also depicted with some complexity.²⁰⁵ However, both players and the ASA were unable to maneuver in ways shown in gameplay and trailers.²⁰⁶

2. Factions/NPC Interactions and Affiliations

Hello Games made several representations regarding the nature and features of non-player characters (NPCs), including joinable space battles, NPC/faction interactions, and faction affiliations. During the large faction fleet battle shown in the E3 2015 gameplay, Sean Murray said that as a player, he could pick sides and intervene in the fight as he pleased.²⁰⁷ However, players did not encounter such a situation, let alone enjoy the ability to choose sides;²⁰⁸ instead, players found small groups of NPC ships circled by pirate ships that would attack the player.²⁰⁹ Another representation was of factions generally interacting with each other without player involvement.²¹⁰ This did not appear in the game.²¹¹ A feature regarding NPC affiliation was represented in an interview as, “If you’re playing the game for exploration’s sake, you might want to focus on that race. But if you’re playing the game and all you want to do is kill things, there are more military-based races, so you might want to try and become friends with them.”²¹² On this point, this represented system appeared to be neutered in the released

²⁰³ *Path Finder Update*, NO MAN’S SKY, <https://www.nomanssky.com/pathfinder-update/> (last visited Sep. 23, 2019).

²⁰⁴ *Update 1.20*, NO MAN’S SKY WIKI, https://nomanssky.gamepedia.com/Update_1.20 (last visited Sep. 23, 2019).

²⁰⁵ HelloGamesTube, *No Man’s Sky gameplay E3 2014*, YOUTUBE, 2:20-2:45 (Jun. 9, 2014), <https://www.youtube.com/watch?v=MZO40WBNA60&feature=youtu.be&t=2m20s> (note how the spacecraft is able to fly close to the ground, fly under a floating rock formation, and complete a barrel roll).

²⁰⁶ *ASA Ruling*, *supra* note 63; *NMS Reddit List*, *supra* note 188.

²⁰⁷ PlayStation, *No Man’s Sky - New E3 2015 Gameplay I PS4*, YOUTUBE, 0:34-1:03 (Jun. 22, 2015), <https://www.youtube.com/watch?v=v5sBbjkyzU&feature=youtu.be&t=34s>.

²⁰⁸ *NMS Reddit List*, *supra* note 188; *Angry Joe Show*, *supra* note 166, at 13:33-14:06.

²⁰⁹ *Pyrocynical*, *supra* note 190, at 5:23-6:22.

²¹⁰ *21 Minutes*, *supra* note 199, at 9:37-9:59; *No Man’s Sky - New E3 2015 Gameplay I PS4*, *supra* note 196.

²¹¹ *NMS Reddit List*, *supra* note 188; *Angry Joe Show*, *supra* note 166, at 14:27.

²¹² Fred Dutton, *No Man’s Sky: A Universe Filled with Lore and Language*, PLAYSTATION BLOG, (Mar. 3, 2016), <https://blog.us.playstation.com/2016/03/03/nomans-sky-a-universe-filled-with-lore-and-language/>.

game.²¹³ Faction reputation was based on three ranks, which players found easy to attain and maintain, regardless of the faction type (exploration, trading, military).²¹⁴ Players found the benefits of being in good standing with factions to be minimal as well.²¹⁵ The ease of attaining good standing with any of the factions in the game took away the need to consider which factions fit a player's playstyle. It ultimately degraded the game's advertised core tenants of fighting, trading, and exploring because factions did not affect a player's experience and options due to their acts and choices.²¹⁶

3. Planetary Features

Hello Games made many representations about the features of planets. Hello Games made some representations about planetary physics, stating the planets orbited around stars and planets' day/night cycle would be affected by orbits and planetary rotation, as opposed to being static planets with skyboxes.²¹⁷ However, in the game, planets and stars were static objects, with planets having the skyboxes traditionally used in video games.²¹⁸ There were a few representations about general planet types, particularly the possibility of ringed planets²¹⁹ and the existence of sand planets.²²⁰ Ringed planets were not

²¹³ *NMS Reddit List*, *supra* note 188; *Angry Joe Show*, *supra* note 166, at 13:25-15:23; *Pyrocynical*, *supra* note 190, at 3:52-5:23.

²¹⁴ *NMS Reddit List*, *supra* note 188; *Angry Joe Show*, *supra* note 166, at 13:25-15:23; *Pyrocynical*, *supra* note 190, at 3:52-5:23.

²¹⁵ *NMS Reddit List*, *supra* note 188; *Angry Joe Show*, *supra* note 166, at 13:25-15:23; *Pyrocynical*, *supra* note 190, at 3:52-5:23.

²¹⁶ *Angry Joe Show*, *supra* note 166.

²¹⁷ IGN, *How No Man's Sky Infinite Universe Actually Works - IGN First*, YOUTUBE, 1:34-1:48 (Jul. 22, 2015), [https://www.youtube.com/watch?v=ueBCC1PCf84&feature=youtu.be&t=1m34s;21 Minutes](https://www.youtube.com/watch?v=ueBCC1PCf84&feature=youtu.be&t=1m34s;21%20Minutes), *supra* note 199, at 3:14-3:34; PlayStation, *No Man's Sky - New E3 2015 Gameplay I PS4*, YOUTUBE, 1:40-2:00 (Jun. 22, 2015), <https://www.youtube.com/watch?v=v5sBbjckyzU&feature=youtu.be&t=1m40s>; Roc Morin, *Inside the Artificial Universe That Creates Itself*, THE ATLANTIC, (Feb. 18, 2016), <https://www.theatlantic.com/technology/archive/2016/02/artificial-universe-no-mans-sky/463308/>.

²¹⁸ *NMS Reddit List*, *supra* note 188.

²¹⁹ Game Informer, *GI Show - No Man's Sky's Sean Murray Answers Community Questions*, YOUTUBE, 11:26-11:46 (Mar. 21, 2016), <https://youtu.be/GjKTJblJpw0?t=686>.

²²⁰ Game Informer, *A Behind-The-Scenes Tour Of No Man's Sky's Technology*, YOUTUBE, 2:06-2:14, (Dec. 5, 2014), <https://www.youtube.com/watch?v=h-kifCYToAU&feature=youtu.be&t=2m6s>; IGN, *No Man's Sky: A Tour of 5 Beautiful Planets*, YOUTUBE, 0:53-1:19, (Apr. 20, 2016),

2019]

Title

147

present but were not expressly promised.²²¹ Ringed planets were only added two years after the game's release.²²² Sand planets as represented could not be found at the time of release.²²³

Hello Games made several representations about surface features, including the appearance of rivers,²²⁴ large structures,²²⁵

<https://www.youtube.com/watch?v=CTRi2aEJrgQ&feature=youtu.be&t=53s>; HelloGamesTube, *No Man's Sky*, YOUTUBE, 1:32-1:39 (Dec. 8, 2013), <https://www.youtube.com/watch?v=RRpDn5qPp3s&feature=youtu.be&t=1m32s>; PlayStation, *No Man's Sky - Gameplay Trailer | PS4*, YOUTUBE, 3:18-4:06 (Dec. 6, 2014), <https://www.youtube.com/watch?v=nmwG6Sj1Yfg&feature=youtu.be&t=3m18s>; HelloGamesTube, *No Man's Sky: Portal gameplay trailer*, YOUTUBE, 1:02-1:41 (Dec. 5, 2014), <https://www.youtube.com/watch?v=WQhSP82uhY4&feature=youtu.be&t=1m2s>; HelloGamesTube, *No Man's Sky: Infinite Worlds*, YOUTUBE, 0:53-0:56 (Jun. 9 2014), <https://www.youtube.com/watch?v=0APP5WcX8v8&feature=youtu.be&t=53s>.

²²¹ *NMS Reddit List*, *supra* note 188.

²²² *NEXT UPDATE – No Man's Sky*, NO MAN'S SKY, <https://www.nomanssky.com/next-update/>; *Update 1.50*, NO MAN'S SKY WIKI, https://nomanssky.gamepedia.com/Update_1.50 (last visited Sep. 23, 2019); Polygon, *No Man's Sky NEXT: The Best (And Worst) New Features*, YOUTUBE, 0:44-1:14 (Jul. 26, 2018), <https://youtu.be/B3T5gmch4VU?t=44>.

²²³ *NMS Reddit List*, *supra* note 188; *Pyrocynical*, *supra* note 190, at 6:35-7:20; *Angry Joe Show*, *supra* note 166, at 10:24-11:00.

²²⁴ Game Informer, *A Behind-The-Scenes Tour Of No Man's Sky's Technology*, YOUTUBE, 8:06-8:14 (Dec. 5, 2014), <https://www.youtube.com/watch?v=h-kifCYToAU&feature=youtu.be&t=8m6s>; PlayStation, *PlayStation E3 2014 | No Man's Sky | Live Coverage (PS4)*, YOUTUBE, 8:25-8:33 (Jun. 10 2014), <https://www.youtube.com/watch?v=U9muD249qNM&feature=youtu.be&t=8m25s>; PlayStation, *PlayStation Experience 2015: No Man's Sky Conversation | PS4*, YOUTUBE, 3:47-4:00 (Dec. 5, 2015), <https://www.youtube.com/watch?v=sb-clg3Tlw&feature=youtu.be&t=3m47s> (a river is visible in the bottom or bottom left corner of the screen).

²²⁵ HelloGamesTube, *No Man's Sky*, YOUTUBE, 0:35 (Dec. 8 2013), <https://www.youtube.com/watch?v=RRpDn5qPp3s&feature=youtu.be&t=32s>; HelloGamesTube, *No Man's Sky gameplay E3 2014*, YOUTUBE, 2:30-2:33 (Jun. 9 2014), <https://www.youtube.com/watch?v=MZO40WBNA60&feature=youtu.be&t=2m30s> (structure seen on the right side of the screen); HelloGamesTube, *No Man's Sky: Infinite Worlds*, YOUTUBE, 0:32-0:35 (Jun. 9 2014), <https://www.youtube.com/watch?v=0APP5WcX8v8&feature=youtu.be&t=32s> (structure seen on the right side of the screen)

structures with moving parts,²²⁶ portals,²²⁷ and crashed freighters.²²⁸ Lakes and rivers appeared in game, but they were significantly smaller and less impressive than those shown in gameplay videos and trailers.²²⁹ Large structures and those with moving parts were not seen in the game, but smaller, less dynamic structures were.²³⁰ Portals were found to be present in game, but players could not activate them until the Atlas Rises Update, released one year later.²³¹ Crashed freighters on planets were not found in the game.²³² Crashed freighters would only be added into the game one year later in August 2017 with the Atlas Rises Update.²³³

4. Resources, Trading and Crafting

Hello Games also made representations regarding resource distribution and elements. These representations also affected trading features, which depended on resource availability and diversity to drive the depth and efficacy of trading. On multiple instances, planet characteristics were represented to substantially affect resource distribution; planets (such as hot and cold planets) would have various resources that would be determined and limited by the planet's type and characteristics.²³⁴ However, this resource distribution system did not appear to be functional in the game; players found that resources

²²⁶ *21 Minutes*, *supra* note 199, at 8:16-8:55; HelloGamesTube, *No Man's Sky: Portal gameplay trailer*, YOUTUBE, 1:43-1:52 (Dec. 5, 2014), <https://www.youtube.com/watch?v=WQhSP82uhY4&feature=youtu.be&t=1m43s>.

²²⁷ *21 Minutes*, *supra* note 199, at 1:37-1:40. (similar structure behind the portal).

²²⁸ HelloGamesTube, *No Man's Sky*, YOUTUBE, 1:19-1:26 (Dec. 8 2013), <https://www.youtube.com/watch?v=RRpDn5qPp3s&feature=youtu.be&t=1m19s>.

²²⁹ *NMS Reddit List*, *supra* note 188.

²³⁰ *Id.*

²³¹ *Atlas Rises Update*, No Man's Sky, <https://www.nomanssky.com/atlas-rises-update/> (last visited Sep. 23, 2019); *Update 1.30*, No Man's Sky Wiki, https://nomanssky.gamepedia.com/Update_1.30 (last visited Sep. 23, 2019).

²³² *NMS Reddit List*, *supra* note 188.

²³³ *Atlas Rises Update*, *supra* note 291; *Update 1.30*, *supra* note 292.

²³⁴ IGN, *How Crafting in No Man's Sky Works - IGN First*, YOUTUBE, 4:33-4:53 (Apr. 15, 2016), https://www.youtube.com/watch?v=it_9pUYO2AY&feature=youtu.be&t=4m33s; IGN, *No Man's Sky: How the Economy Works - IGN First*, YOUTUBE, 1:55-2:08 (Jul. 8, 2015), <https://www.youtube.com/watch?v=BXUrOFVItgs&feature=youtu.be&t=1m55s>; *21 Minutes*, *supra* note 199, at 2:48.

2019]

Title

149

were distributed in a more homogenized fashion.²³⁵ Players could find most, if not all resources they required on a single planet.²³⁶ This misrepresentation created a cascading effect on other features in the game, as resource distribution is an important part of the game's advertised core experiences of exploration and survival. The efficacy and importance of trading was significantly diminished by the actual resource distribution system.²³⁷ Players' ability to find everything they needed on or one or just a few planets defeated the purpose of trading – acquiring resources and items that were not readily available to gather.²³⁸ This detracts from the representation that a player could play exclusively in space as a trader.²³⁹

No *Man's Sky's* crafting features were also affected to a lesser extent by the resource misrepresentation. However, crafting was also represented independent of resource distribution features – it was represented as being similar to *Minecraft*, in which players gather various resources and items and attempt to find the combinations and formulas that yield new items.²⁴⁰ However, in the game, the crafting system revolved around recipes that players discover or are given.²⁴¹ This constitutes a stark difference between a purported system that allows players to craft given the right resources and formula (like *Minecraft*) and the actual, more restrained, and shallow system in which players can only plug materials into recipes that they are given.²⁴²

²³⁵ *NMS Reddit List*, *supra* note 188.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*; IGN, *No Man's Sky: How the Economy Works - IGN First*, YOUTUBE, 0:56-1:19 (Jul. 8, 2015), <https://www.youtube.com/watch?v=BXUrOFVItgs&feature=youtu.be&t=56s>; 21 *Minutes*, *supra* note 199, at 15:57-16:08.

²⁴⁰ IGN, *No Man's Sky: How the Economy Works - IGN First*, YOUTUBE, 2:08-2:46 (Jul. 8, 2015), <https://www.youtube.com/watch?v=BXUrOFVItgs&feature=youtu.be&t=2m8s>; In *Minecraft*, players are not given the recipes needed to craft items. They can either figure it out by trial and error, ask other players, or look up the recipes to craft what they need on community websites. See *Crafting in Minecraft*, MINECRAFTOPIA, http://www.minecrafttopia.com/crafting_in_minecraft (last visited Sep. 23, 2019).

²⁴¹ *NMS Reddit List*, *supra* note 188; *Pyrocynical*, *supra* note 190, at 11:05-12:19.

²⁴² *Id.*

5. Animal Behavior

Hello Games flaunted animal and creature features to help flesh out the game's exploration experience, including large animals affecting the landscape and interactions between different animals. One trailer that was reviewed by ASA showed a large animal stampeding through and disturbing forest brush, causing a flock of smaller animals to flee.²⁴³ However, large animals in game do not cause trees to shake or shed leaves, let alone cause other animals to flee.²⁴⁴ Hello Games also made representations regarding the features of artificial intelligence (AI) governing animal behavior. Animals and plants were represented to sometimes attack and/or eat other.²⁴⁵ The animal AI was also represented to have a layer of complexity in which animals would be aware of certain items and other animals, therefore responding differently to different animals and items.²⁴⁶ In game, players found animals to only wander around, become friendly upon being fed a resource by players, or become aggressive and attack players.²⁴⁷

6. Sentinels

Sentinels were shown as the main form of combat on planets in No Man's Sky.²⁴⁸ Players attract the attention of these sentinels by killing animals, gathering too many resources or otherwise affecting a planet, which in turn gives the player a wanted level and makes the sentinels hostile to the player.²⁴⁹ In No Man's Sky, a wanted level is

²⁴³ HelloGamesTube, *No Man's Sky gameplay E3 2014*, YOUTUBE, 1:12-1:21 (Jun. 9, 2014), <https://www.youtube.com/watch?v=MZO40WBNA60&feature=youtu.be&t=1m12s>; *ASA Ruling*, *supra* note 77.

²⁴⁴ *Id.*; *Pyrocynical*, *supra* note 190, at 12:22-13:26.

²⁴⁵ *70 Questions*, *supra* note 198, at 2:18-2:21; Game Informer, *GI Show – No Man's Sky's Sean Murray Answers Community Questions*, YOUTUBE, 21:09-23:09 (Mar. 21, 2016), <https://www.youtube.com/watch?v=GjKTJbIJpw0&feature=youtu.be&t=21m9s>.

²⁴⁶ Roc Morin, *Inside the Artificial Universe That Creates Itself*, THE ATLANTIC, (Feb. 18, 2016), <https://www.theatlantic.com/technology/archive/2016/02/artificial-universe-no-mans-sky/463308/>.

²⁴⁷ *NMS Reddit List*, *supra* note 188; *Pyrocynical*, *supra* note 190, at 13:04-13:26.

²⁴⁸ *Id.* at 13:30-13:38.

²⁴⁹ PlayStation, *PlayStation Experience 2015: No Man's Sky Conversation | PS4*, YOUTUBE, 3:47-4:04 (Dec. 5, 2015), <https://youtu.be/-sb-clg3Tlw?t=227>.

2019]

Title

151

the measure of attention the sentinels give to the player.²⁵⁰ As stated by Sean Murray, it is based off of the wanted level system featured in the Grand Theft Auto series.²⁵¹ The sentinels were represented to attack players in large groups of up to about 9 to 10 when players would reach the highest wanted level.²⁵² However, in game, sentinels only attacked in groups of 3 to 5.²⁵³ Further, the wanted level was represented to be unaffected (although the wanted level would eventually clear by staying out of the sentinels' sight) by entering buildings.²⁵⁴ In game, entering a building immediately cleared a player's wanted level.²⁵⁵ Another representation was a large walker sentinel appearing dormant and then wandering.²⁵⁶ In game, walker sentinels only spawn and are only seen one at a time when the player has a full wanted level.²⁵⁷ While these misrepresentations result in reduced difficulty for players in dealing with sentinels, they also diminish the challenge and depth of an advertised core feature of the game – fighting.

7. Miscellaneous Features

Multiplayer features were mentioned on multiple occasions by Sean Murray, including on U.S. national television.²⁵⁸ However, prior

²⁵⁰ IGN, *No Man's Sky: 18 Minute Gameplay Demo - IGN First*, YOUTUBE, 4:07-5:12 (Jul. 6, 2015), <https://youtu.be/CLcjuIQJns0?t=247>

²⁵¹ *Id.*; In the Grand Theft Auto series, wanted level measures police attention and is represented by stars displayed in the top right corner of the screen. As the player commits more crimes, the player's wanted level increases and police will pursue the player more aggressively and in higher numbers before sending in more powerful law enforcement authorities, such as SWAT teams, federal agents, and even the military. *See generally Wanted Level*, GTA Wiki, https://gta.fandom.com/wiki/Wanted_Level (last visited Oct. 31, 2019).

²⁵² PlayStation, *PlayStation Experience 2015: No Man's Sky Conversation | PS4*, YOUTUBE, 4:27-4:36 (Dec. 5, 2015), <https://www.youtube.com/watch?v=-sb-clg3Tlw&feature=youtu.be&t=4m27s>; *Pyrocynical, supra* note 190, at 13:30-14:01.

²⁵³ *Id.*; *NMS Reddit List, supra* note 188.

²⁵⁴ *21 Minutes, supra* note 199, at 11:49-12:33.

²⁵⁵ *NMS Reddit List, supra* note 188.

²⁵⁶ HelloGamesTube, *No Man's Sky: Portal gameplay trailer*, YOUTUBE, 0:40-0:50 (Dec. 5, 2014), <https://www.youtube.com/watch?v=WQhSP82uhY4&feature=youtu.be&t=40s>;

The Late Show with Stephen Colbert, *Sean Murray May Have Replaced Morgan Freeman As God*, YOUTUBE, 4:49-5:13 (Oct. 3, 2015), <https://youtu.be/ZqeN6hj4dZU?t=289> [hereinafter Colbert Show].

²⁵⁷ *NMS Reddit List, supra* note 188; *Pyrocynical, supra* note 190, at 14:01-14:41; *Angry Joe Show, supra* note 166, at 16:28-16:46.

²⁵⁸ *70 Questions*, at 0:58-1:11; *Colbert Show*, at 5:42-6:43; *Sean Murray*,

to release, he cautioned that No Man's Sky was not a multiplayer-oriented game and the likelihood of players finding each other was infinitesimally low.²⁵⁹ One day after the game's release, players found themselves in the same exact location on a planet but could not see each other as was represented.²⁶⁰ The only multiplayer features found to be present were those of sharing discoveries and planet names – players could not encounter one another.²⁶¹ Proper multiplayer, including third person view and models, was only added in two years later.²⁶²

Hello Games made more representations about certain miscellaneous features, including uploading resource discoveries, binoculars, beacons, hacking reinforced doors, radio chatter, and translucent glass on starships. Hello Games made the representation that when players found large resource caches of interest on a planet, they would be able to upload that information so other players would be aware that the planet had particular resources.²⁶³ However, this resource discovery and upload feature did not appear in the released game.²⁶⁴ Binoculars were represented as being useful for clearly marking objects in the distance, such as buildings.²⁶⁵ In game, the markings were a less visible green glow and sometimes glitched out with markings.²⁶⁶ Beacons were represented as allowing a player to

Twitter, (Aug. 8, 2016 9:37 AM), <https://twitter.com/NoMansSky/status/762689080245252096> NOMANSSKY

²⁵⁹ Sean Murray, Twitter, (Aug. 8, 2016 9:35 AM), <https://twitter.com/NoMansSky/status/762688708764135425> NOMANSSKY; Crowbcat, *supra* note 166, at 9:50-10:43.

²⁶⁰ Crowbcat, *supra* note 166, at 9:50-10:43; Sean Murray, Twitter, (Aug. 10, 2016 12:06 AM), <https://twitter.com/NoMansSky/status/763270259080097792> NOMANSSKY (The two streamers finding each other in the same exact location in game was acknowledged by Sean Murray).

²⁶¹ Pyrocynical, *supra* note 190, at 14:45-16:05.

²⁶² *No Man's Sky NEXT: The Best (And Worst) New Features*, YOUTUBE, 2:43-3:35 (Jul. 26, 2018), <https://youtu.be/B3T5gmch4VU?t=163>.

²⁶³ IGN, *No Man's Sky: How the Economy Works - IGN First*, YOUTUBE, 1:19-1:55 (Jul. 8, 2015), <https://www.youtube.com/watch?v=BXUrOFVItgs&feature=youtu.be&t=1m19s>; Pyrocynical, *supra* note 190, at 9:57-11:05.

²⁶⁴ Pyrocynical, *supra* note 190, at 9:57-11:05; *NMS Reddit List*, *supra* note 188.

²⁶⁵ IGN, *No Man's Sky: Surviving on a Subzero Planet - IGN First*, YOUTUBE, 1:08-1:21 (Apr. 18, 2016), <https://www.youtube.com/watch?v=cUnKJyoyIlk&feature=youtu.be&t=1m8s>.

²⁶⁶ *NMS Reddit List*, *supra* note 188.

2019]

Title

153

reveal points of interest in a large radius on a planet and being necessary to upload discoveries.²⁶⁷ In game, they did not mark anything nor were beacons necessary to upload discoveries.²⁶⁸ Another representation was that hacking was described as the “best way” to enter buildings with reinforced doors.²⁶⁹ However, hacking was not available as a feature in the game; using explosives was the only way to get through a reinforced door.²⁷⁰ Radio chatter and translucent ship glass was shown in a December 2014 trailer.²⁷¹ Neither appeared in the released game.²⁷²

Under American Deceptive Trades Practices law, did Hello Games commit Deceptive Trade Practices with *No Man’s Sky* prior to its release?

American Deceptive Trade Practices law is fundamentally similar to the British law. The only difference in the core definition is type of consumer perspective (reasonable consumer in the US and the average consumer in the UK). Both countries allow regulators to consider the overall impression created by a company’s advertising. If the FTC or a US court considered the same facts as the ASA, they would likely come to a similar result and find Hello Games to have not committed deceptive trade practices.

On the other hand, there is a major difference between the ASA and FTC in their scopes of authority. The ASA’s limited authority prevented it from considering a multitude of representations and facts. The FTC, however, has statutory authority to broadly pursue deceptive trade practices cases.²⁷³ Regardless, even if the FTC or a U.S. court considered the other misrepresentations that the ASA could not and did not consider, they may still not find Hello Games in violation of law under this situation. This is because of the problems with materiality and video games as described in Part 2 of this article

²⁶⁷ PlayStation, *No Man’s Sky - New E3 2015 Gameplay I PS4*, YOUTUBE, 3:40-5:40 (Jun. 22, 2015), <https://www.youtube.com/watch?v=v5sBbjckyzU&feature=youtu.be&t=3m40s>.

²⁶⁸ *NMS Reddit List*, *supra* note 188.

²⁶⁹ *21 Minutes*, *supra* note 199, 10:57-11:23.

²⁷⁰ *NMS Reddit List*, *supra* note 188; *Angry Joe Show*, *supra* note 166, at 16:09-16:23.

²⁷¹ Playstation, *No Man’s Sky - Gameplay Trailer | PS4*, YOUTUBE, 1:09-1:16 (Dec. 6, 2014), <https://www.youtube.com/watch?v=nmwG6SjlYfg&feature=youtu.be&t=1m9s> (radio chatter).

²⁷² *NMS Reddit List*, *supra* note 188.

²⁷³ 15 U.S.C. § 45(a)(1) (2018); (The FTC may also look at foreign claims if they are likely to cause foreseeable injury or if they involve material conduct within the United States. 15 U.S.C. § 45(a)(4) (2018)).

regarding the materiality element of the FTC Statement on Deception. Although there are many misrepresentations, none of them are material on their own. While an analysis of a feature can yield a finding of misleading to a reasonable consumer, the feature will not be material because the feature will be too small in the scale of the whole game being sold that it cannot be construed as being likely to materially influence a consumer's decision to buy the game. This issue will be covered in depth in the following section.

D. A Materiality Test to determine for misleading representations and practices

The ASA's investigation of Hello Games primarily failed to assess all representations made but more fundamentally, fell short on the issue of materiality. The root of the issues with deceptive trade practices in the video game industry narrows to this element of materiality. The law has no guidance on how to sort through misrepresentations that are individual, not material, even though many consumers may accuse a company of deceptive advertising.

E. Why is the issue about Materiality?

The complication posed by video games is that they are unique, nuanced, and full of various features that consumers demand. However, features vary in relevance to the core game (such as the basic gameplay and story) and therefore consumers give different levels of weight to different representations in their video game purchasing decisions. In other words, video game features often contain easy-to-spot objective elements as to their existence and quality, but involve significant subjective elements of consumer preference and priority for purposes of materiality.

For example, the seminal case *Kraft v. FTC* concerned Kraft's advertisements of their cheese slices in the 1980s.²⁷⁴ The advertisements successfully challenged by the FTC implied that Kraft's cheese slices carried the same amount of calcium as 5 ounces of milk despite the fact that the loss of calcium in processing made this claim false.²⁷⁵ Kraft's selling point of the product was that their cheese was healthier because it had more calcium.²⁷⁶

Other cases that the FTC has covered regarding deceptive trade practices in the video game industry have followed a similar path.

²⁷⁴ *Kraft*, 970 F.2d at 314 (7th Cir.1992).

²⁷⁵ *Id.* at 324.

²⁷⁶ *Id.* at 323.

2019]

Title

155

Ultimeyes concerned a straightforward health claim of improving vision. Machinima and Warner Bros. only concerned the failure to disclose paid endorsements. The PS Vita ruling concerned only the PS Vita's ability to play PS3 games remotely. However, with a video game like No Man's Sky, it does not boil down to advertising a single point to push the product. Video games today often sell themselves on a full suite of features pertaining to the core genre. No Man's Sky invoked various elements, from space flight and combat, to planetary exploration, crafting, faction interactions, NPC interactions, player interactions, a procedurally generated galaxy (complete with planets and space stations), and other interactions with the environment. No Man's Sky's selling point was that it offered this full suite of features that gave players a deep and expansive open world exploration game with many different things to do. Much of this can be depicted in a minutes-long video and consumers pay close attention. Those that don't will usually be exposed to discussion by fans and journalists who scrutinize the videos and interviews. Reading the FTC rules, the depiction of features in an upcoming game could be construed to be express or implied claims and therefore can be presumed to be material under the law. Each of the features could add up to being a single implied claim that a game will have the exhibited features. However, the trouble in reality is that when a deceptive trade practices claim is invoked, only some of the features are misrepresented. This throws a wrench into materiality. The overall claim cannot be presumed to be material because different features receive different levels of consideration and it is often unclear which features affected consumer decisions to purchase the game. It is also unfair to companies to presume materiality under a particular feature in this situation and it is insufficient to not look at the feature in the context of the overall game being sold.

The video game industry presents a new situation for materiality regarding product advertising. Cases in the past would examine a single representation or a limited, well-connected set of representations that connect to a selling point. Every deceptive trade practice ruling the FTC has issued in the video game industry has followed this principle. The Ultimeyes ruling was solely based on a health claim for improving vision. The Machinima and Warner Bros. rulings solely concerned paid endorsements. Further, the PS Vita ruling solely concerned the Vita's remote play capabilities. A video game like No Man's Sky can include numerous misrepresentations from a variety of sources in different formats, such as media interviews, social media posts, traditional advertising, videos, and livestreaming. In the cases of most other industries, the representations

called into question are often few and focused. The FTC and courts can look at the “overall net impression” made by a company, which enables looking at all relevant practices and representations made by a company. However, this does not provide guidance on how multiple misrepresentations that are not individually material affect a consumer’s decision to buy a product.

Given the lack of rules or guidance in determining the materiality of multiple representations in a reasonable consumer’s decision to buy a product like a video game, a new test to determine if misrepresentations are material should be created. Because of the lack of substantive judicial rulings on deceptive trade practices regarding a video game, the only effective remedy is regulatory by improving FTC rules.

THE MATERIALITY TEST

I propose the creation of a materiality test that would provide a framework for sorting through various misrepresentations from multiple sources and determining if they culminate to be likely to affect the purchasing decision of a consumer acting reasonably under the circumstances. This test is to give consumers and regulators the chance to challenge video game companies’ marketing practices regarding the features that they represent and advertise. It also strives to be fair to video game companies by giving them the chance to defend themselves on the merits even when they make misleading statements. The FTC does not need to actively and constantly monitor video game companies; a single judicial or FTC ruling will establish precedent and put companies on notice that deceptive conduct in the future will yield legal consequences. Ultimately, the purpose is preventative – to discourage companies from engaging in deceptive conduct in the future.

The test would have three elements, (1) relevance of the misrepresented features, (2) recency of the misrepresentations in relation to the game’s release, and (3) totality of the misrepresentations. The idea is that misrepresentations should carry different amounts of weight in determining whether the sum of them are material.

The test aims to answer this: are the totality of claims about a game likely to mislead a reasonable consumer and materially affect their decision to purchase the game? The law currently exists in the vacuum of whether a claim is likely to materially mislead a consumer, not whether the *totality* of a claim is likely to materially mislead a consumer. In totality, no claim is material on its own – the claims add

2019]

Title

157

up to create an overall net impression of the product that will be determined to be material or not.

One judicial or FTC ruling that establishes precedent and puts companies on notice that deceptive conduct in the future will yield legal consequences. Ultimately, the aim is preventative – to discourage companies from engaging in deceptive conduct in the future.

Relevance: Turning to the first factor, in relation to the game, is the misrepresented feature an essential feature, a major feature, a minor feature or an accessory feature?

Features may be narrow or broad, depending on the circumstances. They can be as narrow as a single item or interaction or as broad as graphics or an area of gameplay mechanics. An essential feature is material – further analysis under this test would be unnecessary as the materiality requirement would be satisfied. An essential feature is one so central to a game and its genre that the misrepresentation of such a feature will almost always materially affect a consumer’s choice to buy a game.²⁷⁷ An essential feature may also apply to any particular feature that is proven to have caused a significant number of consumers to decide to purchase the game. Features that firmly fall within FTC presumptions (such as price, health, and safety) will be essential as well. A major feature is one that is not material, but consumers give significant weight to it and will carry considerable weight in the totality prong for materiality. Minor features are also not material, as consumers give less weight to it than major features. Minor features will carry some weight in the totality prong for materiality. Accessory features are not material as well – they are typically small features, or those that support major or minor features. Features that are inherently misleading but have little to no effect on a game or a consumer’s decision to buy are accessory as well. They carry little weight in the totality prong for materiality.

Recency: When was the misrepresentation made and particularly, when was it last made prior to the game’s release?

For major, minor, and accessory features, older misrepresentations may be construed to carry less weight in the totality prong than more recent ones. Video games prior to release are products in development. Consumers expect that games are prone to changes in the course of development. This means a misrepresentation may be less likely to be material, especially if there are more recent and similar representations that consumers are giving greater consideration to. For

²⁷⁷ This would fit with the FTC’s presumption that information in a misrepresentation is pertinent to a game’s central characteristics. *Deception Statement, supra* note 134.

example, a misrepresented feature last made a year or two years before release may be less likely to be material than a feature misrepresented a few months prior to release. When a misrepresentation is made repeatedly (for example, using the same gameplay video that carries a misrepresentation), the time it is most recently shown by the company is most important. It is less relevant to determine when the misrepresentation was first made. Recency would be best used in the relevance analysis as a mitigating factor.

Totality: Finally, would the individually non-material misrepresentations in their totality materially affect a customer's decision to purchase the game?

In further detail, the totality question asks: given the relevance and recency of each misrepresentation, do the misrepresentations create an overall net impression that would be likely to materially affect a consumer's decision to buy the game? The importance of this totality element is to determine if materiality exists because of multiple, non-material misrepresentations. Consumers do not consider each feature of a game in a vacuum, but rather in the overall scope of the game they are considering purchasing – misrepresentations should also be considered by the FTC or courts in relation to the overall product being sold.

The number of major, minor, and accessory misrepresentations are probative in determining whether they are material or not in totality. Of course, it depends on the circumstances of the product and misrepresentations, but generally, only a few major misrepresentations alone should amount to be material, while many minor misrepresentations alone should amount to be material. Accessory misrepresentations should usually add very little or nothing to totality but may influence a fact-finder's decision when they are unsure of whether the totality of misrepresentations is material or not.

In absence of an overwhelming number of major and minor misrepresentations to indicate materiality, the totality prong should consider how the misrepresentations affect core areas of the game and how they culminate in shaping a consumer's overall net impression of the game in determining whether to purchase it.

A. Applying the Materiality Test to No Man's Sky

Before proceeding with the test, the core genre and gameplay of No Man's Sky needs to be established – the relevance of each misrepresentation depends on this. Hello Games sold the game as one that centered around four core tenants: trading, exploring, surviving,

2019]

Title

159

and fighting.²⁷⁸ From these core tenants, *No Man's Sky* is a space and planetary exploration game that aims to allow players to interact with the worlds around them.²⁷⁹ The game's core also consists of the player's ability to partake in a variety of activities, including, but not limited to, non-player character (NPC) interaction, resource harvesting, trading, and materials crafting.²⁸⁰

For purposes of demonstrating this proposed materiality test, no misrepresentation will be found to be essential due to a significant number of consumers being persuaded to buy the game based on a particular individual feature. No facts or evidence will be invoked for purposes of furthering such a point.

One further disclaimer is that this application of the materiality test is to *No Man's Sky* in its state in August 2016. *No Man's Sky* in its form since August 2016 and in the present day (as of this writing, August 2019), are not being assessed, particularly because the game has evolved significantly since its release. Further, the representations made before release are highly unlikely to mislead a present-day consumer or affect their decision to buy the game.

1. Relevance

Space Flight and Gameplay

Misrepresenting the nature and options of space combat is major. Space combat includes the ability to destroy space stations and

²⁷⁸ Playstation, *No Man's Sky - New E3 2015 Gameplay 1 PS4*, YOUTUBE, 5:37-5:51 (Jun. 22, 2015), <https://youtu.be/v5sBbjckyzU?t=337>.

²⁷⁹ Kinda Funny Games, *No Man's Sky Release Date, Interview - PS I Love You XOXO (Special Guest Sean Murray)*, YOUTUBE, 0:30-2:07 (Mar. 3, 2016) <https://youtu.be/y6WH6VAhxlI?t=30>; *Colbert Show*, at 3:28-3:48; The descriptions of the videos on HelloGamesTube, uploaded before the game's release in 2016, provide the following description of the game: "No Man's Sky is a science-fiction game about exploration and survival in an infinite procedurally generated galaxy. . . Developed by Hello Games, the indie studio behind PS3 hit *Joe Danger*, *No Man's Sky* is a science-fiction game without limits. If you see a mountain, you can trek there. If you see a planet hanging on the horizon, it's a real place, with its own rich ecology. You can get in your ship, fly into space and it's yours to explore. Not just that, but every star in the sky is the light of a sun, with its own solar system waiting for you to discover and find adventure in." See e.g. HelloGamesTube, *No Man's Sky - 'I've Seen Things' Gameplay Trailer*, YOUTUBE, (Oct. 30, 2015), <https://www.youtube.com/watch?v=-UVQ14JrfRI>.

²⁸⁰ HelloGamesTube, *No Man's Sky - 'I've Seen Things' Gameplay Trailer*, YOUTUBE (Oct. 30, 2015), <https://www.youtube.com/watch?v=-UVQ14JrfRI>; 21 *Minutes*, *supra* note 199, at 3:14-4:28.

fleets, the appearance of large fleets, freighter movement, and NPC fleet battles. The depth of space combat is not an essential feature since the focus in space is on exploration and travel between planets. However, it is a considerable portion of the advertised core tenant of fighting and consumers would therefore give significant weight to these features.

Misrepresenting the existence of differentiation in characteristics and abilities of player's ships, as well as the ability to perform certain maneuvers such as landing on an asteroid or flying under rock formations is major. It is not essential because the focus of the game is not just space flight, it is exploration and interaction with the galaxy on planets, space stations and space, often outside of spacecraft. No Man's Sky is dissimilar to games like *Elite: Dangerous*, which center on spacecraft flight simulation, including combat, trading, and other activities with a spacecraft.²⁸¹ In light of this point, this group of misrepresentations in the game should be considered major in the totality prong.

Factions/NPC Interactions and Affiliations

The misrepresentation of depth, options, and importance of factions is major. This includes joinable space battles, NPC interactions, and NPC/faction affiliations. As with the space flight and combat misrepresentations, NPC and faction features are not an essential part of the game. They do not take a central role as NPCs and factions do in role playing games like those in the *Fallout* and *Elder Scrolls* series.^{282,283} However, consumers would give significant weight to NPC and faction features as they contribute to the game's core tenants of exploration, trading, and combat.

²⁸¹ Dave Cook, *Elite Dangerous: Braben's square peg*, VG 24/7, (Nov. 23, 2012), <https://www.vg247.com/2012/11/23/elite-dangerous-brabens-square-peg/>; *Elite Dangerous*, STEAM, https://store.steampowered.com/app/359320/Elite_Dangerous/ (last visited Sep. 23, 2019).

²⁸² Alison Wayne, *Everything you need to know about the Fallout universe*, VENTUREBEAT (Nov. 29, 2015), <https://venturebeat.com/2015/11/29/everything-you-need-to-know-about-the-fallout-universe/>.

²⁸³ Gina Lees, *A History of the Elder Scrolls Series*, GREEN MAN GAMING, <https://www.greenmangaming.com/The-Elder-Scrolls-hub/a-history-of-the-elder-scrolls-series/> (last visited Sep. 23, 2019).

2019]

Title

161

Planetary Features

The misrepresentation of planetary physics is major. Planetary physics were sold as a unique feature that would invoke a cascading effect onto how planets would work and appear, including resource distribution, day-night cycles, and planet types.²⁸⁴ Because of the importance of planetary physics to the core tenant of exploration and enhancing player experience on planets and to a lesser extent, in space, consumers would give significant weight to these features.

The misrepresentation of sand planets is minor. These planets somewhat impact the game's variety of planet types and features. Given that many other kinds of planets appeared in game, this would bear less weight in most consumer's decisions to buy the game.

The misrepresentation of surface features such as rivers, large structures, structures with moving parts, and crashed freighters is minor. While players were unable to find bodies of water and buildings of the particular sizes and features represented, bodies of water and structures still appeared. Consumers would give some weight these features.

The misrepresentation of portals in the initial release is minor. While portals have functionality in taking players to distant, uncharted planets, their efficacy is reduced by other misrepresentations.

Resources, Trading and Crafting

The misrepresentation of the resource distribution and trading features are major. Resource distribution is central to the game's core tenants of exploration and survival. The need for resources in a game like *No Man's Sky* is often what drives and attracts players to unexplored areas in the game. The survival experience is nullified and the exploration experience is diluted when a player can easily find what they need without having to travel far. It also greatly affects the core tenant of trading because the ease of finding resources reduces the efficacy of trading. It could be argued that the extent of these misrepresented features are so central to the game that they are essential. However, in absence of such an argument presented successfully, consumers would give great weight to these features.

The misrepresentation of crafting is major. Crafting is an integral part of *No Man's Sky* exploration and survival experience. Further, it is an important feature in similar games like *Minecraft*. Therefore, consumers would give significant weight to this feature.

²⁸⁴ *NMS Reddit List*, *supra* note 188.

Animal Behavior

The misrepresentation of animal behavior, including the effects of large creatures on the landscape and interactions between different animals is minor. Animal interactions contribute to the game's core tenant of exploration, but consumers would likely give these features only some weight in deciding whether to purchase the game.

Sentinels

The misrepresentations regarding sentinels are minor. Sentinels are the main form of ground combat, outside of hostile animals. These misrepresentations do not affect space combat. Given that sentinel combat constitutes a fair portion of combat in the game, consumers would give some weight to the features of sentinels.

Miscellaneous Features

The misrepresentation of multiplayer features is minor. While this misrepresentation could have been major or even essential (if *No Man's Sky* was unequivocally represented as a multiplayer game),²⁸⁵ Hello Games' conflicting statements, including the two Tweets made just before release, came to diminish the weight consumers would give to having multiplayer features of being able to meet other players in game.

Misrepresenting the ability to upload resource discoveries is minor. It would be an intuitive feature to improve players' quality of life while exploring and surviving, but it takes a supporting role and consumers would therefore give a low amount of weight to it in deciding whether to purchase *No Man's Sky*.

Functionality of binocular and beacon marking is minor. These features are supporting ones that aid players for exploration and survival. As smaller quality of life features, consumers would give a small amount of weight to these features.

Hacking reinforced doors is minor. The hacking method was merely represented as the best method to enter buildings with reinforced doors. However, reinforced doors can be opened with other methods so consumers would give a low amount of weight to this option of opening reinforced doors in the course of exploration and

²⁸⁵ A further note is that despite the many representations about multiplayer, some consumers were not under the impression that *No Man's Sky* would be a multiplayer game. Angry Joe Show, *supra* note 166, at 15:25-15:37.

2019]

Title

163

survival.

Misrepresentation of radio chatter is accessory. This is a small feature that adds liveliness but contributes little to the overall experience and core tenants of the game. Consumers would give little weight to this factor.

Misrepresentation of translucent glass on starships is accessory. This is a tiny cosmetic feature. It carries almost no weight for the totality prong. It exists as another entry in a long list of features that were missing or downgraded in the released game.

2. Recency

The bulk of misrepresentations regarding No Man's Sky were made in between summer of 2014 and summer of 2016. The general nature and consistency of representations did not change over these two years. The only significant feature that had relevancy affected by recency of statements is multiplayer. Hello Games made multiple representations about the existence and features of multiplayer over time. However, multiplayer was ultimately represented on Twitter just before release as that No Man's Sky should not be construed as a multiplayer game and that the probability of players encountering each other was infinitesimally small. This prevented the misrepresentation of multiplayer features from being found to be major or even essential in relevance.

3. Totality

First, the number of major, minor, and accessory misrepresentations found under this test should be counted. There are 6 major misrepresentations, 8 minor misrepresentations, and 3 accessory misrepresentations. Just on the sheer number of major and minor misrepresentations determined by the materiality, it can be implied that these misrepresentations culminate to create an overall net impression that would be likely to materially affect a consumer's decision to buy the game. A closer look would be unnecessary, but will be taken for the purposes of demonstrating this proposed materiality test.

Before proceeding with this final part of the materiality test, Hello Games sold the game, as stated at the beginning of the test, as one that centered around four core tenants: trading, exploring, surviving, and fighting. Overall, it is a space and planetary exploration game that aims to allow players to interact with the worlds around them, including a variety of activities available to players. Between

each feature misrepresented, every one of the advertised four core tenants of No Man's Sky have been affected in a significant manner. The game was advertised as having an experience that integrates each of the core tenants into a single cohesive exploration game with many choices, activities, and features. Because every one of the elements central to the game were misrepresented in a major manner, backed up by several minor misrepresentations, the totality of them creates an overall net impression that is likely to materially affect a consumer's decision to purchase the game.

As a result, if No Man's Sky was assessed under American law using this materiality test, Hello Games would be found to have committed deceptive trade practices.

B. The Relevance of the Materiality Test for Deceptive Trade Practices in Other Industries

The proposed materiality test is primarily created for the unique situation posed by video games. However, in the situations in which there are many misrepresentations surrounding a product but materiality cannot be presumed and sufficient evidence cannot be shown for materiality, this test may provide an answer to those situations in which there are misleading practices that are difficult to find deceptive.

CONCLUSION

The video game industry is one that is primed for immense growth in the next decade. The area of deceptive trade practices is highly relevant to the industry. How companies can advertise their games can have a profound influence on both the video game business and the culture of the video game community.

The proposed materiality test seeks to rectify the current lack of a fair and effective means of enforcing deceptive trade practices rules. Given the lack of substantive judicial rulings on deceptive trade practices regarding a video game, the only effective remedy is regulatory by improving FTC rules. There does not need to be active and constant enforcement by the FTC against video game companies, there only needs to be one judicial or FTC ruling to establish precedent and put companies on notice that deceptive conduct in the future will yield legal consequences. Ultimately, the aim is preventative – to discourage companies from engaging in deceptive conduct in the future.

As the industry grows and develops, the possibility of new

2019]

Title

165

legal issues and actions does as well. There are many legal questions regarding deceptive trade practices in the video game industry that have not been covered in this article. These include issues with mobile games, graphically downgraded games, broken games, and issues related to microtransactions and DLC (downloadable content).

More people, children and adults alike, are playing video games with each passing year. Working to ensure that Americans have adequate and effective consumer protections to combat deception in the video game industry is in the public interest – current and future generations deserve an environment of responsible advertising and marketing.