

You've Been Served: The Legal Effects of Games as a Service (GaaS)

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The video game industry has undergone a seismic shift from a fixed-goods delivery model to one that instead treats games as a service. Join the LAN Party Lawyers as they discuss this industry shift, what it means for players and video game companies alike, and what game companies could do to appreciate the risks involved.

Transcript:

Nick Brown: Hello and welcome back to the first episode of season two of the LAN Party Lawyers podcast, the only podcast that hits issues at the intersection of video games, law, and business. I am your host, Nick Brown, and joining with me is my cohost and partner in law and crime, Steve Blickensderfer.

Steve Blickensderfer: I agree with you there until you said partners in crime. I disclaim any crimes. Otherwise, I agree with you there. *[laughs]*

Nick Brown: Smart answer. We'll keep that offline. But here we are back at the beginning of season two. We've spent the entire off season fighting legal battles and working hard to bring you hot new video game content. And we figured what better way to come back and start season two than by going big and hitting what might be the biggest shift in the video game industry, the biggest change in the past 15 or 20 years. And what am I talking about? I'm talking about games as a service, which is a huge shift in the model for selling and producing games. It's the idea of going from games being treated as goods to games being treated as services, which, as hopefully we will convince you over the next few minutes, has major practical, legal, and revenue consequences for everybody in the industry. So, Steve, why don't you take it away and help everybody understand how'd we get here.

Steve Blickensderfer: So, it's important in thinking about and talking about games as a service to understand how we got here. Where did it all start? So, you used to go your retailer, and for me it was Toys R Us back in the day, to buy a physical game cartridge. OK. For me it was Nintendo.

Nick Brown: Not going there today.

Steve Blickensderfer: No, not going there anymore. But you used to get a physical cartridge. It cost \$60. It sometimes would have flaws and errors in code because nobody's perfect. But, you would otherwise get a complete game, put it inside your console, and you'd be playing it, and then as soon as you took it out there's no more game. Right? Then, you know,

something like the Internet started to proliferate and create the opportunity for digital distribution of games. OK. So then you had the advent of the Steam store which really was a wonderful progress that was made for...

Nick Brown: You might call it a game changer.

Steve Blickensderfer: A game changer, exactly. I like it. I like what you did there. For the industry, because now you have in one place because - I don't know if you remember this, Nick, but PC games came in a huge box, massive box. And inside that box was just a small little, you know, instruction manual and then the disk, which often...

Nick Brown: They used to have cool art and stuff, too. I'm kind of sad that you got to pay extra to get that nowadays.

Steve Blickensderfer: Yeah, yeah. That's true. But, I mean, I'm just talking about the grossly oversized PC box...

Nick Brown: *[laughs]* Right.

Steve Blickensderfer: ...that I saw once, you know, on a wall. You could make some really cool pop art out of it now. But...

Nick Brown: That was so you couldn't just put it in your jacket and waltz out with it.

Steve Blickensderfer: *[laughs]* I suppose. So, you know, in lieu of having to store those boxes, right, then Steam came along and started digitally distributing games. And so you had it all on your computer. Right? Everything was digital. And so with that progression, the opportunity to add on and fix the game through a later download that came with that game was possible. So.

Nick Brown: Not to mention, getting new content for the game...

Steve Blickensderfer: Right, right. So this...

Nick Brown: ...in the form of DLC or whatever.

Steve Blickensderfer: Right. I was just going to say, downloadable content, DLCs became a thing. At first they were an exception to the rule and then they kind of just became more and more commonplace, whether it was because of the expectation was that games were going to start getting fixed because DLCs contained new content. It also contained hot fixes and otherwise fixed flaws and bugs in games. So we kind of shifted to then there was this distribution of, you know, the game after the game was purchased and otherwise made available.

And so as you developed that, you know, the flow kind of went into having more robust DLC and content to the point where it was no longer free. Then there became a purchase downloadable content, which was basically like buying a point, a half of a game. Right? Or, that's what it kind of felt like at first. You were buying an extra chapter or an extra dungeon.

And then it became...

Nick Brown: Right.

Steve Blickensderfer: ...where DLC was becoming huge to the point where it felt like you were almost getting a 2.0 of the game before.

Nick Brown: Right. And they've really taken advantage of that in the terms of now DLC means so many different things. It could just mean bug fixes and balancing changes because it's downloaded, but it also is whole new content drops over time, entire expansions to the game. It really could be something as simple as a new cosmetic, you know, suit that they've given to mark some, you know, either charitable event or just some other event like getting, for example, they were just selling, I think, DLC that had to do with the Australian wildfires that we've been seeing recently. They would take the proceeds from those and they would apply them to the charitable purposes. So it really spans the gamut.

But now, you know, now that it's so common, many games now come out with a road map of future content because they're not expected to be played and changed long term. And in fact, people now even expect this to the point where, you know, a lot of the game reviews that I see expressly are based on the expectation of future service.

Steve Blickensderfer: Right.

Nick Brown: So it's not uncommon now. You'll see a game review that it'll go through the, you know, the review of the game or whatever they thought and you'll see something at the end like, "Yeah, it's fun now, but let's see how this develops over time. Let's see if it's enough to keep people's attention." Or, on the other hand, if a game is poorly received when it comes out - we can all think of a number of examples of that - the reviews might say something like, "Skip this one for now. It's not worth picking up, but check back after a major update or two. Come back in a month or two and we'll have an updated review that'll tell you whether the game's worth playing by then," which is something that didn't exist back when we were buying cartridges.

Steve Blickensderfer: And this doesn't only affect the player or the person who's reviewing the game. It also affects the game company or the people who are developing the games. If you consider, you know, games that are put out there on kickstarter or the gofundme campaigns, they'll actually sometimes say, "This is what the base game and concept will look like and then we also have plans to drop content later in the form of DLC or an extra whatever" they'll call it. So it's kind of built in and laced into the game. And why is that? It's become a way of funding the development of these games because of the way in which you can monetize the extra downloadable content or this extra service that comes after with the game. It's become a source of revenue, which is actually...

Nick Brown: A big one.

Steve Blickensderfer: ...much needed because if you think about it, going back to the history, the game used to cost just \$60. Well, I don't know who chose \$60 but we kind of were stuck on that figure for a long time. We always kind of accepted that that's how much a video game should cost. Well, today these video games...

Nick Brown: To be clear, my parents never accepted that that's how much a video game should cost.

Steve Blickensderfer: *[laughs]* Yeah. I would always like to think it would cost less. \$30 was always a good number for me.

Nick Brown: *[laughs]*

Steve Blickensderfer: No, but you can't sustain a model where you're selling AAA titles, especially the ones we see these days for \$60 a pop and expect it...

Nick Brown: Well, the budgets are in the hundreds of millions.

Steve Blickensderfer: Right. And these games are oftentimes outselling and out performing Hollywood blockbuster films. Right? I think the biggest digital entertainment product is not, like, the Titanic. I think it's Grand Theft Auto 5. Right?

Nick Brown: Yup.

Steve Blickensderfer: So it's, it's...

Nick Brown: Hold on. Last gen consoles sold on current gen consoles sold on PC and made a ton of money.

Steve Blickensderfer: Right. But how do you budget for that, right, without maybe - now you consider games as a service. You consider extra content at the end or after the game has been launched to further sustain and build on what you've already done. So some, and this runs the gamut. Right? We're speaking in generalities. Some content that you provide after the game has been released is cosmetic only: skins, new guns that don't really impact the game play or they're balanced, new characters, different things like that. But things that you pay for. Right? Because we're talking about...

Nick Brown: Cross over packs.

Steve Blickensderfer: Yeah. Stuff like that. Some is the basis for future content. Right? You can picture, these days what we increasingly are seeing are battle passes, season passes where depending on the game, it can run anything from within this season you can have access to this progression model and you can get these types of skins, these types of guns or whatever, or you can get this particular content, whereas if you were just playing normally and not getting that, you wouldn't have access to that.

Nick Brown: Right. And the seasons are conveniently limited time. So you have to buy the battle pass for this season or buy the game pass and then the season's going to roll over and you'll have to buy another one. And if you zoom out and look at it from a more macro perspective, it works a lot like a subscription where you're paying over time for a certain limited period of time of content and then it will roll over and you can buy it next time or not.

Steve Blickensderfer: Right.

Nick Brown: The bottom line is this stuff is not going away. Right?

Steve Blickensderfer: And this is a trend that we're seeing elsewhere. Right? Amazon. We get a subscription for our toilet paper. At least I know you do. *[laughs]*

Nick Brown: *[laughs]*

Steve Blickensderfer: Disney Plus...

Nick Brown: Can't get enough!

Steve Blickensderfer: ...Office 365, Adobe. These are all turning - now we're increasingly having subscriptions as opposed to just getting the product and then buying it in a year or two when the new one comes out.

Nick Brown: Right. With Disney Plus getting popular and other products that we're used to, you know, historically buying individually are now going to subscription services too. Adobe software is offered on a subscription, Office 365 is offered on a subscription.

Steve Blickensderfer: And there's a reason for this.

Nick Brown: Yeah.

Steve Blickensderfer: There's a reason why more and more companies and models are going to a subscription service. And that is?

Nick Brown: Right. It's because they're all going green, Steve.

Steve Blickensderfer: Green? Oh, well I care about the environment, too. So.

Nick Brown: Well, what I mean is it makes them a ton of money.

Steve Blickensderfer: Oh, that kind of green. *[laughs]*

Nick Brown: Digital River estimates that games as a service has in fact tripled the industry's value.

Steve Blickensderfer: Wow.

Nick Brown: And in fact they said that whereas it didn't exist a few years ago, by 2016 25% of the revenue of games on the PC results of one form or another of games as a service.

Steve Blickensderfer: Yeah. It's a big deal.

Nick Brown: That is a huge, huge deal. And as one little factoid, they put out that EA, Electronic Arts, the company, earned approximately \$2 billion with a B from games as a service transactions in *[inaudible]*...

Steve Blickensderfer: That's just one company. That's just one company.

Nick Brown: One company, one year.

Steve Blickensderfer: Yeah.

Nick Brown: So, it's not surprising that it's very popular among the developers and the publishers. It also, in the same vein, not just makes them a bunch of money, but it cuts down on piracy and fraud. Many games, for example, have to connect to, you know, the developer's or the publisher's servers in order to work. Sometimes it's referred to as always online. And that probably costs them a little bit of money to have those servers run, but it means they lose a lot less money from the game being pirated. And so they end of retaining more of their capital than they otherwise would have been able to do.

Steve Blickensderfer: It's a lot harder to copy a game that is constantly evolving and connected to a server where you need to check in and have a valid key in order to continue to be able to play. Right?

Nick Brown: Right.

Steve Blickensderfer: So that is an obvious plus, but, you know, it also has the negative side of always having to be connected and so there's pluses and minuses. But that's definitely a reason for the trend towards games as a service.

It also allows game companies to get funding for games and games may be made that might not otherwise be made. Right? And so I'm thinking the free to play model of games...

Nick Brown: Exactly.

Steve Blickensderfer: ...which really you can't talk about games as a service without mentioning the free to play model. And what is that? That's a game that is free. You literally can go and download it. A lot of these are mobile titles, and that's really where...

Nick Brown: Right.

Steve Blickensderfer: ...you see a lot of the free to play model succeed.

Nick Brown: But it's not limited to mobile titles.

Steve Blickensderfer: No.

Nick Brown: You know *[inaudible]*...

Steve Blickensderfer: I have one on my computer. Right? Hearthstone is a free to play model that I...

Nick Brown: Right.

Steve Blickensderfer: ...started off very staunchly saying I wouldn't pay any money towards it. I was going to be good free to play style. Free to play is almost like a badge of honor.

Nick Brown: It's adorable when you said that. It was really...

Steve Blickensderfer: *[laughs]* It hasn't worked out too well for me. Not at all.

Nick Brown: ...very naive. It displayed a beautiful innocence, Steven.

Steve Blickensderfer: Yeah. Yeah. So.

Nick Brown: But, you know, the point Steve's making is a good one, which is on these free to play games even if, you know, the - the model works like this: give away the game for free. So they're missing out on the \$60 buy in, right, that a lot of people would be giving. But at the same time, they're increasing their exposure because a lot of people are going to be able to download the game because it doesn't have a \$60, you know, entrance fee.

Steve Blickensderfer: You can try it. Right? You can try it out. That's the big deal.

Nick Brown: See how it is.

Steve Blickensderfer: Exactly.

Nick Brown: And they spend a lot of time on the first few minutes of the game to make sure it's really enjoyable because then they get you hooked and then you'll keep playing the game and you'll spend money on micro-transactions in the game, either some type of currency or skins or something. And what we've seen is that these games are typically supported by what

are called in the industry, whales. And that does not refer to how the people look. It refers to the fact that there are a few people that are going to play these games and they're going to think it's the coolest thing in the whole world and they're going to spend a ton of money on the game. We'll see most people who play free to play games don't spend any money on it. A small percentage of people spend, you know, what we might think of as a reasonable amount of money - a few bucks or the cost of a paid game. And then there's this tiny percentage of whales that just go bonkers and spend a bunch of money supporting the game. And those people actually drive the development and the revenue of the game. For example, I'd be interested to know how much you've spent on Hearthstone now, Steve. I asked you that last year and you didn't want to tell me. So I can only assume that it's better this year.

Steve Blickensderfer: I still don't want to tell you. I still am going to avoid that question. So.

Nick Brown: *[laughs]* It's OK. I'm probably a whale for Pokémon Go, so.

Steve Blickensderfer: Oh, yeah. Let's talk about that.

Nick Brown: We'll keep our numbers to ourselves.

Steve Blickensderfer: *[laughs]*

Nick Brown: Of course, this impacts game budgets, too. Right?

Steve Blickensderfer: Yeah, I was just...

Nick Brown: It means...

Steve Blickensderfer: ...going to say that, you know, now...

Nick Brown: Yeah.

Steve Blickensderfer: ...when you're developing these games you think about how much you can make at the back end when you're selling extra content in game or just, you know, new downloadable content or a season pass. So that means you can monetize the PM, the sunset part of the game. But you just can't fund the game or support the game through a release. So there's kind of a flip side to it. You have to dedicate staff and you have to have a team beyond the initial development and publication to support the game. You're going to need a communications manager, someone who's communicating to the community because you better believe there's going to probably be a sub-reddit created about your game and there's going to be a very vocal community that wants to know how and how often you're going to be updating and creating new content and if there's good quality content and so on and so on.

Nick Brown: So it's a pro and a con. Right? On the one hand, back in the day, they just had to put all their effort into release and getting that cartridge out and then they never had to worry about it again.

Steve Blickensderfer: Right.

Nick Brown: But now, you know, they can make a lot of extra money after release if they handle it right. But it's also going to cost more money to fund it and support it going forward.

Steve Blickensderfer: Right. You can have a great game at launch and then if you just handle the release and the service aspect of the game afterwards, it could be bad. Right. So. And you also can do the flip side. You can have a bad launch. You can have a game that's full of bugs, but if you fix it, right, with a good content on the back end, you can adjust and pivot and really do a good job. So.

Nick Brown: Yeah, we saw a famous example of that with No Man's Sky. Apparently it made a lot of promises pre-release and when it released people felt as though those promises had not been satisfied. But then later on they ended up putting out a big update, a number of updates that changed the game. And I understand now people are pretty happy with it.

Steve Blickensderfer: Right.

Nick Brown: That sort of thing, that's a famous example.

Steve Blickensderfer: Another great example: Anthem. Right? They did a great job of fixing that game. No. No, wait.

Nick Brown: Oh, well. I haven't heard it got fixed.

Steve Blickensderfer: They didn't do that. They didn't.

Nick Brown: I only heard about their bad release. So.

Steve Blickensderfer: *[laughs]*

Nick Brown: I'll rely on you for that.

Steve Blickensderfer: No, no. I'm joking. You obviously didn't get my...

Nick Brown: But this has led to a change in consumer expectations. Right? Because you know that the state the game's in at release isn't necessarily representative of the long term. And it leads people to often wait to buy the game because they know that they may be getting a better or more fulsome product if they just wait. I found a statistic that said on average United States PC players wait at least 21 days after not release, but deciding they want the content to buy it...

Steve Blickensderfer: Yeah.

Nick Brown: ...in the hope of getting a better deal. And I just got to shout out real quick to the Patient Gamers sub-reddit. It's a lot of wise people on there that are making good financial decisions even though they're missing out on some of the day 1 content.

Steve Blickensderfer: I fell in this category without even knowing it because I was just not having enough time in law school, for example, or earlier in my career, even now, to play these games.

Nick Brown: I was going to say, you have less time now! *[laughs]*

Steve Blickensderfer: *[laughs]* No, I - so it was great. Right? Every Steam sale would come around and I'd just collect games from, like, five years ago at a discount. But.

Nick Brown: Right. And so on the one hand people have learned to look beyond the launch week troubles, expecting that the game will mature over time, but on the other it also raises the bar for post-release support. It's no longer enough just to release a good game. People expect you to support it later.

So, what does this mean to, you know, the legal side? It's always been a big debate among, you know, principal academic individuals like Steven and myself: are games goods or services? What are you getting when you're buying it? Of course, case law has never really been settled on whether games are goods or services. Right, Steve?

Steve Blickensderfer: No. No, I haven't been able to figure this out one way or the other looking at the cases. So. And what does that mean? Like, what does it matter if it's a good or a service?

Nick Brown: Well, that's an excellent question, Steve. I'm really glad you asked that. I'm actually prepared to talk about that.

Steve Blickensderfer: It's almost like I knew where you were going. *[laughs]*

Nick Brown: Yeah, it's amazing. It's like we finish each other's...

Steve Blickensderfer: Sentences?

Nick Brown: ...sandwiches.

Steve Blickensderfer: Oh.

Nick Brown: There's a big different between the two, which is under the law goods have their own set of rights that come with them. When you buy goods, you get a certain chunk of rights. This is sometimes referred to as a bundle of sticks. Right? You get this bundle. Each stick represents a different right. One is the right to use the product, another is the right to exclude others from using the product. Another would be the right to destroy the product. You know. You have the right to...

Steve Blickensderfer: You're going to destroy your sticks?

Nick Brown: Hey, you know, they're mine. I can do whatever I want with them.

Steve Blickensderfer: *[simultaneous speaking] [inaudible]*

Nick Brown: I can make a nice fire.

Steve Blickensderfer: I guess *[inaudible] [laughs]*

Nick Brown: I can put them up on the wall. You know, that's why I buy a stick, but at the same time, it triggers a lot of existing legal doctrine. Because people have been buying and selling goods for generations and for hundreds of years. One of them, a big one is something called (the "UCC") The Uniform Commercial Code is a big body of law that applies just to the sell of goods. It exist because people don't always write up a contract when the sell a good and so this body of law kind of comes in and fills in the gaps based on what we've seen over the course of human history. It also triggers certain consumer protection measures and things that we all are kind of use to when we buy a good. Another, you know, crucial point about this is that goods are subject to the first sell doctrine. Now what is the first sell doctrine? It's an intellectual property doctrine, it applies to copyright and it is basically what allows you to resell things that you buy. It's the reason that used book stores can exist.

Steve Blickensderfer: So it's like a *[simultaneous speaking]*...

Nick Brown: Bascially...

Steve Blickensderfer: ...it's almost like a defense to being able to do something if someone said "No, you can't do "X" or you can't sell a book"...

Nick Brown: Right so here *[simultaneous speaking]*...

Steve Blickensderfer: ...but then a used book store comes around and says yes I can because of this doctrine.

Nick Brown: Right. Or things that are copyrighted like books or video games, the copyright belongs to the owner. The first sell doctrine steps in when you buy a copyrighted good like a book or a video game and it says someone who buys a copy of a copyrighted work legit- does so legitimately Steve, not downloading it on your Napster or whatever else you have going on there.

Steve Blickensderfer: I don't think they even still have Napster Nick, get with the times.

Nick Brown: *[laughs]* So someone who buys a legitimate copy of a copyrighted work you also get the right to sell, display, or otherwise dispose of that particular copy not withstand at the interest of the copyright owner. So that's why Game Stop has been so successful for so long in reselling used games. Even though games are copyrighted you're allowed to go in and sell them because the first sell doctrine has applied.

Steve Blickensderfer: When you're referring to goods here, just to point of clarification, you're referring to just things that are physical? Tangible goods? Or you're also referring to, like, software code?

Nick Brown: Well that's a good point because goods can be tangible or intangible, but part of the issue here is that software kind of falls in the middle. Software hasn't been figured out yet by legislators and courts and judges. And so that's why this question, you know, comes into play. However, if it ends up being a service then the whole landscape is changed. Right?

Steve Blickensderfer: Mm-hmm.

Nick Brown: If it's not a good then different rules apply.

Steve Blickensderfer: Yeah, so services are more in control of the servicer, right, the person who's providing the services and they could subject what they're doing to a contract. Any service provision, any provider of services is going to pretty much reduce what they're doing to a contract. And in the context of video games you have end-user license agreements or EULAs that are typical what you see that dictate what a person can and cannot do with a product, right, with a service that comes after the game or the intangible good. So, you know...

Nick Brown: Because you can't own a service. Right? You can only get access to it.

Steve Blickensderfer: Right. Or, I mean, like, it might come to a shock for some, but when you buy a video game or any digital asset - well, I'm not going to say any digital asset; I'm going to stick with video games right now because I don't want to generalize too much - but you don't own the software. Right? You don't own the code. You basically are paying to get a license to use it pursuant to a strict set of terms that are set out by the game company, the developer, the publisher in the EULA. Right? And oftentimes these EULAs are pretty restrictive on what you can do, these post-sale activities. You can't open up a store and start, you know, copying and selling the code, right, which is akin to what a bookstore would do with used books or Game Stop would do with used games. Right? And this is particularly becoming more and more relevant as the digital distribution of games is overtaking...

Nick Brown: Right.

Steve Blickensderfer: ...the physical sale of games. Right? So we no longer are getting cartridges, although you can buy them sometimes. Right? You can buy them for the switch, for example, or you can buy a digital download of the game. And so that actually has an impact on whether you can resell the game or not. That's where you have the restrictions on the use and it particularly is more and more important when games are starting to become more and more as services. OK.

And so EULAs, what are they? They're basically contract. Right? They're electronic or e-contracts and they, e-contracts take various forms. OK? The first is a shrink-wrap agreement. That's the type of agreement found within the services, classically within the sealed packaging where you cannot see the terms of the agreement until after you purchase or use the services or product.

The next is a browser wrap agreement. That's when there's usually a hyperlink at the bottom of a website or page that links you to the agreement. You don't have to click anything in order to say I accept. Usually your use of the product or service is the basis for the assent.

Next is a click wrap agreement. Those are often the most common where the end-user is required to manifest assent by clicking OK or I agree where there's a link to the terms of service next to that box and if you say no you can't proceed to use the product or service.

And finally, and by the way, there are many of these types of agreements, but I'm just going over four. The last I'll go over is the scroll wrap agreement and that requires the user to actually scroll through the terms of the agreement before that checkbox is even available so that they can click whether or not they accept.

Nick Brown: Right. The point, though, is that there's a bunch of different forms.

Steve Blickensderfer: Oh, man. And they're confusing because some are hybrids.

Nick Brown: Yeah, you don't even see a lot of them until after you've purchased the product. You've paid for it and then you download it and install it, and once you go to play it you say, "Oh! By the way, here's a bunch of limitations. You didn't actually buy that game."

Steve Blickensderfer: Right. Well, and the important point here, right, is e-contracts are contracts. The law will consider an e-contract as enforceable as a regular contract with some caveats. Right? E-contracts, particularly, how they're presented to consumers, and depending on how they're presented to the consumer, may be more or less more looked at harshly. Right? So the agreement that requires you to scroll through it before you can even select any option whether you accept, the reason we even have those is because at one point a court rejected a, you know, an agreement that you didn't have to scroll through. Right? And to make it more enforceable someone came around, you know, probably with a lawyer, decided this is

the better path so you can show that the person actually ... [*simultaneous speaking*]

Nick Brown: Required some kind of investment.

Steve Blickensderfer: Right.

Nick Brown: Makes it more likely you can establish that they knowingly and voluntarily agreed to the terms and didn't just pass by it.

Steve Blickensderfer: That's right. And so, you know, you can't claim ignorance, you didn't read the contract. That's a pretty well established legal doctrine that, you know, if it's been presented to you that you can't in a reasonable way say, like, there's no way anybody would have seen this. Right? If it would have been presented to you, you had to click through it and acknowledge it, it's pretty much going to be you are deemed to have read those terms. So.

Anyway, all that said, by treating games as a service publishers and developers have more control to restrict their use of the software and the traditional good that it once was.

Nick Brown: Because they never even sold it. Right?

Steve Blickensderfer: Right.

Nick Brown: All they sold you is a limited, carefully defined right to use the product in a specific way.

Steve Blickensderfer: Right.

Nick Brown: Right? And that's, you know, it has different evaluations depending on what side you're standing on, but one benefit for the developers is that it can be used to get around certain issues that are a lot harder to avoid when you're selling a good, like termination of access. If someone's misusing your product and they've got it out in the world, it's kind of hard to make them stop using it, at least outside of legal process. But, if you've got an agreement that says I can foreclose your access at my sole discretion any time and I've got you playing the game on my cloud-based server, then I can just find your account and shut it down.

It also is a mechanism to push back on some of the consumer protection elements that apply to other goods. Like, for example, your EULA can say there are no class actions about this; you're only going to bring a case in arbitration or something like that. So, it essentially gives more ability to streamline the use and restrict the use of the games.

Steve Blickensderfer: Yeah.

Nick Brown: It also, you know, raises other interesting - or at least interesting to legal nerds - legal issues. Like, for example, there's this thing out there called the Undertaking Doctrine. Do you know what that is, Steve?

Steve Blickensderfer: I do not.

Nick Brown: So, it's a...

Steve Blickensderfer: I really do, but I was just playing along with you.

Nick Brown: [*laughs*]

Steve Blickensderfer: I just hope you know that.

Nick Brown: I know. I kind of set you up for that.

Steve Blickensderfer: OK. [*laughs*]

Nick Brown: It's a legal doctrine and it says basically this: you don't have to do stuff for other people. You don't have to render services to other people. But, if you do, if you undertake to do a thing for someone else, you can then be liable for harm that are caused in rendering those services even if you didn't have to do them in the first place.

Steve Blickensderfer: Right.

Nick Brown: Right? And, you know, it's kind of an analogy to, like, some of the law that says, you know, if you see someone hurt on the side of the road, you don't have to help them, but if you do help them you can't make it worse. You can get in trouble if you make it worse. And this is kind of like that. And it could become relevant here, right, because by you don't have to provide ongoing post-release support for your games that you're developing, but if you do then someone might be able to argue that you've undertaken the obligation to do it in a competent and fulsome manner consistent with consumer expectations.

Steve Blickensderfer: That's just like the Good Samaritan Doctrine that says if you're going to help somebody - you don't have to help them, right. You can leave them on the side of the road. But if you do, you can't hurt them, right, or else you're going to be liable too.

Nick Brown: Right. Exactly.

Steve Blickensderfer: So there's...

Nick Brown: And that argument gets easier to make the more games shift into a games as service model...

Steve Blickensderfer: Right. Right.

Nick Brown: ...as opposed to a goods model.

Steve Blickensderfer: Right. So let's talk a little bit about some take-aways. And I want to start first with some take-aways for game companies. And I think the big take-away here is as we are moving to a model that's games as a service, that means that the traditional EULA that once was kind of an afterthought that came with the game because it just governed the use of the game on the computer where ever it was being locally installed needs to incorporate more of the software as a service provisions and thoughts about, you know, really it's transforming these into subscription agreements. Right? If you think about it that way.

Nick Brown: Right.

Steve Blickensderfer: And so what does that mean? The terms need to account for access and use of the game over the course of the services period. What does the services period look like? That needs to be thought about. That could and should probably need to be spelled out in the agreement. This is particularly if the game is played on the cloud and not locally stored on the computer.

Nick Brown: Right.

Steve Blickensderfer: So, are there also terms that govern the maintenance and availability of the game during down time? Another important consideration. Also, what about the customer's right to use the software as a service at the termination of the agreement? What does it look like when the services end with respect to the rights of the end-user? And what happens to the data, right? I'm a data privacy guy. I do that a lot for clients. What happens with the storage of the data at the end of the services? Is there any data that's going to be flowing to and from the game or the local computer? Anyway, all this to say, the agreement should anticipate the unique differences between the traditional model and where we're going, the subscription model as it pertains to games. So, one last point on this and then I'll let you switch to maybe take-aways for the consumer, is that agreements, these whole e-contract wrap agreements typically are not drafted evenly. Right? There's kind of just the game company is drafting and putting it out there. You don't want it to be...

Nick Brown: Yeah. They're not negotiated. They're drafted on a take it or leave it basis.

Steve Blickensderfer: That's right. And so the law construes those contracts against the drafter, more often than not usually. So it's important not to overreach and insert reasonable terms on those contracts.

Nick Brown: Right, because you could say, "Oh, well I'm in control here," and put bizarre, wacky, strongman things into your contract only to have them invalidated because they're off the charts unreasonable which would...

Steve Blickensderfer: Right.

Nick Brown: ...defeat the whole purpose.

Steve Blickensderfer: Right.

Nick Brown: So, on the other side of that is, of course, the user side, the consumer side. The most important thing, I think, to understand is for you to understand when you're buying a game, know what you're getting because nowadays you probably don't actually own much. What you're getting is not ownership rights in a product. What you're getting is a license to use a service in a very specific way. And that can have a lot of implications. So, it's important. I know this is the terrible lawyer answer that nobody wants to hear, but it is a good idea to read those EULAs and read those terms of service because...

Steve Blickensderfer: Especially if you have trouble sleeping.

Nick Brown: *[laughs]* Right. Yeah. It may actually have a side benefit.

Steve Blickensderfer: There you go.

Nick Brown: But take a look at them, especially for things like monetization. You know, I know we have a lot of streamers that listen to our podcast and streamers that are on varying levels of revenue. Some people do it more for fun, some people, they actually make their living doing that. And so it's important to know what you're allowed to do with the games. An example that we saw come up and kind of hit the, you know, the airwaves last year was whether or not you're allowed to stream games on private servers. Some games will allow you to stream them but only if it's done for free. Other games don't have that same restriction. And so especially if there's money involved and you're making income off of it, then that makes you more of a target and it's important, even more important, to know the rights that you're getting.

Steve Blickensderfer: Good points. Well, I think that wraps up today's episode. Be sure to check out our other episodes from season two and also season one because those are still relevant and you should check them out. You can connect with us on our Instagram page or on our webpage lanpartylawyers.com. And, Nick, unless you have anything to add, I think that's a wrap.

Nick Brown: That's all I got. Thanks for listening. Thanks for all the wonderful five star reviews you've been giving us.

Steve Blickensderfer: Unsolicited. Appreciate it.

Nick Brown: Unsolicited, until now. And, you know, until then, until next time...

Steve Blickensderfer: Game on.

Nick Brown: ...game on.

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