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Video Game Studios: Be Mindful of What You Say at E3

BY [VIDA DJAGHOURI](#) / ON OCTOBER 28, 2016

No Man's Sky is an action-adventure survival video game in which a player is free to explore an uncharted universe comprised of *18 quintillion* planets, nearly each one unique with procedurally generated terrain, flora, and fauna.^[1] The game, published by Hello Games (HG) and distributed by Sony Interactive Entertainment America (SIEA), has been widely reviewed since its release in August, receiving such praises as "magnificent," "unprecedented," "incredible," and "an experience unlike anything a game has ever delivered, or one that we're ever likely to see again."^[2] With such rave reviews, it may be surprising to learn that within weeks of its release, many disappointed customers returned the game and sought refunds for digital copies.^[3]

Following *NMS*'s release, outraged consumers and reviewers in the U.S. immediately commenced discussion in public forums regarding potential false advertising claims against HG and SIEA.^[4] In the U.K., the Advertising Standards Agency received actual complaints from citizens since *NMS*'s release and finally responded to these claims in October by commencing an investigation into HG.^[5] So, why would consumers file suits against HG and SIEA over an "incredible" and "unprecedented" product? The answer may lie in a 2014 press conference at E3.

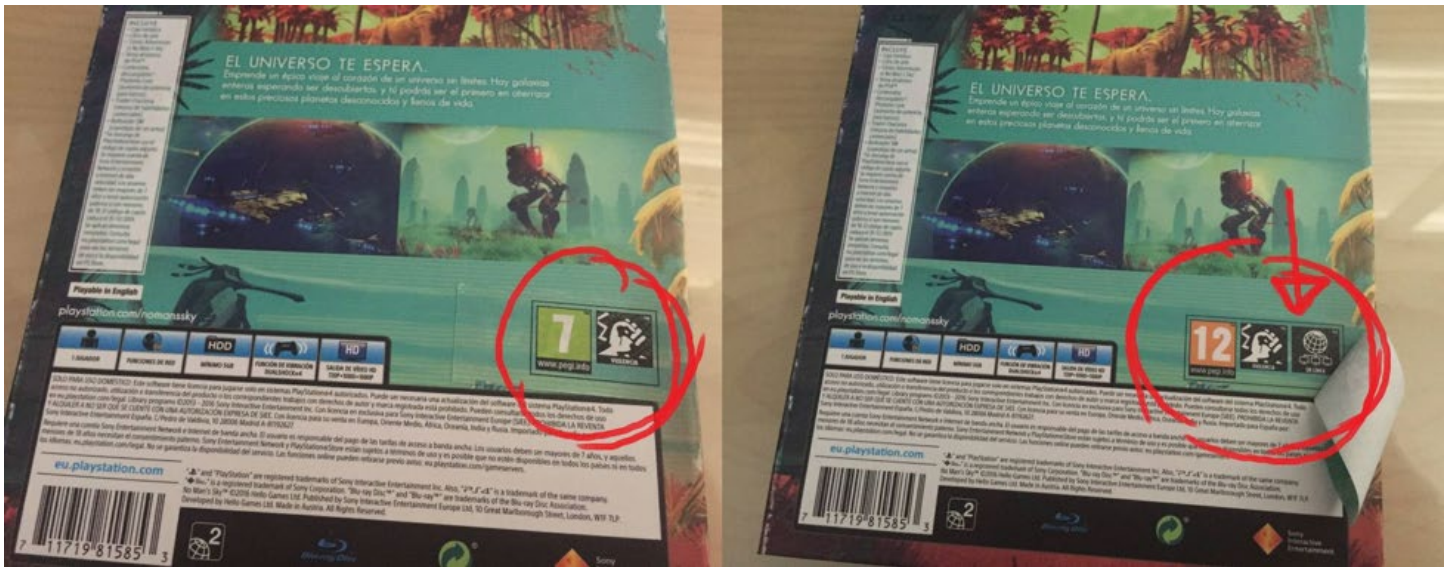


The Electronic Entertainment Expo, known as E3, held in Los Angeles each year.

The Electronic Entertainment Expo, known as “E3,” is an annual trade fair held by the Entertainment Software Association, open only to those connected to the video game industry and members of the press. Video game developers attend E3 to showcase the most anticipated and groundbreaking announcements for upcoming games and hardware, as it is easily the most important show in the industry. By building up hype at E3, many video game titles and products can later gain, not only a following, but also dedicated customers by means of pre-orders up until their release dates. In this sense, products are often sold, both literally and figuratively, months or years before they hit store shelves or digital download servers. Further, larger production and marketing budgets have necessitated reaching broader audiences. To garner the attention of that audience, marketing messaging lead times have grown increasingly longer in order to build the necessary hype to stand out in the crowded marketplace. To that end, developers and publishers have turned to making promises of features and key selling points of their products throughout production. These promises can and have sometimes led to legal disputes.

In the summer of 2014, SIEA (then, Sony Computer Entertainment America) and HG announced *NMS* by screening a gameplay trailer and holding a press release at E3, where their woes may have begun.^[6] As the name suggests, gameplay trailers are often purported to display actual gameplay footage—what users are likely to see and hear during their experiences playing a game. Consumers and critics allege that the *NMS* trailer shown at E3, which supposedly showcased a world which was procedurally-generated live at the event, had actually been manufactured beforehand.^[7] A polished and artificial demonstration is not new to video game consumers. When attempting to demonstrate aspects that are allegedly randomized or otherwise unpredictable, however, it contradicts the entire nature of the presentation when a developer uses pre-built segments of the game. This deception was one of consumers’ initial criticisms.

At E3 and thereafter, a spokesman for HG continued to publicly describe captivating features of *NMS* that have since been found to be absent or incorrectly described. For example, developers described a multiplayer experience in a universe so vast that players were unlikely to encounter one another by chance. However, players testing this theory discovered that they were unable to meet at all.^[8] In fact, after the release of the game, consumers in Europe had discovered that the multiplayer designation icon on *NMS* packaging had been covered with stickers—in essence, removed.^[9] Since its release, *NMS* players have identified over forty-three instances of undelivered features, complete with links to the sources of each claim.^[10]



Though no one has yet brought forth a claim in the U.S. against HG or SIEA for NMS advertisements, consumers in the past have already done so under similar circumstances.

False Advertising Claims Against Video Game Companies

Ladore v. Sony Computer Entertainment America, LLC.[\[11\]](#)

In 2014, plaintiff Douglas Ladore, purchaser of the game *Killzone: Shadow Fall*, brought a class action suit against Sony Computer Entertainment America, alleging fraudulent or misleading representations of in-game multiplayer graphics. *Killzone* was advertised to render graphics in native 1080p in both single and multiplayer modes of gameplay (one such advertisement included a gameplay trailer at E3).[\[12\]](#) Though it displayed in 1080p in both modes, the engine only rendered individual frames in 1080p in the single player mode. In multiplayer mode, however, developers used methods such as interpolation[\[13\]](#) to make it appear that the resolution was the same. Ladore alleged that *Killzone's* actual multiplayer graphics did not measure up to marketing claims and that, having been exposed to such claims and reading the same claims on the product's packaging, he had relied on them in his decision to make the purchase. He alleged that, if not for those claims and the accompanying packaging, he would not have purchased *Killzone* or would otherwise have paid less for it.

Sony filed to dismiss the case under F.R.C.P. 12(b)(6), for failure to state a claim, which the court refused. Ladore's claim met requirements for a false advertising claim;[\[14\]](#) however, the court found that it failed to allege a non-economic loss suffered, as is required under California's economic loss rule.[\[15\]](#) The case was settled in May 2015.

Perrine v. Sega of America, Inc.[\[16\]](#)

Two named plaintiffs sought a class action certification to represent consumers who pre-ordered *Aliens: Colonial Marines (ACM)* against Sega and Gearbox. As with issues related to *NMS*, these claims were in relation to allegedly misleading demo versions of *ACM* presented at E3 in 2011. Plaintiffs alleged that Sega and Gearbox developed an advanced version of the game that was non-retail and presented to consumers as actual gameplay. This version, they alleged, implemented use of artificial intelligence and a game engine than in the delivered product itself.

Sega negotiated a \$1.25 million settlement with Perrine and Locke that is contingent on the court's grant of class certification for the plaintiff. Meanwhile, Gearbox moved for dismissal. The court found too many complications in the complaint to grant class certification, including the fact that plaintiffs could not determine exactly which advertisements purported "actual gameplay," and that it would be too difficult to identify consumers who had been deceived by the advertisements. Plaintiffs agreed to dismiss Gearbox with prejudice, while Sega's potential settlement remains tentative.[\[17\]](#)

McMahon v. Take-Two Interactive Software, Inc.[\[18\]](#)

Take-Two Interactive Software, Inc. and Rockstar Games, Inc. faced legal action for advertisements and packaging for *Grand Theft Auto V (GTA V)*, which announced that the game would feature extensive multiplayer features. These features, however, were unavailable for several weeks following the game's release date.[\[19\]](#) Due to this discrepancy, the plaintiffs McMahon and Bengston brought forth a class action lawsuit, asserted under California's Unfair Competition Law and False Advertising Law. The district court dismissed the suit, finding that the defendants never claimed the online features would be available immediately to all users and that consumers suffered no substantial loss. The appellate court reversed and remanded the decision, finding instead that the advertising claimed it would potentially be unavailable to some users, when it was not actually available to any users at all. They noted that, "The district court erred by failing to construe plaintiffs' allegations that these representations were misleading in the light most favorable to plaintiffs."[\[20\]](#) The plaintiffs may now file an amended complaint.

What Does This Mean for Video Game Producers?

Implications for Future Litigation

Several cases like these have been brought forth against multiple video game companies both in the U.S. and abroad.[\[21\]](#) Often, as is demonstrated by those discussed above, if such cases are not dismissed by the court they are dismissed by the parties themselves and settled outside of court. Though such settlements may rob future litigators of precedent, these cases provide guidance by highlighting several considerations for future litigation. First, as seen in *Ladore*, claims under tort law are likely to fail due to the California economic loss rule.

Second, judges in *Perrine* and *McMahon* commented on complications related to class certification—it is difficult to identify the classes of consumers who have been duped by specific advertisements. Incidentally, this may be the case with *NMS*,^[22] as the court arguably cannot identify which users' purchasing decisions were influenced by their ability to find one planet amongst 18 quintillion in the *NMS* universe featuring details showcased in advertisements. In addition, whether video games can be considered a "good" under the Consumers Legal Remedies Act is up for debate, as it was in both *Perrine* and *McMahon*.

Video Game Companies' Unique Relationships with Consumers

Companies in the video game industry do something that is virtually undone in any other industry: throughout the production cycle, they share explicit details with consumers on dozens of aspects of an unreleased product. Such details can include gameplay modes, plot, art, actual gameplay footage, technological specifications and potential technological advances. This inside look generates the type of excitement and loyalty that can garner record-breaking profits.^[23] However, because of the nature of these products—their existence within the realm of both art and technology, which require creativity and innovation with unpredictable results—unexpected changes to the product invariably must occur. Video game consumers are used to polished trailers, dropped features during production, and delayed releases; however, "the culture of truth-bending gets worse with every successive E3,"^[24] giving rise to dissatisfaction. This, combined with the pre-order culture associated with gaming, places these companies in a precarious position in regards to false advertising.

While the legitimacy of such claims is up for debate, prominent lawyers who specialize in legal issues related to video games such as Ryan Morrison and Stephen McArthur, warn that "the biggest impact here will be that it sends a message to other game companies to be careful about what they put in their trailers and not to oversell their games with unrealistic 'gameplay footage.'"^[25]

Heeding the Warning

Since the onslaught of consumer backlash, HG, SIEA, and Steam have taken steps to alleviate the situation with *NMS*. Such measures include: providing refunds, even to those who have downloaded the game digitally and have played over 50 hours, changing packaging, and revising the game description on the Steam online store. It is unclear whether this will be enough to counteract the damage and dissuade consumers from bringing forth claims in the US.

Regardless of what occurs in regards to *McMahon*, *Perrine*, and *No Man's Sky*, the message is clear. Video game developers: Be careful what you promise, especially at E3.

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[1] *No Man's Sky* Website. <http://www.no-mans-sky.com/>

[2] Reviews for *No Man's Sky*. Metacritic. <http://www.metacritic.com/game/playstation-4/no-mans-sky/critic-reviews>

[3] Erik Kain. *No, Getting A 'No Man's Sky' Refund Doesn't Make You A 'Thief.'* Forbes. Sept. 1 2016, <http://www.forbes.com/sites/erikkain/2016/09/01/no-getting-a-no-mans-sky-refund-doesnt-make-you-a-thief/#55fabe727655>

[4] *No Man's Sky Discussion Board. Steam Community.* <https://steamcommunity.com/app/275850/discussions/0/360672304897862902/>

[5] Amanda Hudgins. *No Man's Sky and the Trickiness of Advertising a Procedurally-Generated Game.* Killscreen. Oct. 04, 2016. <https://killscreen.com/articles/no-mans-sky-trickiness-advertising-procedurally-generated-game/>

[6] *No Man's Sky Gameplay Trailer | E3 2014 | PS4.* YouTube. <https://www.youtube.com/watch?v=nLtmEjqzg7M>

[7] Shane Corfield. *Hype, False Advertising, and Refunds: A Look at the No Man's Sky Controversy.* Aug. 28, 2016. Informed Pixel. <http://informedpixel.com/hype-false-advertising-and-refunds-a-look-at-the-no-mans-sky-controversy/>

[8] Tom Marks. *Two No Man's Sky players manage to meet, but apparently can't see each other.* PC Gamer. Aug. 09, 2016 <http://www.pcgamer.com/no-mans-sky-multiplayer/>

[9] Graham Smith. *No Man's Sky Limited Edition Boxes Have Sticker Covering "Online Play" Icon.* Aug. 11, 2016. Rock Paper Shotgun. <https://www.rockpapershotgun.com/2016/08/11/no-mans-sky-online-play-sticker/>

[10] Reddit user "Cymen90." *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).* Sept. 2016. Reddit. https://www.reddit.com/r/Games/comments/4y1h9i/wheres_the_no_mans_sky_we_were_sold_on_a_big_list/

[11] *Ladore v. Sony Computer Entm't Am., LLC*, 75 F. Supp. 3d 1065 (N.D. Cal. 2014)

[12] A more technical discussion of the distinctions between rendering and display resolutions within the context of this case: <http://www.forbes.com/sites/davidthier/2014/08/07/angry-gamer-is-suing-sony-over-killzone-shadow-fall-graphics/#4a13272a1a48>

[13] Definition of interpolation: In computer graphics, it is the creation of new values that lie between known values. For example, when objects are rasterized into two-dimensional images from their corner points (vertices), all the pixels between those points are filled in by an interpolation algorithm, which determines their color and other attributes (see graphics pipeline). Another example is when a video image in a low resolution is upscaled to display on a monitor with a higher resolution, the missing lines are created by interpolation. In a digital camera, the optical zoom is based on the physical lenses, but the digital zoom is accomplished by algorithms (see interpolated resolution). From: <http://www.pcmag.com/encyclopedia/term/45282/interpolation>

[14] 15 U.S.C. § 1125

[15] *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145 (1965). "In actions for negligence, manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone."

[16] *Perrine v. Sega of Am., Inc.*, No. C 13-01962 JSW, 2013 WL 6328489 (N.D. Cal. Oct. 3, 2013)

[17] This settlement remains tentative as of June, 2015.

[18] *McMahon v. Take-Two Interactive Software, Inc.*, 640 F. App'x 669, 671 (9th Cir. 2016)

[19] Anne Bucher. *Grand Theft Auto False Advertising Class Action Revived By 9th Circ.* Feb. 29, 2016. Top Class Actions. <http://topclassactions.com/lawsuit-settlements/lawsuit-news/329284-grand-theft-auto-false-advertising-class-action-revived-by-9th-circ/>

[20] See *McMahon*

[21] See *In re: Nvidia GTX 970 Graphics Chip Litigation*, Case No. 4:15-cv-00760, in the U.S. District Court for the Northern District of California. See also *Branden DORRANCE individually and on behalf of all other similarly situated, Plaintiff, v. ELECTRONIC ARTS, INC. A Delaware Corporation and Sony Computer Entertainment America, Lc, a Delaware Limited Liability Company, Defendants.*, 2011 WL 6433339 (Cal.Superior). Complaint filed in 2011 for false advertising claim related to *Battlefield 3*. For background on this filing, see: <http://kotaku.com/5860729/ea-being-taken-to-court-over-broken-battlefield-promise>. See also (UK examples) *Wolfenstein: The New Order*. https://www.asa.org.uk/Rulings/Adjudications/2014/8/Zenimax-Europe-Ltd/SHP_ADJ_268953.aspx#.WAE9zZMrJE7. *Dungeon Keeper*.

https://www.asa.org.uk/Rulings/Adjudications/2014/7/Electronic-Arts-Ltd/SHP_ADJ_258907.aspx#.WAE9zZMrJE7

[22] Matt Sayer. *We talk to lawyers about the No Man's Sky false advertising investigation*. Oct. 2016. PC Gamer.

<http://www.pcgamer.com/nms-lawyers/>

[23] *Grand Theft Auto V* broke the record for profits on the release date of any game, earning over \$1 billion within 3 days of release.

<http://www.guinnessworldrecords.com/news/2013/10/confirmed-grand-theft-auto-breaks-six-sales-world-records-51900>

[24] Brendan Caldwell. *Hype Check: Debunking E3's Marketing*. June 15, 2016. Rock Paper Shotgun. <https://www.rockpapershotgun.com/2016/06/15/hype-check-debunking-e3/>

[25] Matt Sayer. *We talk to lawyers about the No Man's Sky false advertising investigation*. Oct. 2016. PC Gamer.

<http://www.pcgamer.com/nms-lawyers/>