California Western Law Review

Volume 59 | Issue 2 | Article 5

2023

Redress for Mass Software License Consumption in the Video Game Industry: Profits for the Producer; Power for the People

James Thomas

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Recommended Citation

Thomas, James (2023) "Redress for Mass Software License Consumption in the Video Game Industry: Profits for the Producer; Power for the People," *California Western Law Review*: Vol. 59: Iss. 2, Article 5.
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REDRESS FOR MASS SOFTWARE LICENSE CONSUMPTION IN THE VIDEO GAME INDUSTRY: PROFITS FOR THE PRODUCER; POWER FOR THE PEOPLE

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INTRODUCTION

On November 12, 2021, the release of *Battlefield 2042* was met with immediate backlash from fans and reviewers alike.[1] Upon launch, the game sold for $70[2] on current-generation consoles in the United States and was purchased by 4.23 million consumers in the first week alone.[3] However, its peak concurrent player count dropped 70% in the weeks after its launch as players seemingly abandoned the game and complaints of software defects flooded the internet.[4] One popular personal computer video game launcher, Steam, was inundated with thousands of negative reviews and warnings from players "not to buy *Battlefield 2042*."[5] For those who already purchased the game, the real issue was how to get a refund on the product, and whether the license attached to it allowed them the opportunity.

The rise of digital goods and software licenses that have replaced physical sales has led to confusion and the loss of ownership rights.[6] Attached to these licenses—and present in virtually all digital video game sales—are arbitration clauses. These clauses place a restriction on consumer protection.[7] Purchasers can no longer rely on return policies found in brick-and-mortar stores, which previously allowed consumers to decide where they would like to purchase based on more favorable re-

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1. *Battlefield 2042*, METACRITIC, https://www.metacritic.com/game/pc/battlefield-2042 (last visited Nov. 26, 2022).

2. Satoshi Nakamoto, *Allow Refund for Battlefield 2042 on All Platforms*, CHANGE.ORG, https://www.change.org/p/sony-allow-refund-for-battlefield-2042-on-all-platforms (last visited Dec. 20, 2022).

3. Briana Reeves, *Battlefield 2042 Has Second-Best Launch in Series Despite Poor Reception*, SCREEN RANT (Dec. 3, 2021), https://screenrant.com/battlefield-2042-sales-second-best-launch-franchise-history/ (current generation consoles, in this case, are the latest console iterations of Xbox (Xbox Series X and Xbox Series S) and Playstation (PlayStation 5)).

4. *Id.*

5. Andy Brown, *'Battlefield 2042' launch marred by thousands of negative Steam reviews*, NME (Nov. 19, 2021), https://www.nme.com/news/gaming-news/battlefield-2042-launch-marred-by-thousands-of-negative-steam-reviews-3100034.

6. Aaron Perzanowski & Chris Jay Hoffnagle, *What We Buy When We Buy Now*, 165 UNIV. PA. L. REV. 317, 324 (2017) (explaining the misleading of customers in the purchase of software licenses).

7. *See infra* Part III (discussing the negative consumer protection consequences of arbitration clauses precluding class action).

fund systems. For years, this has presented redressability issues for purchasers of digital products. However, new legal tactics and organizational software has allowed for cost-effective mass arbitration. The expense of this mass arbitration tactic cannot be understated. For example, recent filings against DoorDash resulted in the company attempting—and failing—to argue its way out of paying arbitration fees.[8] The popular food delivery company paid a staggering $9,000,000 bill before arbitration even began.[9] The court noted that companies like DoorDash "have tried for thirty years to keep plaintiffs out of court, and so finally someone says, 'OK, we'll take you to arbitration,' and suddenly it's not in your interest anymore. Now you're wiggling around, trying to find some way to squirm out of your agreement."[10] The "poetic justice" noted by the court may soon make its way to the sale and use of software.[11]

Instead of relying on arbitration clauses to act as a suit of armor protecting against consumer lawsuits, positive steps may be taken for the video game industry (the "Industry") to safeguard itself from potential liability while building a stronger relationship with its customers. Online Dispute Resolution ("ODR") has been used by eBay since the late 1990s when it began employing a mediator who used email to resolve disputes between the website's users.[12] eBay's ODR system has evolved, using new and advanced technology which allows it to handle sixty million disputes every year.[13] eBay conducted a study using routinely-collected data to show that users who participated in the ODR system were more likely to increase their activity on the platform afterward, so long as the

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8. Michael Corkery & Jessica Silver-Greenberg, *'Scared to Death' by Arbitration: Companies Drowning in Their Own System*, N.Y. TIMES (Apr. 6, 2020), https://www.nytimes.com/2020/04/06/business/arbitration-overload.html.

9. *Id.*

10. *Id.*

11. *Id.*; Lakin Greene, *Migliaccio & Rathod LLP and the Ongoing Fight Against Bethesda Around Fallout 76*, KY PRELAW LAND (Jan. 22, 2021), https://ky.prelawland.com/post/641024635877638144/migliaccio-rathod-llp-and-the-ongoing-fight (showing potential for applying automated arbitration claims to software license disputes).

12. *Online Dispute Resolution: Companies Implementing ODR*, U. MO. SCH. L. (Sept. 9, 2020), https://libraryguides.missouri.edu/c.php?g=557240&p=3832247 (describing a brief history of ODR use by various companies including eBay) [hereinafter *Companies Implementing ODR*].

13. *Id.*

process took less than six weeks to resolve.[14] Such user interaction, which promotes the continued use of the company's platform, is in stark contrast with arbitration, which tends to preclude an ongoing relationship.[15]

This Comment will examine the case law concerning software licenses, class action lawsuits, and arbitration clauses that have left millions of consumers unable to obtain refunds on purchased products or use the court system for monetary compensation. It will then discuss using a mass mediation system through automated ODR to address this expansive problem. Part I will characterize the current issues in interactive entertainment software and troubled releases, highlighting the difficulty in refunding or gaining compensation through the courts for purchasing "broken" software. Part II will discuss software classification as a good to be regulated by the Uniform Commercial Code ("UCC") and how it favors the producer over the consumer. Part III will discuss the ubiquity of restrictive arbitration clauses and how they disallow redress through the stifling of class action lawsuits. Part IV will propose a form of mass mediation to be adopted by the Industry to cut the costs of arbitration and litigation, while protecting industry growth and consumer purchases. Finally, Part V will discuss methods of ODR that the Industry can use to mediate on a large scale.

I. CHARACTERIZING THE PROBLEM

The past several decades have seen an unprecedented growth in the production and consumption of video games across the globe due to technological innovations and mainstream popularity. In the Industry's formative years, major console producers created cartridges that held the game's software and sold them through third-party retailers.[16] The reliance on major retailers, such as Wal-Mart, led publishers to spend weeks preparing to pitch their hardware and software and created strong relation-

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14. *Id.*

15. Thomas J. Stipanowich, *Arbitration: The "New Litigation*,*"* 2010 U. ILL. L. REV. 1, 28 (2010).

16. Tom Huddleston, Jr., *Jerry Lawson is one of the most important Silicon Valley pioneers you've never heard of—here's why*, CNBC MAKE IT (Dec. 1, 2022, 10:17 AM), https://www.cnbc.com/2021/10/30/jerry-lawson-black-silicon-valley-pioneer-changed-video-games-forever.html (detailing the advent of game cartridge technology for sale to consumers).

ships between retailers and leading developers.[17] Even a well-prepared sales pitch touting new innovative hardware, such as Sega's Genesis, could fail if the retailer was already reliant on another supplier.[18]

In the late 1980s, storied video game developer, Nintendo, accounted for 10% of Wal-Mart's total revenue.[19] Nintendo's relationship with Wal-Mart was so strong, Wal-Mart refused to carry games and gaming consoles created by other rival companies out of fear of damaging their relationship with the monolithic video game kingpin.[20] However, this reliance on traditional retail storefronts has seemingly ended. Implementing new information technologies allowed major console manufacturers to create digital storefronts and sell directly to the consumer through Xbox Live and PlayStation Network beginning in 2002.[21] These new networks allowed prominent developers to operate their own storefronts and create specialized policies for software licenses and refunds.[22] Unlike physical goods, these "network storefronts" mean consumers cannot freely sell or trade their purchases without creating a new copy of the software, which is generally held to be copyright infringement.[23] The shift from tangible goods to digital licensing in the exploitation of copyright has created a system in which restrictive software licenses, including arbitration clauses, leave consumers without a traditional means to refund their purchase.[24]

Major video game development companies are facing increasing backlash when expensive, marquee titles are released only to contain major malfunctions, leaving consumers upset with no means to refund the product. After its launch, fixes to *Battlefield 2042*'s most essential operating functions were delayed—including standard fare such as a score-

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17. BLAKE J. HARRIS, CONSOLE WARS 67 (Mark Chait ed., 2014).

18. *Id.* at 70.

19. *Id.*

20. *Id.* at 71.

21. Wesley Fenlon, *How PlayStation Network Works*, HOWSTUFFWORKS, https://electronics.howstuffworks.com/playstation-network.htm (last visited Mar. 19, 2023).

22. *See infra* Part IV.D. (discussing the use of proprietary online storefronts and refund policies found therein).

23. Perzanowski & Hoffnagle, *supra* note 6, at 320; 17 U.S.C. § 106 (1976) (showing only copyright owners may make copies of copyrighted material).

24. *See infra* Parts I, II, and III (expanding on the ways in which consumers lack redressability for "broken" software).

board and in-game voice chat—until months after the game's launch.[25] The discontent by fans manifested when a disgruntled member of the community started a Change.org petition in January 2022.[26] By February 7, 2023, the petition had 233,768 signatures from those demanding a refund or simply showing support for others due to what the community felt was false advertising and a series of broken promises.[27] Ultimately, the petition's creator abandoned hope for launching a lawsuit against the game's publisher, Electronic Arts, due to anticipated barriers to litigation.[28] A close look at the End User License Agreement ("EULA") sheds light on why litigation would likely prove difficult.

Specifically, Section 15(A) of the EULA contains an arbitration clause confining, "[a]ll disputes, claims or controversies arising out of or relating to this Agreement . . . [to] be determined exclusively by binding arbitration."[29] Unfortunately, the cost and time of arbitration greatly outweighs the benefit for upset users concerning a $70 purchase.[30] Further complications occur in Section 15(C), wherein the EULA states fees and costs attributed to arbitration will be in accordance with the American Arbitration Association's Consumer Rules.[31] Following these rules, a nonrefundable fee of $200 is required at the time of filing,[32] making small claims impractical. Finally, the EULA contains a limitation allowing individual claims only "and not as a . . . class member," making the

25. Zack Zwiezen, *More Than 160,000 Battlefield 2042 Players Sign Petition Asking for Money Back*, KOTAKU (Feb. 11, 2022), https://kotaku.com/battlefield-2042-refund-petition-ea-bf2042-change-1848524654.

26. Nakamoto, *supra* note 2.

27. *Id.*

28. Satoshi Nakamoto, *We Shall Stand as ONE*, CHANGE.ORG (Aug. 4, 2022), https://www.change.org/p/sony-allow-refund-for-battlefield-2042-on-all-platforms/u/30805188 (explaining the difficulty in pursuing a class action lawsuit against Electronic Arts due to restrictive clauses contained in the game's EULA).

29. *Electronic Arts User Agreement*, ELEC. ARTS, https://tos.ea.com/legalapp/WEBTERMS/US/en/PC/#section15 (last visited Nov. 25, 2022).

30. *See* Reeves, *supra* note 3 (showing the price and profitability of *Battlefield 2042*); Corkery & Silver-Greenberg, *supra* note 8 (explaining why individual arbitration is impractical).

31. *Electronic Arts User Agreement*, *supra* note 29.

32. *Consumer Arbitration Rules*, AM. ARB. INST. 33, https://adr.org/sites/default/files/Consumer%20Rules.pdf (last visited Nov. 23, 2022).

pursuit of a class action unattainable unless the contract itself is declared void.[33]

Battlefield 2042 is not the only recent launch from a major studio to contain game-breaking malfunctions. In 2018, storied video game developer Bethesda Game Studios released *Fallout 76*, an online action role-playing experience set in an already popular in-game universe.[34] At launch, *Fallout 76* was plagued by technical issues and exploits, breaking the in-game economy by allowing players to duplicate valuable items and access developer-only areas filled with every earnable item in the game.[35] *Fallout 76* suffered further from framerate drops, broken character models affecting essential in-game functions, disappearing questlines, and a digital world devoid of content for engagement.[36] Much like *Battlefield 2042, Fallout 76*'s lack of content and numerous software glitches at launch caused immediate vitriol from its fanbase.[37] Similar to the heightened sales seen at the launch of *Battlefield 2042*, *Fallout 76* sold 1.06 million units in the first week.[38]

After refunds proved difficult, players turned to the court system and had to contend with the license attached to the game's software. In a statement by the plaintiffs' lawyers, Migliaccio & Rathod LLP, the firm argued that the refusal of refunds after purchase left the players "to deal with an unplayable experience until patches bring it back to a playable

33. *Electronic Arts User Agreement*, *supra* note 29.

34. Quinton O'Connor, *How Many Fallout Games Are There?*, THE GAMER (Jan. 16, 2022), https://www.thegamer.com/how-many-fallout-games-are-there/ (highlighting the scope and popularity of the franchise's series of games).

35. Cass Marshall, *It may not be possible to save Fallout 76*, POLYGON (Feb. 7, 2019, 1:34 PM), https://www.polygon.com/2019/2/7/18214008/fallout-76-updates-patch-fix-future.

36. Paul Tassi, *Bethesda's Silence of the State of 'Fallout 76' at Launch is Deafening*, FORBES (Nov. 27, 2018, 9:27 AM), https://www.forbes.com/sites/insertcoin/2018/11/27/bethesdas-silence-of-the-state-of-fallout-76-at-launch-is-deafening/?sh=3d47ac5661e7.

37. *Id.*

38. William D'Angelo, *Fallout 76 Sells an Estimated 1.06 Million Units First Week at Retail-Sales*, VGCHARTZ (Feb. 5, 2019), https://www.vgchartz.com/article/394146/fallout-76-sells-an-estimated-106-million-units-first-week-at-retail/#:~:text=Here%20are%20how%20first%20week,Fallout%2076%20%2D%201.06%20Million%20Units.

state."[39] Customer support told users who were attempting to receive a refund that they were ineligible after downloading the product.[40]

While the first sale doctrine typically grants purchasers ownership rights to transfer and sell physical products, this doctrine does not provide the same consumer protections for software purchases. This essentially allows buyers to recoup losses when unsatisfied with a purchase; however, digital goods cannot be resold in the same manner,[41] altering the relationship consumers have with their purchases. Digital copyright owners justify this loss of previously-established resale rights through the complicated licenses employed in digital sales, which deny actual ownership to purchasers.[42] Bethesda's EULA attached to *Fallout 76* is primarily silent regarding refunds.[43] The 9,475-word document notes that statutory obligations may allow users compensation in certain countries, excluding the United States.[44] Much like the aforementioned *Battlefield 2042*, the arbitration clause in Bethesda's EULA includes a class-action waiver, stymieing attempts at redress.[45] Attorneys attempted to file claims in multiple forms to keep the class action in court,[46] however, the EULA's arbitration clause still proved ironclad.[47]

Still seeking compensation for consumers unhappy with the state of *Fallout 76*, law firm Migliaccio & Rathod launched what it has dubbed "arbageddon."[48] "Arbageddon," as practiced by Migliaccio & Rathod, is an aggressive approach consisting of filing hundreds of individual demand letters against Bethesda on behalf of game purchasers in an attempt

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39. Kevin Tucker, *What is the Fallout 76 refund class action lawsuit about?*, SHACK NEWS (Nov. 27, 2018, 1:25 PM), https://www.shacknews.com/article/108729/what-is-the-fallout-76-refund-class-action-lawsuit-about.

40. *Id.*

41. Perzanowski & Hoffnagle, *supra* note 6, at 319 (explaining the loss of rights purchasers experience using software licensing).

42. *Id.* (describing how digital rights owners and retailers view software licensing and ownership).

43. *Fallout 76 End User License Agreement ("EULA")*, BETHESDA, https://bethesda.net/en/eulas/fallout-76 (last visited Nov. 25, 2022).

44. *Id.*

45. *Id.*

46. Greene, *supra* note 11.

47. *Id.* (noting the difficulty in pursuing a class action).

48. *Id.*

to force a settlement.[49] While the results of this mass arbitration method are currently undetermined, it demonstrates a desire among consumers and litigators alike to establish a means of monetary compensation for the purchase of software in a primarily broken and unusable state.

II. THE FIRST STEPS TOWARD DENYING RECOURSE; SOFTWARE IS, APPARENTLY, A GOOD

It is now generally held that software is considered a good in the eyes of the court, rather than a service, which has limited the protections available to consumers. In application to the Industry, such a distinction is difficult to justify. Classifying software as a good has effectively forced consumers to provide complete assent to unfavorable terms in order to use and enjoy a product. Courts cannot predict future changes in technology when ruling on the case before them, and a series of cases have created a classification for software as a good that strongly protects the interests of producers at the expense of their customers.

Software's designation as a good was initially justified by its attachment to a physical purchase, which could then be returned by the customer to the retailer from which it was purchased. In the 1991 case *Advent Systems Ltd. v. Unisys Corp.*, the Third Circuit ruled that software was a good to be regulated by the UCC.[50] Key to this decision was the acknowledgment that although "computer programs may be copyrightable as intellectual property . . . the fact that once in the form of a floppy disc or other medium, the program is tangible, moveable and available in the marketplace."[51] It is well established that "goods" under the UCC are interpreted broadly, with Section 2-105 defining the term as meaning "all things . . . which are movable at the time of . . . sale."[52] *Advent Systems* offers the premise that intangible intellectual property, such as a software code for a video game, becomes a tangible good when it is attached to a medium, such as a compact disc.[53] Therefore, the disc holding Advent's software was the good that qualified for regulation under the UCC, and not necessarily the software itself.[54]

49. *Id.*
50. Advent Sys. V. Unisys Corp., 925 F.2d 670, 672 (3d Cir. 1991).
51. *Id.* at 675.
52. U.C.C. § 2-105 (AM. L. INST. & UNIF. L. COMM'N 1990).
53. *Advent Sys.*, 925 F.2d at 675.
54. *Id.*

Further, when Sony launched the PlayStation 5, it marked the first time one of its primary consoles was released with the option to purchase a unit without a disc drive.[55] The choice to release a console with no disc drive was likely in direct response to the growing trend in digital sales.[56] In the past two years, Sony's software sales have grown from 71% in digital form, to 79%,[57] meaning most purchasers never obtain a physical copy of any game they purchase. For proprietary storefronts in the Industry, this also means increased profitability through controlling prices and limiting software resale.[58]

Soon, courts began to recognize that software was not a traditional good for which the UCC was written to govern, yet struggled to move away from its classification as a good. In *ACI Worldwide Corp. v. Keybank National Association*, the court applied the "predominant purpose test" to make the distinction.[59] The court illustrated the problems associated with such a classification concerning software, stating, "[s]oftware is not clearly a good or a service in the abstract."[60] Courts can, therefore, "determine 'whether the . . . contract is a rendition of services . . . or is a

55. Jim Ryan, *PlayStation 5 launches in November, starting at $399 for PS5 Digital Edition and $499 for PS5 with Ultra HD Blu-Ray Disc Drive*, PLAYSTATION.BLOG (Sept. 16, 2020), https://blog.playstation.com/2020/09/16/playstation-5-launches-in-november-starting-at-399-for-ps5-digital-edition-and-499-for-ps5-with-ultra-hd-blu-ray-disc-drive/.

56. Perzanowski & Hoffnagle, *supra* note 6, at 325–26 (showing the trend toward digital downloads instead of physical purchases).

57. Chandler Wood, *71% of PlayStation Games Sold in Q1 FY2021 Were Digital Download*, PLAYSTATION LIFESTYLE (Aug. 4, 2021), https://www.playstationlifestyle.net/2021/08/04/71-of-playstation-ps5-games-digital-sold-in-q1-fy2021-were-digital-download/; Liam Croft, *Nearly 80% of All PS5, PS4 Games Are Bought Digitally*, PUSH SQUARE (Jul. 29, 2022), https://www.pushsquare.com/news/2022/07/nearly-80percent-of-all-ps5-ps4-games-are-bought-digitally (showing the drastic growth in digital sales on PlayStation consoles).

58. Christian H. Nadan, *Software Licensing in the 21st Century: Are Software Licenses Really Sales, and How Will the Software Industry Respond*, 32 AIPLA Q. J. 555, 567 (2004).

59. ACI Worldwide Corp. v. Keybank Nat'l Ass'n, 2020 U.S. Dist. LEXIS 37359, at *32 (D. Mass. 2020) (providing that the "predominant purpose test" analyzes whether the contract between parties primarily concerns the sale of goods or services).

60. Rottner v. AVG Tech. USA, Inc., 943 F. Supp. 2d 222, 230 (D. Mass. 2013) (listing consistent rulings that software sales are classified as a good).

rendition of goods.'"[61] Such a determination can be challenging in the software space involving the sales and licensing of video games. Games-as-a-Service business models promise to provide content to players over the game's lifespan rather than at the time of purchase.[62] This model clearly blends the purchase of a good, the software itself, and service, which is the promised update of digital content within the software. Adding choice of law and choice of venue clauses, allowable under the UCC, however, can create a way around the predominant purpose test and further injure the consumer's ability to seek monetary compensation.[63] Choice of law has been given such deference in contract disputes that "'in principle,' the parties may choose to 'have portions of their contract governed by the law of Tibet, the law of pre-revolutionary Russia, or . . . the law of California.'"[64]

The location of the EULA itself has also been a detrimental factor in deciding the legality of form contracts for software licenses, with courts finding assent even if a contract cannot be accessed until after purchase. Such license terms generally include wording stating the user assents to the software license through its use, and the intent is that upon opening and using the software, the terms have been assented to.[65] In *Specht v. Netscape Communications Corp.*, for example, the court noted that the mere act of downloading software does not indicate "an unambiguous indication of assent. The primary purpose of downloading is to obtain a product, not to assent to an agreement."[66] The acceptance of shrinkwrap as a means of assent has led to copyright owners' expansion of their own

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61. Simulados Software, Ltd. v. Photon Infotech Priv., Ltd., 40 F. Supp. 3d 1191, 1199 (N.D. Cal. 2014) (applying the predominant purpose test to software license sales); *ACI Worldwide Corp.*, 2020 U.S. Dist. LEXIS 37359, at *32.

62. Slava Zaiets, *Why AAA Studios Shift to Games-as-a-Service (GaaS) Model*, GRIDLY (Oct. 9, 2020), https://www.gridly.com/blog/games-as-a-service/#:~:text=%2Da%2DService%3F,Games%2Das%2Da%2DService%20(GaaS)%20is%20a,form%20of%20in%2Dgame%20purchases.

63. *Choice of Law in Sales Contracts*, ABC/AMEGA (Mar. 19, 2019), https://www.abc-amega.com/articles/choice-of-law-in-sales-contracts/.

64. Symeon C. Symeonides, *Choice of Law in the American Courts in 2015 Twenty-Ninth Annual Survey*, 64 AM. J. COMPAR. L. 1, 31 (2016) (discussing the widespread deference afforded to choice of law clauses).

65. Mark A. Lemly, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1241–42 (1995).

66. Specht v. Netscape Communications Corp., 150 F. Supp. 2d 585, 595 (S.D.N.Y. 2001).

rights at the user's expense.[67] Among the most important of this expansion was that producers were allowed to propel their rights beyond those established by intellectual property law and limit their liability to consumers.[68]

This deference to contract terms, combined with contracts that virtually no consumer reads and are permitted to be hidden until after purchase, places consumers at a severe disadvantage.[69] Actual assent to contract terms are somewhat questionable as most consumers believe that software licenses are much more favorable than they are.[70] This "term optimism" is likely based on the experiences consumers have purchasing physical goods and associating the rights granted to them in those purchases with digital downloads.[71] However, major software publishers in the Industry have taken advantage of such rulings to create licenses which completely shield themselves from liability.

III. "TOO DARN BAD": COURTS CONTINUE TO DENY RECOURSE TO AGGRIEVED CONSUMERS

The introduction of mass form contracts for software licenses has led to an almost ubiquitous inclusion of arbitration clauses.[72] Further, the Federal Arbitration Act ("FAA") supersedes all attempts to use state consumer protection laws. The combination of court rulings favoring contract formation and the FAA having denied recourse in the form of class action suits, has allowed for large corporations to reap great benefits while taking advantage of consumers.[73]

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67. Lemly, *supra* note 65, at 1246.

68. *Id.* at 1248.

69. Symeonides, *supra* note 64, at 31 (showing deference to contract terms and choice of law); Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts* 5 (L. & Econ. Rsch. Paper Series, Working Paper No. 09-40, 2009).

70. Perzanowski & Hoffnagle, *supra* note 6, at 322 (explaining common perceptions of software licenses among consumers).

71. *Id.* at 321 (explaining "term optimism" as the belief that contracts grant more ownership rights than they actually do).

72. Jeff Sovern et al., *"Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 MD. L. REV. 1, 119–20 (2015).

73. ERWIN CHEMERINSKY, CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECOME UNENFORCEABLE 189 (1st ed. 2017).

The Supreme Court has offered its opinion on a number of consumer cases affecting the Industry and the limited ability for consumers to seek monetary relief for faulty products. In the 2011 case *AT&T Mobility LLC v. Concepcion*, the Supreme Court upheld an arbitration agreement that would force consumers who were unhappy with the purchase of their cell phones to pursue their claims through arbitration.[74] In its decision, the Court stated the individual $30.22 in sales tax that the claimants would be responsible for if their cases were prosecuted made it such that the cases could not proceed as a class action.[75] Much like the EULA in *Battlefield 2042*,[76] consumers were offered no additional protections through the court systems.

The majority opinion in *AT&T Mobility*, authored by Justice Scalia, concluded that the federal laws favoring arbitration over adjudication preempted the state law that would allow for a class action in such a case.[77] The Court began by recognizing the basic principle that, "Section 2 of the Federal Arbitration Act (FAA) makes agreements to arbitrate 'valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'"[78] In response to AT&T's compulsion of arbitration, the plaintiffs contended that the arbitration agreement itself was unconscionable under state law because it disallowed class-wide procedures.[79] The Ninth Circuit agreed with the assessment, however, the Supreme Court held their precedent allowed for a "liberal federal policy favoring arbitration," and that "arbitration is a matter of contract."[80] The plaintiffs' attorney later offered his perspective on the outcome of the case, stating the corporate use of arbitration clauses "[were] never about making it easier for customers to resolve disputes—[they were] about killing claims."[81]

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74. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351–52 (2011).

75. *Id.*

76. *Electronic Arts User Agreement*, *supra* note 29.

77. CHEMERINSKY, *supra* note 73, at 195.

78. *AT&T Mobility LLC*, 563 U.S. at 336 (citing 9 U.S.C. § 2).

79. *Id.* at 337–38.

80. Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 67 (2010).

81. Michael Corkery, *Amazon Ends Use of Arbitration for Customer Disputes*, N.Y. TIMES (Sept. 28, 2021), https://www.nytimes.com/2021/07/22/business/amazon-arbitration-customer-disputes.html.

Although many Supreme Court decisions favoring arbitration have been narrow,[82] the FAA continuously prevents class action consumer claims. Justice Kagan stated in the *American Express v. Italian Colors Restaurant* dissent that, "[t]he monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse. And here is the nutshell version of today's opinion, admirably flaunted rather than camouflaged: Too darn bad."[83] Arbitration clauses derive their legality from the FAA, which supersedes any state consumer protection act used by plaintiffs to find monetary relief.[84] The Class Action Fairness Act of 2005 ("CAFA") allows federal courts original jurisdiction over class action cases with controversies in excess of five million dollars.[85] In *Adell v. Cellco Partnership*, which involved consumer cell phone contracts including an individual arbitration clause, the plaintiff argued that CAFA supersedes the FAA in class action arbitration cases.[86] However, the district court noted that when interpreting two statutes, the best course of action is to give effect to both.[87] The court cited precedent supporting the notion that the FAA supersedes other federal laws and stated, "[even] a statute's express provision for collective legal actions does not necessarily mean that it precludes 'individual attempts at conciliation' through arbitration."[88] Therefore, the court found CAFA and the FAA could coexist as the contract signed by the plaintiff allowed for arbitration and disallowed class action suits.[89] With seventy-eight Fortune 100 companies utilizing class action waivers in arbitration contracts, the widespread nature of this problem—continuously denying

82. CHEMERINSKY, *supra* note 73, at 195.

83. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 240 (2013) (Kagan, J., dissenting).

84. *See AT&T Mobility LLC*, 563 U.S. at 351–52.

85. 28 U.S.C. § 1332(d)(2).

86. *Adell v. Cellco P'ship*, No. 21-3570, 2022 WL 1487765, at *1–2 (6th Cir. May 11, 2022).

87. *Id.* at *13 (quoting Morton v. Mancari, 417 U.S. 535, 551 (1974)).

88. *Id.* at *14 (quoting Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1627 (2018)) (noting that the absence of any specific statutory discussion of class actions or arbitration evidences Congress's intent not to displace the FAA).

89. *Id.* at *15–16.

recourse to plaintiffs even in the presence of statutes like CAFA—is readily apparent.[90]

IV. A PROPOSAL OF A SELF-REGULATING SYSTEM OF MASS MEDIATION

Since FAA's adoption, arbitration has been a court-supported means of avoiding litigation, but its usefulness is beginning to wane. Rising costs, combined with new, plaintiff friendly filing methods, has shifted the balance of power between producers and consumers. The Industry must adapt by shifting its focus to create new means of solving disputes using ODR to ensure future growth through proactive self-regulation.

A. The Growing Dangers of Arbitration and Mediation as a Solution

Consumer protection advocates have already begun turning their eyes towards software sales, focusing on the use of new technology to quickly and easily weaponize arbitration claims on a large scale. Bethesda's current "arbageddon" is just one form of mass arbitration being employed in an attempt to overwhelm a corporate entity.[91]

Mass arbitration filings are the result of a system perceived by the public and many attorneys, to have been manipulated in favor of corporate interest.[92] Generally, the sheer expense of arbitration has been one of the main obstacles preventing consumers from using the system to resolve their product claims.[93] However, the use of automated software programs has dramatically reduced these costs and softened the obstacles.[94] For instance, FairShake was established to disrupt the arbitration system by allowing aggrieved parties to engage in the arbitration process through an automated procedure with greater ease and lower personal cost.[95] In its first outing, FairShake launched 1,000 arbitration actions

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90. Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 32 U.C. DAVIS L. REV. ONLINE 233, 234 (2019) (analyzing the prevalence of arbitration agreements, specifically containing class waivers, in customer transactions with top companies).

91. *See* Greene, *supra* note 11; Corkery, *supra* note 81.

92. Stipanowich, *supra* note 15, at 41.

93. Corkery & Silver-Greenberg, *supra* note 8.

94. *Id.*

95. *Id.*

against AT&T and Comcast.[96] Stunning the companies and overloading arbitration resources, several of these claims took more than two years to move through the system.[97] AT&T's big win in *AT&T Mobility* was now being weaponized against the company as an unprepared governing body was forced to confront unhappy consumers.[98]

TurboTax, made by Intuit, is a software program easily accessed through the developer's website and used by consumers to file their taxes.[99] TurboTax had two relevant products: one called "Free Edition" and the other known as "Free File."[100] Use of Free Edition resulted in some users accruing charges based on the forms they filed by directing them to paid services.[101] Free File allowed users to file taxes free of charge, but the company effectively hid its use from online search engines, driving engagement to the paid version.[102] In 2019, a class action suit was initiated against Intuit, whereby the plaintiffs were able to successfully compel arbitration.[103] The law firm of Keller Lenkner chose to represent the plaintiffs through mass arbitration, of which the administrative fees will be paid by Intuit.[104] Such fees could reach $3,000 per case, with awards for arbitration participants potentially reaching six figures.[105] As demon-

96. *Id.*

97. *Id.*

98. *AT&T Mobility LLC*, 563 U.S. at 336 (explaining the legal background supporting courts' upholding of arbitration clauses under the FAA); Corkery & Silver-Greenberg, *supra* note 8. *See also supra* Part III (discussing *AT&T Mobility LLC's* denial of consumer redress).

99. Justin Elliott, *TurboTax Maker Intuit Faces Tens of Millions in Fees in a Groundbreaking Legal Battle Over Consumer Fraud*, PROPUBLICA (Feb. 23, 2022, 3:15 PM), https://www.propublica.org/article/turbotax-maker-intuit-faces-tens-of-millions-in-fees-in-a-groundbreaking-legal-battle-over-consumer-fraud.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. Justin Elliott, *TurboTax Maker Intuit Faces Tens of Millions in Fees in a Groundbreaking Legal Battle Over Consumer Fraud*, PROPUBLICA (Feb. 23, 2022, 3:15 PM), https://www.propublica.org/article/turbotax-maker-intuit-faces-tens-of-millions-in-fees-in-a-groundbreaking-legal-battle-over-consumer-fraud.

105. Kimberly Adams & Sasha Fernandez, *TurboTax maker Intuit faces mass arbitration*, MARKETPLACE TECH (Feb 28, 2022), https://www.marketplace.org/shows/marketplace-tech/turbotax-maker-intuit-faces-mass-arbitration/.

strated by this example, organizational software is proving to be a powerful tool in pursuing consumer rights.[106]

Even considering the Supreme Court decisions favoring the upholding of arbitration clauses, companies have been exposed to a new and severe vulnerability: weaponized arbitration.[107] Arbitration clauses can no longer act as a shield against liability for bad business practices or faulty products.[108] New tactics used by enterprising law firms have finally established a weakness in arbitration clauses that the FAA does not protect.[109] Recently, Amazon buckled after facing a total of 75,000 potential arbitration hearings; but games like *Battlefield 2042* had over 200,000 vocally upset consumers, a number significantly higher than that which caused Amazon to yield.[110] The ease of filing mass arbitration claims, pioneered by companies like FairShake, could potentially lead to a breaking point for the ubiquity of these arbitration practices, swinging the benefit pendulum from the producer to the consumer. Considering potential claims for video game disputes are already common, and likely inevitable in the future because millions of players experience the same software bugs, the Industry must reconsider individual arbitration as a tool in dispute resolution.

B. The History of the Industry's Successes with Self-Regulation

To avoid further controversy, arbitration, and litigation costs, the Industry should look to its past successes in circumventing government regulation to create a "safe harbor" for itself by taking a proactive approach in establishing a self-regulating system. By enabling the Industry's lobbying arm to implement self-regulation, the Industry can create a new dispute resolution path that avoids arbitration software. In 1993, the United States Senate began its hearings on violence in video games. As

106. *Id.*; Corkery & Silver-Greenberg, *supra* note 8.

107. *See infra* Part IV.B. (illustrating the effectiveness of mass online dispute resolution from companies like eBay).

108. *See infra* Part IV.B.

109. *See* Corkery & Silver-Greenberg, *supra* note 8 (demonstrating how automated systems can be used to file arbitration paperwork).

110. Corkery, *supra* note 81 (illustrating an instance where Amazon abandoned its use of arbitration clauses for certain customers after it was threatened by mass arbitration); Nakamoto, *supra* note 2 (displaying the number of disappointed claimants in software disputes favoring a refund for a video game).

a result, the major video game console producers at the time, Sega and Nintendo, were questioned regarding the content of the games they marketed and sold.[111] The hearings included the testimony of advocacy groups as well as footage from video games, such as *Mortal Kombat*, *Night Trap*, and *Lethal Enforcer*, to demonstrate particular instances of extreme violence within the games.[112] The message was clear—the United States government was interested in regulating the content and sale of video games.[113] Soon after the hearings, the House of Representatives introduced the Video Games Rating Act of 1994.[114] The bill established a subcommittee appointed by the President to approve a rating system for video games.[115] While this bill would consider the "voluntary" participation of companies to partake in the rating system, the prior hearings entertained the idea that it was irresponsible for companies to release violent or sexual content in any form.[116] Senator Joe Lieberman's letter to his colleagues highlighted the governmental concern about current and future video game content, stating that "[a]dvances in technology . . . depict murder, mutilation, and disfigurement in an extremely graphic manner."[117]

In response, leading developers, console manufacturers, and retailers all agreed to the operation and establishment of an independent rating system: the Electronic Software Ratings Board ("ESRB").[118] The comprehensive nature of the ESRB impressed regulators to such a great extent that Senator Lieberman later called it "the most comprehensive [rating system] in the media industry."[119] The ESRB became active just in time for the 1994 holiday season, and still operates today as an independent arm of the Industry's lobbying and advocacy body, the Enter-

111. NeoGamer – The Video Game Archive, *Violence in Video Games – Highlights of the American Senate Committee Hearings in 1993*, YOUTUBE (Apr. 21, 2019), https://www.youtube.com/watch?v=lhwM3ZMTCR0.

112. *Id.* at 01:11, 03:10, 6:00.

113. *Id.*

114. *Id.* at 22:10–22:20.

115. *Id.*

116. *See generally id.*

117. HARRIS, *supra* note 17, at 474.

118. Gaming Historian, *The Story of the ESRB*, YOUTUBE, at 00:00–00:30 (Sept. 23, 2016), https://www.youtube.com/watch?v=Wv3HDVd22P8.

119. *Id.* at 30:10–30:15.

tainment Software Association ("ESA").[120] As a result, the Industry was successfully able to shift the burden of monitoring violence in video games from the shoulders of the developers to the purchasers of the games—children's parents.[121] Since the self-regulatory scheme's inception, the Industry's success has grown exponentially. The worldwide value of the video game industry in 2022 is currently estimated at $235.7 billion, with analysts predicting growth of up to $321.1 billion by 2026, far outpacing other entertainment sectors.[122] In fact, the current profitability of the Industry, even in the face of controversial releases, may make the adoption of a new system seem wholly unnecessary. However, there is opportunity and an economic incentive in the early adoption of a system for dispute resolution outside of arbitration or the courts.

C. *Profits for the Producers Through a System of Mass Mediation*

Adopting mass mediation will not only protect the Industry from weaponized arbitration software, but may also create greater profits through the increased engagement and goodwill of consumers. The benefits of mediation, as opposed to arbitration, for businesses using software licenses to distribute their product is readily apparent. Traditionally, business lawyers favored arbitration for "cost savings, shorter resolution times, a more satisfactory process, [the use of] expert decision makers, privacy and confidentiality, and relative finality."[123] However, with the rise of arbitration clauses in agreements, this viewpoint has received considerable pushback. Even studies showing that corporate at-

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120. *Video Game Industry Expands Parental Resources for Spanish-Speaking Families*, ENT. SOFTWARE ASS'N (Sept. 21, 2021), https://www.theesa.com/news/video-game-industry-expands-parental-resources-for-spanish-speaking-families/.

121. *See, e.g.*, Gaming Historian, *supra* note 118, at 06:00–07:00 ("In short, parents had no idea exactly how violent a game was until they saw it for themselves, in their own living rooms. And a lot of them didn't like what they saw.").

122. Simon Read, *Gaming is booming and is expected to keep growing,* WORLD ECON. FORUM (July 28, 2022), https://www.weforum.org/agenda/2022/07/gaming-pandemic-lockdowns-pwc-growth/. *See also* José Gabriel Navarro, *Key data on the movie production & distribution industry worldwide 2022*, STATISTA (Aug. 16, 2022), https://www.statista.com/statistics/326011/movie-production-distribution-industry/; Marie Charlotte Götting, *Global revenue of the recorded music industry 1999-2021*, STATISTA (May 25, 2022), https://www.statista.com/statistics/272305/global-revenue-of-the-music-industry/.

123. Stipanowich, *supra* note 15, at 4.

torneys favor arbitration, generally focus on the negative elements of its use.[124] The progression of arbitration replacing many forms of civil litigation has increased costs, as the evolution of such a process has made arbitration more "formal, costly, time-consuming, and subject to hardball advocacy."[125] In addition, the efficiency of the arbitration process has depreciated; arbitrators are more likely to allow the admittance of evidence and, unlike federal judges, they do not "dramatically shorten presentation time."[126] Using a third party to mediate instead of arbitrating the consumer's claims will still protect the company's sensitive and proprietary information, as facts released to the third party will not necessarily be shared with the consumers in dispute.[127] In essence, the adoption of mass mediation will allow greater control for the developers and publishers of entertainment software because they can control the process without complying with FAA regulations.[128]

Moreover, adopting mediation on a large scale may also create growth in the form of greater consumer engagement in one of the most popular business models in the Industry. Formalized arbitration often, by the nature of its strict regulation, "divert[s] resources away from mutually beneficial efforts and commit[s] them to mutual combat."[129] For video game producers, increased interaction leads to increased profits.[130] Major publishers, like Sony, Microsoft, and Nintendo, rely on engagement in their proprietary storefronts.[131] The Industry often gauges its

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124. *Id.* at 5.

125. *Id.* at 8–9.

126. *Id.* at 15.

127. CAL. EVID. CODE § 1119(c).

128. Stipanowich, *supra* note 15, at 25–26.

129. *Id.* at 28.

130. *See* Zaiets, *supra* note 62 (demonstrating how GaaS economically incentivized the Industry).

131. Stefanie Fogel, *Nintendo Switch Software Attach Rate Higher Than the Wii's*, VARIETY (Apr. 26, 2019, 11:19 AM), https://variety.com/2019/gaming/news/nintendo-switch-software-attach-rate-1203198916/. *Cf.* Rory Young, *Xbox Series X Has Massive Game Pass Attach Rate*, GAME RANT (Nov. 15, 2020), https://gamerant.com/xbox-series-x-game-pass-attach-rate/ (illustrating the correlation between a high attach rate and increased profitability for Xbox); Stephen Tailby, *PS4 Has a Very High Software Attach Rate, Average Player Owns Around Ten Games*, PUSH SQUARE (Jan. 15, 2019), https://www.pushsquare.com/news/2019/01/ps4_has_a_very_high_software_attach_rate_average_player_owns_around_ten_games (collectively showing

engagement through "attach rates," which are calculated by "dividing the number of units an individual game has sold by the number of consoles sold," and are used to assess the health of a video game console.[132] For example, Sony's PlayStation 4 had an average of just under ten games sold per console and was considered highly successful.[133] The drive to keep consumers involved has led the Industry at large to adopt the Games-as-a-Service ("GaaS") model, which offers players the opportunity to purchase or freely download a game once, with the promise of continually updating the game throughout its lifespan.[134] This model has allowed games such as Epic's smash hit, *Fortnite*, to generate $1.2 billion in its first year.[135] However, the model is highly reliant on continued support from developers and interaction from players.[136] Companies focus on releasing in-game purchases to keep players involved and work with third-party companies designed to create and promote digital economies.[137] This in turn highlights the Industry's necessity to keep players interested.[138] The switch in revenue model amongst many games will benefit from ODR's creation of goodwill. A comprehensive study of eBay's ODR system shows that participation in a successful mediation process can lead to more significant user interaction.[139] Instead of leaving fans of *Fallout 76*, as mentioned above, upset with their purchase and unable to refund or gain redress, using ODR can heighten fans' engage-

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the importance of attach rates to the health and profitability of proprietary consoles in the Industry).

132. Serkan Toto, *Attach Rates vs Tie Ratios (And Why You Should Forget Tie Ratios Today)*, KANTAN GAMES (Aug. 21, 2020), https://www.serkantoto.com/2020/08/21/attach-rates-vs-tie-ratios-and-why-you-should-forget-tie-ratios-today/#:~:text=Attach%20Rates%20Are%20For%20Games,the%20number%20of%20consoles%20sold.

133. Tailby, *supra* note 131.

134. *See* Zaiets, *supra* note 62 (illustrating the economic incentive of GaaS for the Industry).

135. *Id.*

136. *Id.*

137. Ilker Koksal, *Video Game Industry & Its Revenue Shift*, FORBES (Nov. 8, 2019, 5:50 PM), https://www.forbes.com/sites/ilkerkoksal/2019/11/08/video-gaming-industry—its-revenue-shift/?sh=7b60efcc663e.

138. *Id.*

139. *See Companies Implementing ODR*, *supra* note 12.

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ment with the product, keeping them in the company's system and spending their money with the corporation.[140]

Stepping away from compelled arbitration and embracing a system of mass mediation may also prevent negative press coverage and word of mouth among consumers. Following their launches, games like *Battlefield 2042* and *Fallout 76* received an array of criticism on the internet, which likely affected their future purchases and overall profitability.[141] Studies have shown that many consumers of electronic entertainment gather information from games before purchasing, with 61% using professional reviews as a determinant.[142] An overwhelming amount of purchasers rely on word of mouth to determine whether they will purchase a video game, with 91% of a recent survey's respondents confirming they use online forums to help inform their buying decisions.[143] As such, widespread online coverage of *Fallout 76's* contentious launch likely informed consumers' decisions.[144] If purchasers had been able to solve their disputes quickly through online mediation, by way of a system like this Comment proposes, much of the negative discourse surrounding the game might have been avoided and producers would have been able to increase their profits.[145] By allowing for standardized ODR options for upset gamers, companies not only protect themselves from unwanted mass arbitration, but can also protect the interests of their users and keep their player base within the digital ecosystem.[146]

Perhaps the strongest argument for self-regulation through the adoption of an ODR system is the potential for the Industry to create a "safe harbor" and avoid regulation and litigation from the Federal Trade

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140. *See* Zaiets, *supra* note 62 (discussing profits generated by user interaction).

141. *See supra* Part I (discussing consumer reactions to the release of *Fallout 76* and *Battlefield 2042*).

142. David Bounie et al., *Do Online Customer Reviews Matter? Evidence from the Video Game Industry* 6–9 (Dep't of Econ. and Soc. Sci. Telecom ParisTech, Working Paper No. ESS-08-02, 2008) (an anonymous survey administered on a leading French website dedicated to video games found that out of 6,984 participants, more than 80% of respondents consulted at least two different sources of information from online forums and customer reviews prior to purchasing a video game).

143. *Id.*

144. *See supra* Part I (discussion on customers' negative reception of *Fallout 76*). *See also* Bounie et al., *supra* note 142.

145. *See, e.g.*, *supra* Part I.

146. *See, e.g.*, *Companies Implementing ODR*, *supra* note 12 (displaying how eBay's online dispute resolution methods help to create future engagement from users).

Commission ("FTC").[147] The FTC is currently targeting Microsoft's acquisition of Activision-Blizzard on anti-competition grounds.[148] The $69 billion deal represents the largest acquisition in video game history and has drawn the ire of regulatory agencies across the globe.[149] Similar to the Senate hearings of 1993, regulators are again targeting the video game industry as its size and influence grows.[150]

Again, the Industry can look to its past successes in dealing with regulatory bodies and adopt a system of mediation to escape consumer protection agencies. Under direction from Congress, the FTC created the Children's Online Privacy Protection Rule ("COPPA"), which requires parents to be notified of the personal information collected from their children.[151] COPPA directly impacted the Industry because it protects the data of children under the age of thirteen, and 24% of those who interact with electronic entertainment are eighteen and younger.[152] COPPA allows providers to submit self-regulatory guidelines for approval to the FTC.[153] Once approved, the provider can enjoy "safe harbor" and avoid investigation from the government's regulatory arm.[154] Commis-

147. *See generally supra* Part IV.B. (exemplifying a successful attempt in the industry to create a safe harbor).

148. *FTC Seeks to Block Microsoft Corp.'s Acquisition of Activision Blizzard, Inc.*, FED. TRADE COMM'N (Dec. 8, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/12/ftc-seeks-block-microsoft-corps-acquisition-activision-blizzard-inc.

149. *Id.*; *The CMA investigation into the Microsoft and Activision Blizzard merger*, COMPETITION AND MKTS. AUTH. (Oct. 20, 2022), https://www.gov.uk/guidance/the-cma-investigation-into-the-microsoft-and-activision-blizzard-merger (explaining the United Kingdom's investigation of the Activision-Blizzard acquisition).

150. *See supra* Part IV.B. (detailing hearings about violence in video games).

151. *Children's Online Privacy Protection Rule: Not Just for Kids' Sites*, FED. TRADE COMM'N, https://www.ftc.gov/business-guidance/resources/childrens-online-privacy-protection-rule-not-just-kids-sites (last visited Mar. 16, 2023) [hereinafter *Children's Online Privacy Protection Rule*].

152. *Id.*; *see also* Jessica Clement, *U.S. video gaming audiences 2022, by age group*, STATISTA (Oct. 17, 2022), https://www.statista.com/statistics/189582/age-of-us-video-game-players/ (providing information on demographics of consumers based on age).

153. *Children's Online Privacy Protection Rule*, *supra* note 151.

154. *FTC Approves Modifications to Video Game Industry Self-Regulatory COPPA Safe Harbor Program*, FED. TRADE COMM'N (Aug. 14, 2018), https://www.ftc.gov/news-events/news/press-releases/2018/08/ftc-approves-modifications-video-game-industry-self-regulatory-coppa-safe-harbor-program.

sioners working for the FTC voted 5-0 to approve the guidelines submitted by the ESRB.[155] The FTC has already worked with major Alternative Dispute Resolution providers and has shown great respect for the ESRB in the past, considering them to have the best rating system in the entertainment sector.[156] A comprehensive ODR program promoting mediation for software licensing can potentially apply for a similar safe harbor and avoid further regulatory oversight.

The creation of this safe harbor can have another benefit for the Industry: protection from Attorney Generals ("AGs"). AGs have *parens patriae* authority to act on behalf of citizens of the state when enough of them have been negatively affected by corporate misfeasence.[157] Although there is some dispute about whether AGs are bound to agency principles—forcing them to abide by the individual arbitration clauses used in software licenses[158]—it is generally accepted that *parens patriae* suits are not subject to contractual constraints.[159] In fact, such AG lead legal actions allow circumvention of arbitration clauses that preclude class action suits.[160] *Parens patriae* authority is not derived from the relationship between AGs and the citizens of their states; instead, it arises when the injured party has no control of the litigation.[161] The Supreme Court has already held that government agencies are not barred from seeking damages when arbitration clauses prevent class members from litigation.[162] In *EEOC v. Waffle House, Inc.*, for example, employees were barred from participating in a class action suit based on their contract terms. In other words, it prevented them from "pursuing victim-

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155. *Id.*

156. *File a Privacy Shield Claim with JAMS*, JAMS, https://www.jamsadr.com/file-an-eu-us-privacy-shield-claim (last visited Mar. 16, 2023); Max Jay, *FTC: ESRB Has Most Effective Ratings Enforcement*, ESRB BLOG (July 1, 2018), https://www.esrb.org/blog/federal-trade-commission-finds-that-esrb-has-most-effective-ratings-enforcement/ (showing precedent for the FTC to work directly with alternative dispute providers).

157. Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 659 (2012) (detailing the ability for AGs to pursue claims on behalf of citizens).

158. *Id.* at 662.

159. *Id*. at 659.

160. *Id.*

161. *Id.*

162. *Id.*

specific judicial relief, such as backpay, reinstatement, and damages."[163] The Court ruled the United States Equal Employment Opportunity Commission ("EEOC"), acting on behalf of the class, could intervene without having to arbitrate individually.[164] As such, there is precedent for government actors to step in for software consumers and sidestep restrictive arbitration clauses.[165]

High-profile litigation has recently embroiled the Industry, and government actors have already targeted large interactive entertainment companies.[166] On July 20, 2021, California's Department of Fair Employment and Housing filed suit against Activision-Blizzard for workplace discrimination against female employees.[167] The bias was so pervasive that the EEOC stepped in to litigate on behalf of approximately 10,000 affected employees.[168] If AGs can sidestep arbitration clauses on behalf of consumers, entertainment companies face a severe liability for faulty software. Compliance and approval from the FTC through the creation of a mass mediation system can act as a protective shield from such claims.

D. Power for the People

For customers, any reimbursement for a regretted purchase will improve the current arbitration problem.[169] Currently, there is little oppor-

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163. EEOC v. Waffle House, Inc., 534 U.S. 279, 282 (2002) (showing precedent for AGs circumventing class action precluding employment contracts).

164. *Id.* at 291.

165. *Id.*

166. *See* Carolyn Casey, *Cyberpunk 2077 Investor Files Securities Class Action Lawsuit Against Game Developers,* EXPERT INST. (June 29, 2021), https://www.expertinstitute.com/resources/insights/cyberpunk-2077-investor-files-securities-class-action-lawsuit-against-game-developers/. *See also* Matt St. John, *The Most Controversial Lawsuits in Gaming History*, LOOPER (Aug. 6, 2021, 8:34 AM), https://www.looper.com/480419/the-most-controversial-lawsuits-in-gaming-history/; Smallwood v. NCSOFT Corp., 730 F. Supp. 2d 1213 (D. Haw. 2010) (collectively showing large amounts of litigation and high profile cases in the Industry for a variety of reasons).

167. Cynthia Littleton, *Activision Blizzard Sues California State Agency in Connection with Sexual Harassment Probes*, VARIETY (Dec. 8, 2022, 6:00 PM), https://variety.com/2022/biz/news/activision-blizzard-california-department-fair-employment-housing-lawsuit-1235454921/.

168. *Id.*

169. *See supra* Parts II & III (describing lack of redressability for consumers in software license disputes); Patrick Hearn, *How to Return PS4 and PS5 Games to the*

tunity for practical legal action, and direct refunds are also an ineffective means of redress.[170] Unlike many physical consumer purchases, software refunds through proprietary storefronts can become an arbitrary process wherein the company does not agree with the consumer's assessment of the product.[171] For example, the PlayStation Store offers refunds up to two weeks after a purchase, but denies refunds for downloaded and purchased products "unless the content is faulty."[172] The language controlling this refund process, specifically the word "faulty," is up for interpretation and was only added to the storefront in 2019.[173] For example, a particularly contentious game launch, *Cyberpunk 2077*, was considered broken by many consumers and public outrage resulted in the developer offering a full refund.[174] The developer's Twitter account directed buyers to the storefront through which they downloaded the game.[175] However, PlayStation did not consider the game faulty, nor did they develop or produce it, leading them to deny refunds.[176] Instead,

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PlayStation Store for a Refund, ONLINE TECH TIPS (Oct. 16, 2022), https://www.online-tech-tips.com/gaming/how-to-return-ps4-and-ps5-games-to-the-playstation-store-for-a-refund/ (explaining the return process on PlayStation's proprietary storefront).

170. *See supra* Parts I & II; Hearn, *supra* note 169.

171. Hearn, *supra* note 169.

172. *See How to request a refund on a PlayStation Store purchase*, PLAYSTATION, https://www.playstation.com/en-us/support/store/ps-store-refund-request/ (last visited Mar. 16, 2023) (providing Sony's official refund policy).

173. Owen S. Good, *Cyberpunk 2077's refund fiasco*, POLYGON (Dec. 17, 2020, 6:15 PM), https://www.polygon.com/2020/12/17/22179460/cyberpunk-2077-refunds-requested-refused-cd-projekt-red-xbox-playstation-gamestop.

174. Ryan Browne, *The developers of Cyberpunk 2077 are offering refunds after the game suffered major bugs on console*, CNBC (Dec. 18, 2020, 11:54 AM), https://www.cnbc.com/2020/12/14/cyberpunk-2077-cd-projekt-red-offers-refunds-after-console-game-bugs.html.

175. Cyberpunk 2077 (@CyberpunkGame), TWITTER (Dec. 13, 2020, 11:47 PM), https://twitter.com/CyberpunkGame/status/1338390123373801472?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1338390123373801472%7Ctwgr%5Ea6e3b79933e4bb5de5f7f3c0400cc56838f87ccf%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.polygon.com%2F2020%2F12%2F17%2F22179460%2Fcyberpunk-2077-refunds-requested-refused-cd-projekt-red-xbox-playstation-gamestop.

176. Koda (@ThatBoiKoda), TWITTER (Dec. 14, 2020, 9:33 AM), https://twitter.com/ThatBoiKoda/status/1338537607404396544?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1338537607404396544%7Ctwgr%5Ea6e3b79933e4bb5de5f7f3c0400cc56838f87ccf%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.polygon.com%2F2020%2F12%2F17%2F22179460%2Fcyberpunk-2077-refunds-requested-refused-cd-projekt-red-xbox-playstation-gamestop; Kim Lyons, *Cyberpunk*

customer service representatives at PlayStation suggested that consumers wait for the developer to fix the game's many issues and denied customer support claims.[177] The confusion caused by the developer's statement eventually forced Sony's hand, made PlayStation pull the game from its digital storefront, and issue refunds to avoid further backlash.[178] It took one of the most controversial and broken launches in video game history to make an exception to Sony's stringent refund policy. Even in extreme situations, refunds are challenging to obtain, necessitating a new and better means of redress.

The current system of arbitration also takes control from both the producers and consumers and is overly burdensome.[179] The relevant statutes and licensed arbitration providers' self-imposed rules and procedures govern disputes, which in turn creates a long, drawn-out system for consumers to navigate.[180] Mediation offers consumers more control through its use of information management.[181] Parties reach a voluntary agreement through effective communication without the formal, court-like requirements the FAA calls for.[182] Additionally, mediators must ensure the parties recognize the mediator's duties, understand the mediation process, and accept the terms of the settlement.[183] This alone favors the consumer over arbitration, as it stifles the ability of corporations with vast resources to game the system by choosing what attorneys and judges

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2077 full development reportedly didn't start until 2016, THE VERGE (Jan. 16, 2021, 6:24 AM), https://www.theverge.com/2021/1/16/22234452/cyberpunk-2077-development-2016-pc-console-projekt-red (showing what company developed *Cyberpunk 2077*).

177. Koda, *supra* note 176.

178. Jay Peters, *Sony is pulling Cyberpunk 2077 from the PlayStation Store and offering full refunds*, THE VERGE (Dec. 17, 2020, 5:13 PM), https://www.theverge.com/2020/12/17/22188007/sony-cyberpunk-2077-removed-playstation-store-full-refunds-policy.

179. Stipanowich, *supra* note 15, at 5.

180. *AAA court- and time-tested rules and procedures*, AM. ARB. ASS'N, https://www.adr.org/active-rules (last visited Nov. 20, 2022).

181. Pablo Cortes, *The Potential of Online Dispute Resolution as a Consumer Redress Mechanism* (July 6, 2007), https://ssrn.com/abstract=998865; Stipanowich, *supra* note 15, at 5.

182. Cortes, *supra* note 181; Stipanowich, *supra* note 15, at 5.

183. *Mediators Ethics Guidelines*, JAMS, https://www.jamsadr.com/mediators-ethics/ (last visited Nov. 15, 2022).

are used to arbitrate.[184] Accordingly, a system with set parameters can limit some of the favoritism that repeat players receive when having their disputes heard.[185] In addition, using a third party unregulated by strict procedure can bring a sense of fairness to the process.[186]

Mediation can also expedite the claims process, allowing consumers to see results quickly instead of contending with the long waiting periods typically experienced by consumers in mass arbitration actions.[187] ODR provides for the use of asynchronous communication, confidentiality, and immediacy.[188] The asynchronous nature of mediation means consumers can seek redress based on their schedules.[189] Automated asynchronous mediation also negates concerns such as travel costs and accommodations.[190] Moreover, the average internet user can navigate an automated resolution facilitator using nothing more than the skills required for standard internet services.[191]

In the scenarios discussed in Part I, concerning *Battlefield 2042* and *Fallout 76*, the cost of arbitration outweighs the benefits completely, making it unlikely the consumer will obtain any form of redress.[192] For example, the court in *Sutherland v. Ernst & Young LLP*, noted that the cost of arbitrating a single claim from one of the class participants would

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184. Thomas J. Stipanowich & Ryan Lamare, *Living with ADR: Evolving Perceptions and Use of Mediation, Arbitration, and Conflict Management in Fortune 1000 Corporations*, 19 HARV. NEGOT. L. REV. 1, 64 (2013).

185. Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CAL. L. REV. 1, 9 (2013) (explaining how arbitration favors those who have previously used the process).

186. Stipanowich & Lamare, *supra* note 184, at 8 (detailing how third parties create a sense of fairness for consumers in building trust in the mediation process); *see also supra* Part IV (describing the requirement of trust for successful mediation).

187. Corkery & Silver-Greenberg, *supra* note 8.

188. Cortes, *supra* note 181, at 4.

189. *Id.*

190. *See* Chandrasekher & Horton, *supra* note 185, at 26 (citing John Campbell, *Mis-Concepcion: Why Cognitive Science Proves the Emperors Have No Robes*, 79 BROOK. L. REV. 107, 143 (2013)) (noting the various costs that come with pursuit of arbitration).

191. Julio César Betancort & Elina Zlatanska, *Online Dispute Resolution (ODR): What Is It, and Is It the Way Forward?*, 79 INT'L J. OF ARB., MEDIATION, AND DISP. MGMT. 256, 261 (2013).

192. *See supra* Parts II & III (discussing difficulties in redress for software license consumers).

be more expensive than any individual payout they could receive.[193] As a result, the employees, still involved by the time the case was consolidated and proceeded to the Supreme Court, believed arbitration was too costly and ineffective, precluding redress.[194] ODR offers a free solution, with institutions such as eBay offering a complimentary service for buyers and sellers to resolve conflicts.[195]

V. METHODS OF ODR AND THE POTENTIAL OF BULK MEDIATION

In order for mediation to be done on a scale that effectively resolves the number of complaints seen in *Battlefield 2042*, *Fallout 76*, and *Cyberpunk 2077*, the current methods of ODR must be adapted to video game purchases. The Industry has a powerful lobbying arm in the ESA, with enough resources to outspend the National Rifle Association.[196] The implementation of ODR as a means of solving disputes using the ESA offers the potential to fairly control the process, similar to using the ESRB as an independent regulatory arm.[197] For this to be successful, there must be a sense of trust between the consumer and this new form of self-regulation.[198] Confidence in the mediation process facilitates participation and dispute settlement when dealing with consumers upset about their purchase.[199] In instances like the launch of *Fallout 76*, much of the frustration was aimed directly at developers, meaning it is unlikely that consumers would trust the developers enough to engage in such a process in good faith.[200] For mediation of software claims to be successful,

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193. Chandrasekher & Horton, *supra* note 185, at 3–4; Sutherland v. Ernst & Young LLP, 768 F. Supp. 2d 547, 552 (S.D.N.Y. 2011).

194. *Id.* at 5.

195. *See infra* Part V. (discussing the merits of eBay's ODR process).

196. Jeff Grubb, *The Entertainment Software Association outspends the NRA on lobbying politicians*, VENTURE BEAT (July 16, 2013, 11:40 AM), https://venturebeat.com/games/the-esa-outspends-the-nra-on-lobbying-politicians/.

197. Gaming Historian, *The Story of the ESRB*, YOUTUBE (Sept. 23, 2016), https://www.youtube.com/watch?v=Wv3HDVd22P8 (showing precedent for creative problem solving through use of the ESA's resources).

198. Noam Ebner, *ODR and Interpersonal Trust*, 11 HAGUE: ELEVEN INT'L PUBL'G 203 (2012).

199. *Id.* at 207.

200. *See supra* Part I (illustrating a lack of trust between developers and consumers).

"likeability, integrity, [and] neutrality" are essential.[201] Establishing a "credible neutral third-party" to mediate the process between developers, publishers, and consumers can accomplish this goal.[202] When choosing what form of ODR to use, trust and voluntary engagement will likely be critical to ensure success.

The high number of potential participants in software licensing mediation must also be considered. eBay has shown that the Industry can implement ODR systems to handle a volume in excess of civil filings in the United States.[203] The system designed for eBay required distinguishing dispute types to organize suitable resolutions.[204] These distinctions would vary widely, but are simplified into two categories: nonreceipt of the item ordered and the item arriving not as described.[205] However, eBay's ODR functions as a facilitator between two parties, and for the Industry to be successful in mediating software disputes, it would need to handle a class of consumers.[206] For software disputes in the video game industry, similar categories can be created, allowing large amounts of claims to be handled by a much smaller staff.[207] Unfortunately, this does not solve the problem of implementation.

To effectively implement online mediation, the Industry can embrace practices used by its greatest threats, including the automation of arbitration filings pioneered by FairShake, and the class action lawsuits the Industry has contracted away from. Where FairShake has developed a process to automate research and complete legal documents, the Industry can automate the process of filing a request for mediation.[208] Based on this model, consumers can show their product purchase, describe their issues with the software, and subsequently select what types of redress

201. Ebner, *supra* note 198, at 210.

202. Amy J. Schmitz & Colin Rule, *The New Handshake: Online Dispute Resolution and the Future of Consumer Protection* 1, 35 (Legal Stud. Rsch. Paper Series, Working Paper No. 2018-08, 2018).

203. *Id.* at 34.

204. *Id.* at 36.

205. *Id.*

206. *Id.* at 35; *supra* Part I (describing the large number of potential disputes).

207. Schmitz & Rule, *supra* note 202, at 35.

208. Alison DeNisco Rayome, *Overcharged by a tech company? New service could help get your money back*, CNET (Mar. 3, 2020, 7:00 AM), https://www.cnet.com/tech/services-and-software/overcharged-by-a-tech-company-new-service-could-help-get-your-money-back/.

would satisfy their claim.[209] One method of ODR allows for a fully-automated negotiation process wherein both parties submit a set number of offers which are then revealed if they are within a certain percentage or dollar amount of each other.[210] However, this method would be hard to implement when used in a mass mediation process, [211] so the aggregation of claims should be done in conjunction with more traditional methods of mediation in order to be manageable.

While companies adopted arbitration to avoid class action lawsuits and monetary loss, certain aspects of class actions should be utilized. One such aspect is setting a commonality requirement similar to Federal Rules of Civil Procedure Rule 23(b)(3) and requiring a strict commonality of claims.[212] This would require that the mediation participant has suffered the same injury, "central to the validity" of the claim, that can be resolved in a single action.[213] Rule 23(b)(3) also requires class members demonstrate that a "class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[214] Adapting this strategy, the Industry can require claimants be denied refunds prior to participating in automated mediation. Standardized forms may be used to gather the plaintiff's information regarding a claim, using a character limit and what type of redress the plaintiff believes they are owed.[215] Once forms are filled out by consumers, they can be automatically organized into more straightforward categories for ease of use by the system. Then, once they are sorted, the forms may be tested to see if they meet the standard borrowed from Rule 23(b)(3).[216] The software employed by the mediating body can "automatically impose and enforce rules" to "guarantee equal treatment and comprehensive compliance."[217]

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209. *Id.*

210. Cortes, *supra* note 181; Stipanowich, *supra* note 15, at 6.

211. *See supra* Part IV.C. (discussion on aggregation of claims through software application).

212. FED. R. CIV. P. 23(b)(3).

213. A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B. U. L. REV. 101, 106 (2013).

214. FED. R. CIV. P. 23(b)(3).

215. Ayelet Sela, *The Effect of Online Technologies on Dispute Resolution System Design: Antecedents, Current Trends, and Future Directions*, 21 LEWIS & CLARK L. REV. 635, 652 (2017).

216. *See* Schmitz & Rule, *supra* note 202, at 33–46.

217. Sela, *supra* note 215, at 657.

Essentially, this software can be used as a filter to remove dishonest actors, only allowing those with legitimate claims to proceed to the mediation process. Borrowing rules from class action procedures can ensure mass mediation claims are handled fairly for consumers while preventing producers from being mistreated.

It should be acknowledged that mediation may not always be the correct way to solve disputes. Companies can allow for redress while protecting their interests by including informal negotiation or mediation periods before compelled arbitration. Software service providers such as Hulu have already employed clauses requiring individual meet-and-confer dispute resolution procedures outside the legal system.[218] Video game providers can use this template and replace the requirement for informal negotiation with a requirement to participate in informal mediation.[219] Since mediation is not binding unless the parties agree on the settlement terms, they can compel arbitration if the mediation process does not bear fruit.[220] When consumers submit claims through the dedicated website, automated decision trees will allow mediators to "identify interests, develop strategies and generate resolution options."[221] The standardized collection of information helps identify uncontested issues amongst the parties and show what issues remain disputed.[222] This process will allow mass amounts of consumers to engage in the process and, due to the difficulty of finding redress by other means, accept the form of compensation offered.

CONCLUSION

The Industry has been celebrated for its melding of art and technology. The Industry's growth from small startup companies to major corporations has led the entertainment sector in innovation and profits and has created, not just a shift in the medium of entertainment, but in popular culture. This innovation has created new legal questions ranging from the meaning of the First Amendment to consumer protection concerns. It has been at the forefront of a new online marketplace through proprietary

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218. *Hulu Subscriber Agreement*, HULU (Oct. 24, 2022), https://www.hulu.com/terms.

219. *Id.* (showing the use of mediation before arbitration in a software license).

220. Cortes, *supra* note 181; Stipanowich, *supra* note 15, at 29.

221. Sela, *supra* note 215, at 655.

222. *Id.* at 656.

digital storefronts. Such growth has been built on the e-commerce boom of the past fifteen years and is predicted to continue at a stellar rate in the future. However, this expansion has come at a cost to consumers and their ability to assert their rights to fair reimbursement for faulty products. For electronic entertainment to reach its full potential and continue to break barriers in the future, it must allow for monetary compensation to its consumers as "only after users of online marketplaces can obtain redress will the real potential of e-commerce be achieved."[223]

James Thomas[*]

223. Cortes, *supra* note 181, at 1 (quoting COLIN RULE, ONLINE DISPUTE RESOLUTION FOR BUSINESS 89 (1st ed. 2002)).

* J.D. Candidate, California Western School of Law, 2024; Associate Writer, *California Western Law Review*; B.A. San Diego State University, 2010. I would like to express my sincere gratitude to Chelsey Barkley, Marshall Fern, and the entire editorial team for their hard work and support. Thanks to Professor Smythe for his guidance and good nature during the writing process; Professor Vavasour for his mentorship and encouragement; Jessica Gross for her enthusiasm and knowledge; my parents, Dave and Beth, for their enduring love and support; and my beautiful wife, Stephanie, for believing in me and providing unconditional love, patience, and infinite joy.