



NOTE

**DIGITAL GRAVEYARDS: ADDRESSING VIDEO  
GAME OBSOLESCENCE THROUGH A  
PRESERVED GAMES MANDATE**

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*For years, the legal structure of the video game industry has rested on the idea that consumers do not buy games but rather purchase licenses to access them. As the industry has shifted toward always-online games and online multiplayer, this minor distinction has transformed from a technicality into a tool for product obsolescence. Through an analysis of case law and video game history, this Note examines the widening gap between consumer expectations of digital ownership and the restrictive realities of modern user license agreements. Central to this argument is the observation that market-based mechanisms such as litigation and consumer outrage have failed to sufficiently deter these practices. Lastly, this Note evaluates the limitations of emerging state legislation, such as California's Assembly Bill 2426, and advocates for more than just a disclosure-based framework. Specifically, the Note proposes a statutory preserved game mandate, requiring publishers to provide offline or peer-to-peer patches upon server closure and discusses the economics of providing those patches. Without such intervention, the gaming landscape risks becoming a graveyard of purchased goods that exist only at the whim of corporate lifespans.*

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## TABLE OF CONTENTS

I.	INTRODUCTION.....	585
II.	PURCHASED BUT NOT OWNED: THE COLLISION OF COPYRIGHT LAW AND VIDEO GAMES.....	588
	A. <i>Physical Media and the History and Scope of the First Sale         Doctrine.....</i>	588
	B. <i>How EULAs Transformed Video Games into Licenses.....</i>	590
	C. <i>Scholarly Criticism and Alternative Judicial Approaches.....</i>	592
	D. <i>Advertising a Revocable License as a Permanent Product.....</i>	593
III.	GAAS-LIGHTING THE CONSUMER: HOW GAMES AS A SERVICE AND DIGITAL RIGHTS MANAGEMENT BECAME THE NORM...	594
IV.	ERASURE: CASE STUDIES IN VIDEO GAME OBSOLESCENCE....	597
	A. <i>Racing Towards Erasure: The Crew Shutdown and the Failure         of Litigation.....</i>	597
	B. <i>The Shot Clock Expires: 2K Sports and the Precarious Nature of         In-game Purchases.....</i>	598
	C. <i>Games Never Die (Until the Sequel): Forced Migration and the         Failure of Fan Outrage.....</i>	601
V.	CURRENT LEGISLATIVE RESPONSES TO DIGITAL OBSOLESCENCE.....	603
	A. <i>Why Warning Labels Fail: California Assembly Bill 2426 and         Other State Actions.....</i>	603
	B. <i>Stop Killing Games: European Union Petition.....</i>	606
VI.	THE PRESERVED GAME AND STATUTORY REMEDIES FOR THE END OF VIDEO GAMES.....	607
	A. <i>The Offline Mandate: Requiring Preservation Patches for         Online Video Games.....</i>	607
	B. <i>The Penalty: Requiring Open Sourcing of Abandoned Games         .....</i>	608
VII.	THE VIDEO GAME PUBLISHER’S INCENTIVE: TURNING DEAD GAMES INTO PASSIVE INCOME AND LITIGATION SHIELDS.....	609
	A. <i>Preservation Patches and Removing the Damage Element of         Legal Action.....</i>	610
	B. <i>How Game Publishers Can Turn Dead Video Games into         Passive Income.....</i>	611
	C. <i>Goodwill on the Balance Sheet: Increasing Acquisition Value         through Consumer Loyalty.....</i>	613

DIGITAL GRAVEYARDS

D. Preempting the European Union: Setting the Standard Before Regulators Do..... 614
VIII. CONCLUSION .....614

I. INTRODUCTION

Imagine you purchase an old pinball arcade machine.1 You take it home, set it up in your basement, and despite it being a couple of years old, the machine still plays perfectly.2 You enjoy spending your evenings kicking the bumpers, watching the ball ricochet, and running up personal best scores.3 A few months later, you go down to your basement for a little pinball action.4 However, you discover that the pinball machine manufacturer has snuck into your home, removed the paddles, and taken out all the buttons.5 The monitor that once displayed your high score now proudly displays "Thanks for playing! Upgrade to the Newest Version of Pinball."6 You paid a significant amount of money for this pinball machine just a few months ago. While a pinball manufacturer breaking into your home and making your machine inoperable would raise eyebrows, it is not unlike what happened to owners of the popular online racing video game, The Crew.7

On March 31, 2024, video game publisher Ubisoft Inc. shut down the online servers for The Crew.8 The Crew was launched in 2014 and cost \$59.99 for a physical disc that could be played on multiple gaming consoles and home personal computers.9 Now that the servers are

1. See Complaint at 1-2, Cassell, et al. v. Ubisoft, Inc., No. 25CV014305 (E.D. Cal. Nov. 4, 2024), https://www.pacermonitor.com/public/filings/DFKSKDEQ/Cassell\_et\_al\_v\_Ubisoft\_Entertainment\_SA\_et\_al\_caedce-24-03058\_0001.o.pdf [https://perma.cc/5ZJR-L8H7].

2. See id.

3. See id.

4. See id.

5. See id.

6. See id.

7. See id.

8. Id.

9. Samit Sarkar, The Crew Launching Fall 2014, Two Editions Now Up for Pre-order, POLYGON (Apr. 8, 2014, at 14:30 ET), footnote continued on next page

offline, anyone who owns a physical disc of *The Crew* encounters an error message upon inserting the disc and cannot access gameplay.<sup>10</sup> Anyone who purchased a digital version of the game had it removed from their library of games, unable to even see that they once owned it.<sup>11</sup> Ubisoft has subsequently released multiple sequels to *The Crew*, even while the original remains unplayable.<sup>12</sup>

*The Crew* is far from the only example of this forced obsolescence. 2K Games is the maker of the popular sports games *NBA 2K* (professional basketball), *WWE 2K* (professional wrestling), and *PGA Tour 2K* (professional golf).<sup>13</sup> Each year, 2K releases a new version of its sports games while also retiring the servers of older versions, thereby terminating online game features and functionality.<sup>14</sup> In addition to the retail price of the game, 2K Games sells virtual currency (“VC”), which allows consumers to upgrade their experience for real money.<sup>15</sup> When a publisher retires a game, consumers typically lose all of their in-game purchases and upgrades, often totaling hundreds to thousands of dollars.<sup>16</sup>

The video game industry is now larger than the film, music, and book publishing industries combined, but that has not stopped numerous video game publishers from shutting down their games or severely limiting service in recent years.<sup>17</sup> Publishers shut down over

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<https://www.polygon.com/2014/4/8/5594220/the-crew-release-window-fall-2014-pre-order-two-editions/> [https://perma.cc/PH7H-AR2G].

10. Matt Wales, *Ubisoft Reportedly Revoking The Crew from Owners’ Libraries Following Server Shutdown*, EUROGAMER (Apr. 23, 2024), <https://www.eurogamer.net/ubisoft-reportedly-revoking-the-crew-from-owners-libraries-following-server-shutdown> [https://perma.cc/GMB2-9HW4].

11. *Id.*

12. *The Crew (Series)*, FANDOM WIKI, [https://thecrew.fandom.com/wiki/The\\_Crew\\_\(Series\)](https://thecrew.fandom.com/wiki/The_Crew_(Series)) (last visited Feb. 2, 2026) [https://perma.cc/Q7SZ-GJY5].

13. Complaint at 2, *J.A. v. 2K Games, Inc. et al*, No. 3:23CV05961 (N.D. Cal. Nov. 4, 2024), <https://storage.courtlistener.com/recap/gov.uscourts.cand.421038/gov.uscourts.cand.421038.1.o.pdf> [https://perma.cc/DXV7-B4FU].

14. *Id.*

15. *Id.* at 4.

16. *Id.*

17. Jack Caporal, *Video Game Spending Statistics*, MOTLEY FOOL (Sep. 22, 2025), <https://www.fool.com/money/research/video-game-spending-statistics/> [https://perma.cc/6WSS-LVTG].

## DIGITAL GRAVEYARDS

sixty games just in 2023,<sup>18</sup> which joined the over six hundred games that are either dead or fan-preserved.<sup>19</sup> Other game developers have avoided outright shutdown by restricting use, such as the online multiplayer game *Destiny*, which continued service but made purchased content inaccessible for users.<sup>20</sup> Similarly, Blizzard discontinued online hero-shooter *Overwatch* to release its free-to-play and more aggressively monetized sequel, *Overwatch 2*.<sup>21</sup> The coming years will be paramount for preservation, as the Stop Killing Games Initiative has labeled another 430 currently available games as “at risk with no end of life plan.”<sup>22</sup>

This Note addresses digital ownership of video games in an era where nearly all games have online features subject to sudden shutdown and erasure. Part II will discuss the origins of the first sale doctrine and how online video games have mostly been exempted in favor of following the same rules as software licensing, applicable to ebooks, digital music, and digital movies as well. Part III will discuss how the always-online infrastructure of video games makes them

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18. Levi Winslow, *60 Games Have Already Been Killed, and 2023 Ain't Over yet [Update]*, KOTAKU (Nov. 28, 2023), <https://kotaku.com/dead-games-2023-delisted-servers-offline-1850083031>.

19. See *Dead Game List*, STOP KILLING GAMES WIKI, [https://stopkillinggames.wiki.gg/wiki/Dead\\_game\\_list](https://stopkillinggames.wiki.gg/wiki/Dead_game_list) [<https://perma.cc/FC4K-7GY9>] (last visited Mar. 18, 2026). The Stop Killing Games Initiative keeps an incomplete list of dead or unplayable games due to server shut down. There are 440 dead games that cannot be played in any manner, and 196 games which can only be played via unofficial, fan made support patches that are not sanctioned or approved by the original publisher. *Id.* Fan-preserved patches are likely a violation of copyright law; thus they are not a sufficient long-term solution to the problem of inaccessible games. See *Gaming Mods and Copyright*, MICH TECH. L. REV. <https://mttlr.org/2012/11/gaming-mods-and-copyright/> [<https://perma.cc/QPF2-KSC7>] (last visited Apr. 13, 2026).

20. Tom Phillips, *Destiny 2's Unpopular Removal of Older Game Content Now Hampering Bungie's Ability to Defend Plagiarism Lawsuit*, EUROGAMER (May 6, 2025), <https://www.eurogamer.net/destiny-2s-unpopular-removal-of-older-game-content-now-hampering-bungies-ability-to-defend-plagiarism-lawsuit> [<https://perma.cc/E34Y-ZEMB>].

21. Alyssa Mercante, *The Final Hours of Overwatch 1: An Unhinged Sendoff for a Multiplayer Legend*, GAMESRADAR (Oct. 3, 2022), <https://www.gamesradar.com/the-final-hours-of-overwatch-1-an-unhinged-sendoff-for-a-multiplayer-legend/> [<https://perma.cc/YL8C-K52A>].

22. STOP KILLING GAMES WIKI, *supra* note 19.

uniquely vulnerable to service shutdown. Part IV will discuss the failure to protect video games as illustrated by *Cassell v. Ubisoft*, where players lost the ability to play physical discs they purchased; *J.A. v. 2K Games*, a case where a minor lost access to significant purchases made with in-game currency; and, lastly, this Part will discuss the story of *Overwatch 2* and the consumer backlash. Part V will discuss how some states, such as California, are responding with statutory remedies and contemplate the future impact of the Stop Killing Games Petition in the European Union, which received over one million signatures. Part VI will argue that the law should statutorily require disclosure-based law but also a preserved state of the game or product. Finally, Part VII will argue that game publishers would benefit from creating preservation patches by (1) reducing any damage claims in litigation; (2) extending the revenue tail of video games; (3) improving consumer goodwill which increases company value; and (4) preempting any regulatory changes or requirements, specifically in the European Union. Ultimately, without immediate action by legislatures, the video game graveyard will continue growing as gamers lose access to their games and purchases.

## II. PURCHASED BUT NOT OWNED: THE COLLISION OF COPYRIGHT LAW AND VIDEO GAMES

### A. *Physical Media and the History and Scope of the First Sale Doctrine*

Before discussing how video games are different than other forms of media, it is crucial to understand how most media are protected under copyright laws. Copyright is a legal way of protecting expression.<sup>23</sup> It protects poetry doodled on the back of a napkin, a selfie taken with friends, and blockbuster online video games.<sup>24</sup> Copyright is automatic, though the United States Copyright Office says the best practice is to file a copyright with its office.<sup>25</sup> Copyright law provides

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23. See, e.g., *What is Copyright?*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/what-is-copyright/> [https://perma.cc/RJU9-B99C] (last visited Mar. 1, 2026).

24. See *id.*

25. See *id.* (discussing why it is best practice to file a registration with the copyright office as it can make it much easier to litigate copyright claims and allows certain types of damages unavailable without registration).

## DIGITAL GRAVEYARDS

that no one may make a copy or otherwise infringe the copyright of another unless protected by specific exceptions.<sup>26</sup>

A copyright holder necessarily gives up some control over their copyright when they sell copies of the copyrighted work.<sup>27</sup> That giving up of rights is called *exhaustion*, which has been recognized since the early 1800s in the United States.<sup>28</sup> As an early example of this theory, Mark Twain originally planned to sell *The Adventures of Huckleberry Finn* exclusively through a bookselling subscription service.<sup>29</sup> However, Twain's plan was interrupted when book distributors began selling his books directly to bookstores.<sup>30</sup> Twain sued the book distributors, leading to a legal showdown.<sup>31</sup> The court ultimately sided with the book distributors, reasoning "that since they owned the books they bought from Twain, the distributors were free to sell them to whoever they chose."<sup>32</sup> Shortly after, Congress would enshrine this principle in statute, known as the first sale doctrine.<sup>33</sup> The original law "provided that 'nothing in this Act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained.'"<sup>34</sup> When Congress overhauled the Copyright Act in 1976, it retained the first sale rule in a slightly modified form that remains in effect today.<sup>35</sup>

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26. *Definitions*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/help/faq/faq-definitions.html> [<https://perma.cc/D9KM-PLM2>] (last visited Mar 1, 2026). For a discussion of the exceptions to copyright laws, such as fair use, see *Exceptions & Limitations to Copyright*, UNIV. ARIZ. UNIV. LIB., <https://libguides.library.arizona.edu/copyright/exceptions> [<https://perma.cc/U9G9-H37G>] (last visited Mar. 1, 2026).

27. AARON PERZANOWSKI & JASON SCHULTZ, *THE END OF OWNERSHIP: PERSONAL PROPERTY IN THE DIGITAL ECONOMY* 25 (2016) <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1114&context=books> [<https://perma.cc/FF9K-ZYUH>].

28. *Id.* at 26.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 27.

34. *Id.*

35. *Id.*; 17 U.S.C. § 109 (2025).

Currently, when someone purchases a physical copyrighted product, such as a book, the first sale doctrine applies.<sup>36</sup> The modern first sale doctrine is codified under 17 U.S.C. § 109 and provides that an “individual who knowingly purchases a copy of a copyrighted work from the copyright holder receives the right to sell, display or otherwise dispose of that particular copy, notwithstanding the interests of the copyright owner.”<sup>37</sup> When a customer purchases a physical book, Compact Disc (“CD”), or Digital Versatile Disc (“DVD”), they may sell it, lend it to a friend, or even destroy it, so long as they do not reproduce the copyrighted item.<sup>38</sup> Despite being similar to DVDs, and even sometimes sold on DVDs, video games and software have been mostly exempt from the first sale doctrine, as discussed in the next section.

### B. *How EULAs Transformed Video Games into Licenses*

Video game ownership is different from many other types of physical media. Video game publishers have strongly pushed for exceptions to the first sale doctrine for video games, even calling “the used market a bigger threat than piracy . . . [and] the industry’s undoing if gamers continue to resell their \$60 video games after finishing them.”<sup>39</sup> To circumvent any first sale claims, video game publishers began selling video games as licenses and wrapping them in restrictive license agreements.<sup>40</sup>

Courts generally treat software differently than other forms of physical media in copyright cases. The Ninth Circuit case *Vernor v.*

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36. 1854 *Copyright Infringement — First Sale Doctrine*, U.S. DEPT. JUST., [www.justice.gov/archives/jm/criminal-resource-manual-1854-copyright-infringement-first-sale-doctrine](http://www.justice.gov/archives/jm/criminal-resource-manual-1854-copyright-infringement-first-sale-doctrine) [<https://perma.cc/86AH-WABZ>] (last visited Feb. 02, 2026).

37. *Id.*

38. *Id.*; *First Sale Doctrine in Trademark and Copyright Law*, BONA LAW, <https://www.bonalaw.com/insights/legal-resources/first-sale-doctrine-in-trademark-and-copyright-law> [<https://perma.cc/HM3B-7XYF>] (last visited Feb. 02, 2026).

39. PERZANOWSKI & SCHULTZ, *supra* note 27, at 31.

40. Alice J. Won, *Exhausted? Video Game Companies and the Battle Against Allowing the Resale of Software Licenses Allowing the Resale of Software Licenses*, 33 PEPPERDINE J. NAT. ADMIN L.J. 388, 405–06 (2013).

## DIGITAL GRAVEYARDS

*Autodesk*<sup>41</sup> (“*Vernor*”) is pivotal in distinguishing software from other copyrighted works.<sup>42</sup> In *Vernor*, the plaintiff was purchasing and reselling Autodesk computer software discs that had been purchased legally from a previous owner.<sup>43</sup> The court held “that a software user is a licensee rather than an owner of a copy where the copyright owner (1) specifies that the user is granted a license; (2) significantly restricts the user’s ability to transfer the software; and (3) imposes notable use restrictions.”<sup>44</sup> In *Vernor*, the court determined that the original purchaser was merely a licensee of the software and, therefore, any subsequent transfers were impossible without Autodesk’s permission.<sup>45</sup> In summary, the original purchaser was only licensing the Autodesk software, and the subsequent purchaser was not an owner, despite legally purchasing the discs.<sup>46</sup>

Further cases have extended the rule of software licensing in *Vernor* to online video games. In *MDY Industries, LLC v. Blizzard Entertainment, Inc.*,<sup>47</sup> the game publisher, Blizzard, sued MDY Industries, a company that unleashed bots into *World of Warcraft* on the purchaser-players’ behalf.<sup>48</sup> Following the precedent in *Vernor*, the court held that *World of Warcraft* players were licensees, not owners, of the software.<sup>49</sup> Because Blizzard’s End User License Agreement (“EULA”) imposed significant restrictions on use and distribution, the users did not even own the game files on their hard drives but were instead licensing the game.<sup>50</sup> Furthermore, since the purchaser must connect to Blizzard’s servers to play the game, any code stored locally on a user’s computer is entirely unplayable without the servers.<sup>51</sup>

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41. 621 F.3d 1102 (9th Cir. 2010).

42. *Id.* at 1109.

43. *Id.* at 1106.

44. *Id.* at 1109.

45. *Id.* at 1116.

46. *Id.*

47. 629 F.3d 928 (9th Cir. 2010).

48. *Id.* at 938.

49. *Id.* at 939.

50. *Id.*

51. *Id.*

In *MDY v. Blizzard*, the Ninth Circuit drew a sharp distinction between breaching a contract and infringing copyright.<sup>52</sup> The court established that for MDY's violation to constitute copyright infringement, there must be a "nexus" to the licensor's exclusive statutory rights, such as right of reproduction.<sup>53</sup> Because the ban on bot usage in Blizzard's EULA did not implicate Blizzard's exclusive statutory rights to reproduction, players using the bots were committing a breach of contract, not copyright infringement.<sup>54</sup> While the court shielded these modifications from copyright violation penalties, the ruling validated the industry's strategy of using restrictive EULAs to circumvent consumer software ownership.

### C. Scholarly Criticism and Alternative Judicial Approaches

Scholars criticize the *Vernor* decision for its ownership implications and have often contrasted it with the Second Circuit's more holistic approach to software. Critics argue that it is a ridiculous result for a one-time purchase to be akin to a license agreement simply because the seller uttered "a few key phrases."<sup>55</sup> Going further, "[u]nder the [*Vernor*] court's test, copyright holders can defeat the buyer's property claim by objecting to resale and lending [in the User Terms of Service]."<sup>56</sup>

Though there is no current circuit split, prior to *Vernor*, other courts, such as the Second Circuit, were more skeptical of the broad latitude given to software licensors.<sup>57</sup> The Second Circuit noted, "it seems anomalous for a user whose degree of ownership of a copy is so complete that he may lawfully use it and keep it forever . . . to be nonetheless unauthorized to fix . . . or to make an archival copy . . ."<sup>58</sup> While this reasoning might imply a different result than *MDY v. Blizzard*, the holding is likely limited to the right to repair software rather than a broad application of the first sale doctrine since this

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52. *Id.*

53. *Id.* at 941.

54. *Id.* at 939.

55. PERZANOWSKI & SCHULTZ, *supra* note 27, at 76.

56. *Id.*

57. *Krause v. Titleserv, Inc.*, 402 F.3d 119, 123 (2d Cir. 2005).

58. *Id.*

## DIGITAL GRAVEYARDS

ruling predates most electronic media.<sup>59</sup> The Second Circuit has also found that someone who pays a one-time fee is more likely to be an owner than someone whose access depends on ongoing payments.<sup>60</sup>

Regardless, no recent courts have taken up the question of whether modern online video games fall strictly under these software licensing rules. Irrespective of how any future circuits might rule, it is impracticable to leave ownership of online video games as a geographical difference. It is an absurd result that someone in California would not own their disc of *The Crew*, while someone in Vermont would since they are governed by different circuits.

Similarly, video game publishers would likely demand consistency across jurisdictions. Ruling against companies that have built massive digital storefronts would upend current business practices on the assumption that they are correctly following current copyright rules. Given the massive reliance on the current rules, it seems likely a circuit split will not develop. Therefore, Congress will need to take statutory action if there is to be any meaningful copyright reform in online video games.

### D. Advertising a Revocable License as a Permanent Product

Despite the legal differences, online video games are typically advertised in the same way as a first sale product like a book. Most products, whether books or video games, use the same general language on online retailers such as “Buy Now” or “Add to Cart,” often without specifying that a purchase might just be a license.<sup>61</sup> Consumers own physical books indefinitely, and publishers possess essentially no practical mechanism to revoke that ownership. Despite the legality of ownership being different, game publishers often advertise video games in the same way as books. As an example, Ubisoft’s Amazon

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59. See *id.*

60. PERZANOWSKI & SCHULTZ, *supra* note 27, at 77.

61. Compare *The Crew - Xbox 360*, AMAZON, <https://www.amazon.com/Crew-Xbox-360/dp/BooMXENWQo> [<https://perma.cc/XBU4-GJX7>] (last visited Feb. 02, 2026) (showing the same page for a video game covered by a EULA); with ALEXA CHEW & KATIE ROSE PRIYAL, *THE COMPLETE LEGAL WRITER* (2d ed. 2020), <https://www.amazon.com/Complete-Legal-Writer-Second/dp/1531019420> [<https://perma.cc/ZN2S-ZPBM>] (last visited Mar. 1, 2026) (showing a textbook covered by the first sale doctrine).

page for *The Crew* contains no disclosure or warning that the game is merely being purchased as a license.<sup>62</sup> Juxtaposing *The Crew* with a physical textbook *The Complete Legal Writer*—unambiguously covered by the first sale doctrine—reveals that storefronts often market both products without any material distinction. Notwithstanding the lack of disclosures on Amazon, Ubisoft outlines in its EULA its right to terminate the online game at any time for essentially any reason.<sup>63</sup> This discrepancy between expectations and the reality of video game licenses is elevated in the case of video games as discussed in the next section.

### III. GAAS-LIGHTING THE CONSUMER: HOW GAMES AS A SERVICE AND DIGITAL RIGHTS MANAGEMENT BECAME THE NORM

To understand why a physical disc can be rendered unusable overnight, one must examine the architectural evolution of modern gaming. This transformation shows exactly how the transition to a digital licensing framework uniquely impacts video games. Online video games conjure different pictures to different people. Many people picture fantasy massively multiplayer games like *World of Warcraft*, with clan members collaboratively taking down “raid” bosses.<sup>64</sup> Others might think of the world’s largest local area network (“LAN”) party in Sweden, where over eight thousand people brought computers and connected them to play games together.<sup>65</sup> Perhaps some think only of teenagers playing first person shooter *Halo* after school. These examples are only a small snapshot of the overall online video

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62. *The Crew - Xbox 360*, AMAZON, <https://www.amazon.com/Crew-Xbox-360/dp/BooMXENWQo> [<https://perma.cc/XBU4-GJX7>] (last visited Feb. 02, 2026).

63. *End User License Agreement*, UBISOFT (Jan. 1, 2023), <https://www.ubisoft.com/legal/documents/eula/en-US> [<https://perma.cc/E9BN-5H93>].

64. Ryan Filliam, *The 8 Most Memorable Moments from World of Warcraft Boss Fights (For Better or Worse)*, POLYGON (Feb. 26, 2020), <https://www.polygon.com/2020/2/26/21153218/world-of-warcrafts-biggest-final-boss-expansions-nzoth-kiljaeden-arthas-deathwing-garrosh-archimond> e/ [<https://perma.cc/E9BN-5H93>].

65. *Largest LAN Party*, GUINNESS BOOK OF WORLD RECORDS, <https://www.guinnessworldrecords.com/world-records/largest-lan-party> [<https://perma.cc/LEL6-UJQX>] (last visited Mar. 2, 2026).

## DIGITAL GRAVEYARDS

game industry. Of course, online multiplayer video games require an internet connection by definition. However, many modern single-player video games also require a constant internet connection.<sup>66</sup> For example, one game requires an internet connection to watch story scenes between missions, and another requires an online connection in order to “save, access certain game modes, gain experience, and more.”<sup>67</sup>

This always-online requirement has been dubbed Digital Rights Management (“DRM”).<sup>68</sup> DRM “requires a user to remain connected to the company’s server in order to access [the company’s] product.”<sup>69</sup> Typically, “[a]ccess is controlled through a variety of methods, including permission management and encryption, and DRM has been used by many major companies . . . .”<sup>70</sup> Everyone from law journals<sup>71</sup> to video game selling storefronts<sup>72</sup> has criticized the use of DRM in video games.

Another change in the video game industry that separates online video games from other digital media is the shift to Games as a Service (“GaaS”).<sup>73</sup> These games are offered as a one-time purchase, or sometimes even for free, and include aggressive monetization methods, such as in-game purchases, to sustain future development and content.<sup>74</sup> This rise has also corresponded with the increase in

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66. Evelyn Meyer, *10 Single Player Games that Need Internet*, GAMER (Mar. 5, 2023), <https://www.thegamer.com/single-player-games-that-require-internet/> [https://perma.cc/842Z-SSF2].

67. *Id.*

68. Olivia Yoon, *Always Online DRM and Video Games*, CARDOZO ARTS & ENT. J. (Sep. 27, 2021), <https://cardozoelj.com/2021/09/27/always-online-drm-and-video-games/> [https://perma.cc/6ARK-JREM].

69. *Id.*

70. *Id.*

71. *Id.*

72. Jędrzej Kunat, *How DRM in Video Games can Hurt Your Privacy*, GOOD OLD GAMES (Nov. 2024), <https://www.gog.com/blog/how-drm-in-video-games-can-hurt-your-privacy/> [https://perma.cc/2SFG-NT7W].

73. Mario Stefanidis, *The Rise of Gaming as a Service*, ROUNDHILL INV. (Oct. 30, 2020), <https://blog.roundhillinvestments.com/the-rise-of-gaming-as-a-service> [https://perma.cc/F3CQ-XHS6].

74. *Id.*

“validation discs.”<sup>75</sup> Previously, a consumer could purchase a game on a disc that included the full game, but that is no longer always true.<sup>76</sup> In fact, if a disc is offered at all, it often just includes a validation key to download the full game from the servers.<sup>77</sup> One recent game disc included only seventy megabytes of data, a fraction of its 150-gigabyte download.<sup>78</sup> Games rarely come on the disc and often require a persistent online connection, resulting in a dramatic shift in the gaming industry.

Always-online DRM and validation discs place games in a unique situation compared to other digital media. Though courts have applied a licensing framework to other electronic media such as ebooks, MP3 music, and online videos,<sup>79</sup> there is a key distinction. In most cases, an ebook, digital album, or movie can still be consumed offline.<sup>80</sup> A digital book user can, in theory, happily read their ebook long after the server they downloaded it from shuts down.<sup>81</sup> But a video game user is left with a useless disc that is no better than a coaster. Therefore, a shutdown can have very different outcomes for consumers depending on the media. While ebooks users are still impacted, video game consumers are uniquely harmed since there is no plausible way to continue using the media. Because of that, video game shutdowns can lead to litigation and fan outrage, unfortunately leaving gamers with little remedy.

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75. Derek Garcia, *You're Not Buying Video Games, You're Buying IOUs*, SCREEN RANT (Nov. 13, 2022, at 10:00 ET), <https://screenrant.com/video-game-physical-disc-validation-key-digital-download/> [<https://perma.cc/Q6VT-ERCG>].

76. *See id.*

77. *See id.*

78. *See id.*

79. *First Sale (or Exhaustion) Doctrine in Copyright*, UNIV. MASS. AMHERST LIBRS., <https://websites.umass.edu/copyright/copyright-basics/first-sale/> [<https://perma.cc/MED8-9TG8>] (last visited Mar. 2, 2026).

80. *See generally* Andrew Liszewski, *Amazon's Killing a Feature that Let You Download and Backup Kindle Books*, THE VERGE (Feb. 14, 2025, at 16:59 ET), <https://www.theverge.com/news/612898/amazon-removing-kindle-book-download-transfer-usb> [<https://perma.cc/M4TG-9LCJ>] (noting that Kindle books are generally useable offline though Amazon has taken steps to restrict this recently such as discontinuing the ability to back-up the book and even remotely deleting books from Kindles connected to the internet).

81. *Id.*

## IV. ERASURE: CASE STUDIES IN VIDEO GAME OBSOLESCENCE

Courts applying software licensing rules to online video games have created massive concerns with consumer property rights. This Note will evaluate three cases to demonstrate the consequences of applying software licensing rules to online video games: (1) the shutdown of Ubisoft's *The Crew*; (2) the shutdown of multiple 2K Sports products and the loss of in-game purchases; and (3) the forced migration of *Overwatch* to *Overwatch 2*. The first two cases gave rise to litigation, and the third situation spawned consumer backlash. All three will demonstrate how the current law is ineffective in protecting consumers.

A. *Racing Towards Erasure: The Crew Shutdown and the Failure of Litigation*

In 2024, Ubisoft shut down the online servers of *The Crew*, a popular racing game.<sup>82</sup> Litigants sued Ubisoft for various forms of fraud.<sup>83</sup> The crux of the argument was that, because *The Crew* had included a code for add-on content in the box that did not expire until 2099, customers assumed that Ubisoft was guaranteeing the game would be playable until 2099.<sup>84</sup> Ubisoft replied, referencing the terms on the packaging saying, "Ubisoft can revoke access to the game upon prior notice, thus indicating that purchasers were obtaining a limited license."<sup>85</sup> Consequently, the purchasers should have no reasonable belief they owned the game.<sup>86</sup> The plaintiffs would voluntarily dismiss their claims just two days later.<sup>87</sup> Though no formal reason was given

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82. Complaint at 1, Cassell, et al. v. Ubisoft, Inc., No. 25CV014305 (E.D. Cal. 2024), <https://storage.courtlistener.com/recap/gov.uscourts.caed.455496/gov.uscourts.caed.455496.i.o.pdf> [https://perma.cc/6ERN-926X].

83. *Id.*

84. *Id.* at 26.

85. Reply at 12–13, Cassell, et al. v. Ubisoft, Inc., No. 25CV014305 (E.D. Cal. 2024), [https://storage.courtlistener.com/recap/gov.uscourts.caed.455496.22.o.pdf](https://storage.courtlistener.com/recap/gov.uscourts.caed.455496/gov.uscourts.caed.455496.22.o.pdf) [https://perma.cc/5QZD-FN3R].

86. *Id.* at 13.

87. Plaintiff Notice of Voluntary Dismissal without Prejudice at 1–2, Cassell, et al. v. Ubisoft, Inc., No. 25CV014305 (E.D. Cal. 2024), [https://storage.courtlistener.com/recap/gov.uscourts.caed.455496.23.o.pdf](https://storage.courtlistener.com/recap/gov.uscourts.caed.455496/gov.uscourts.caed.455496.23.o.pdf) [https://perma.cc/D5H3-ZF2W].

or is available in public records, it seems reasonable to infer that clearing the licensing hurdle set out by Ubisoft would prove difficult.<sup>88</sup>

Critics have raised concerns that game publishers making games unplayable after purchase by a consumer is atypical in the history of the industry.<sup>89</sup> Much older games than *The Crew* can still be played, provided the customer owns the disc and the console. One commentator said the shutdown of *The Crew* felt no different than “sending hired goons to my house to confiscate my old copies of *Colin McRae*<sup>90</sup> [racing].”<sup>91</sup> If gamers just want a way to continue playing the game they purchased, the withdrawal of *The Crew* litigants represents a clear failure.

#### B. *The Shot Clock Expires: 2K Sports and the Precarious Nature of In-game Purchases*

Sometimes, video game consumers not only lose access to their game but also the ability to access hundreds of dollars of in-game purchases.<sup>92</sup> 2K Games makes the popular sports games *NBA 2K*, *WWE 2K*, and *PGA Tour 2K*.<sup>93</sup> These sports games usually retail for \$69.99 with

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88. *Id.*

89. Luke Reilly, *Delisting The Crew Makes Sense, Preventing It from Ever Being Played Again Does Not*, IGN (Apr. 22, 2024, at 06:50 ET), <https://www.ign.com/articles/delisting-the-crew-makes-sense-preventing-it-from-ever-being-played-again-does-not> [https://perma.cc/8FVP-MFWR].

90. Colin McRae racing is a series of racing games released in the 1990s through the late 2000s on multiple video game home consoles. See *Colin McRae Rally*, GIANT BOMB WIKI, [https://giantbomb.com/wiki/Franchises/Colin\\_McRae\\_Rally](https://giantbomb.com/wiki/Franchises/Colin_McRae_Rally) [https://perma.cc/P7ZC-NQCR] (last visited Feb. 2, 2026).

91. Reilly, *supra* note 89.

92. “Also called a microtransaction, an in-app purchase is one of the three main monetization models for mobile gaming alongside paid apps and in-game ads. In-game purchases are any paid transaction taking place within the app once it is downloaded.” *In-game Purchase*, APPSFLYER, <https://www.appsflyer.com/glossary/in-game-purchase/> [https://perma.cc/CN5Q-XNBS] (last visited Feb. 2, 2026).

93. Complaint at 4, *J.A. v. 2K Games, Inc. et al.*, No. 3:23CV05961 (N.D. Cal. 2023), <https://storage.courtlistener.com/recap/gov.uscourts.cand.421038/gov.uscourts.cand.421038.1.o.pdf> [https://perma.cc/DXV7-B4FU].

## DIGITAL GRAVEYARDS

premium versions selling for up to \$149.99.<sup>94</sup> In addition to the retail price of the game, these games offer upgrades to the gaming experience with VC in exchange for real money.<sup>95</sup> According to the litigants in *J.A. v. 2K Games*, “[s]pending VC allows gamers to improve the quality of their players’ skill and, accordingly, their ability to compete against others online.”<sup>96</sup> 2K Sports encourages users to spend real money in-game on various upgrades for their characters and fantasy teams.<sup>97</sup> 2K Games regularly runs promotions to incentivize gamers to spend money on in-game upgrades, such as “a 2023 NBA 2K tournament sponsored by Chips Ahoy! cookies, [or] using promotional material featuring an NBA 2K player riding a Formula-1-style go-cart . . . .”<sup>98</sup>

Each year, 2K releases new versions of its sports games and also retires older versions of those games by disabling the servers that allow the games to operate in a live, online environment.<sup>99</sup> According to 2K, “the cost of continuing the operation and maintenance of servers eventually becomes untenable as fewer and fewer gamers use older versions of the game.”<sup>100</sup> 2K Games has retired games as quickly as two years after the original release.<sup>101</sup> Typically, the next sports title is a full price purchase, and items or upgrades purchased in the previous game do not carry over into the new game.<sup>102</sup>

A plaintiff brought a class action against 2K Games for this behavior, alleging conversion, civil theft, and unfair business practices

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94. Gabriel Huerta, *All Editions of NBA 2K26: Price, Release Date, and Free VC*, MERISTATION (Aug. 22, 2025, 23:50 CT), <https://en.as.com/meristation/news/all-editions-of-nba-2k26-price-release-date-and-free-vc-n/> [https://perma.cc/8RP6-8LBJ].

95. Complaint at 4, *J.A. v. 2K Games, Inc. et al.*, No. 3:23CV05961 (N.D. Cal. 2023), <https://storage.courtlistener.com/recap/gov.uscourts.cand.421038/gov.uscourts.cand.421038.i.o.pdf> [https://perma.cc/DXV7-B4FU].

96. *Id.*

97. *Id.* at 5.

98. *Id.*

99. *Id.* at 11.

100. *Id.* at 7.

101. See Complaint at 6, *J.A. v. 2K Games, Inc. et al.*, No. 3:23CV05961 (N.D. Cal. 2023), <https://storage.courtlistener.com/recap/gov.uscourts.cand.421038/gov.uscourts.cand.421038.i.o.pdf> [https://perma.cc/DXV7-B4FU].

102. *Id.*

under the California Business & Professions Code.<sup>103</sup> While the case is ongoing, plaintiffs face an uphill battle as the 2K Sports Terms of Service likely bar the claims.<sup>104</sup> In the Terms of Service, 2K Games “ha[s] the right to terminate this Agreement and your access to the Services, Virtual Items and your Account, or cease providing such Services, at any time for any reason in our sole discretion.”<sup>105</sup> Based on the breadth courts have given in *Vernor* and *MDY*, and the failure of the *Cassell v. Ubisoft* litigants, it seems likely the court will follow the general rules for software licensing and uphold 2K Games’s right to remove access to these purchases upon the release of a new game, so long as the possibility is outlined in the EULA.

The idea that someone can spend hundreds or even thousands of dollars on a game only to have that purchase disappear a couple of years later sets a concerning precedent.<sup>106</sup> Consumer grievances are elevated, considering many of the purchasers are minors, who often have special protections under the law, such as the litigant in *J.A. v. 2K Games*.<sup>107</sup> However, as 2K Games says in its licensing agreement, “[y]ou agree that you have no ownership or other rights in or to any Virtual Items or your Account.”<sup>108</sup> Once decided or settled, the *J.A. v. 2K Games* case will likely demonstrate once again that consumers are totally at the whims of video game business life cycles.

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103. *Id.* at 7–13.

104. See *Take Two Terms of Service*, 12. Termination., TAKE-TWO GAMES, <https://www.take2games.com/legal/en-US/#12-termination> [<https://perma.cc/UP9C-C55B>] (last visited Feb. 2, 2026).

105. *Id.*

106. Angel Gutierrez, *Are Videogame Companies “Stealing” Their Own Fictitious Currencies?*, ARIZ. ST. SPORTS & ENT. L.J. (Mar. 13, 2024), <https://asuselj.org/are-videogame-companies-stealing-their-own-fictitious-currencies/> [<https://perma.cc/5A5K-T6EH>].

107. *Id.*

108. *Take Two Terms of Service*, *supra* note 104.

C. *Games Never Die (Until the Sequel): Forced Migration and the Failure of Fan Outrage*

In 2016, the multiplayer first-person shooter *Overwatch* released to record-breaking sales across physical and digital stores.<sup>109</sup> It was a massive success, selling over seven million copies<sup>110</sup> in the first week and eventually reaching fifty million copies,<sup>111</sup> many of which were physical discs.<sup>112</sup> Just three years later though, *Overwatch* was struggling due to a mixture of behind-the-scenes drama at the publisher,<sup>113</sup> slowing sales, and minimal new multiplayer maps and characters.<sup>114</sup> Blizzard then announced *Overwatch 2*, which would promise new content, new modes, and be free to play for all players.<sup>115</sup> *Overwatch 2* was a free-to-play game,<sup>116</sup> in which the developers offer paid upgrades to access additional content or characters.<sup>117</sup> The surprising news was that instead of allowing owners of the original *Overwatch* to continue

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109. Ravi Sinha, *Overwatch Brings in \$585.6 Million Revenue on PC*, GAMINGBOLT (Dec. 22, 2016, at 15:01 ET), <https://gamingbolt.com/overwatch-brings-in-585-6-million-revenue-on-pc> [<https://perma.cc/U52U-MKHQ>].

110. *Overwatch Is a Global Hit with 7 Million Players—and Counting*, BLIZZARD ENTERTAINMENT (June 2, 2016), <https://blizzard.gamespress.com/OVERWATCH-IS-A-GLOBAL-HIT-WITH-7-MILLION-PLAYERSAND-COUNTING> [<https://perma.cc/2DKS-WZN6>].

111. Cecilia D’Anastasio, *Activision’s Overwatch 2 is Redefining the Sequel*, BLOOMBERG NEWS (Apr. 29, 2022), <https://www.bloomberg.com/news/newsletters/2022-04-29/activision-blizzard-s-overwatch-2-game-is-a-lot-like-the-original-review> [<https://perma.cc/3GKT-XHTD>].

112. *Id.*

113. For a full discussion of the many issues at Blizzard, makers of Activision, see Jason Schreier, *What Went Wrong at Blizzard Entertainment*, ATLANTIC (Oct. 7, 2024) <https://www.theatlantic.com/technology/archive/2024/10/blizzard-entertainment-play-nice/680178/> [<https://perma.cc/7YDR-7B73>].

114. Adam Benjamin, *Overwatch 2 Aims to Fix the First Game’s Biggest Flaw*, CNET (Jun. 18, 2022, at 16:00 ET), <https://www.cnet.com/tech/gaming/overwatch-2-aims-to-fix-the-first-games-biggest-flaw/> [<https://perma.cc/5E79-4SAB>].

115. *Id.*

116. Carli Velocci, *A Parent’s Guide: What Free-To-Play Really Means*, ENT. SOFTWARE RATING BD. (May 14, 2025), <https://www.esrb.org/blog/what-free-to-play-really-means/> [<https://perma.cc/SSB2-6SDG>].

117. Benjamin, *supra* note 114.

playing their game, Blizzard announced that *Overwatch* would be shut down upon the release of *Overwatch 2*.<sup>118</sup>

Gamers were outraged at the launch of *Overwatch 2*.<sup>119</sup> That outrage intensified when Blizzard canceled many of the forthcoming features for *Overwatch 2* months after its release.<sup>120</sup> The game also introduced aggressive monetization, encouraging gamers to pay for many of the same features included in the original *Overwatch*.<sup>121</sup> An example of the outrage can be found on Steam, the largest video game selling platform.<sup>122</sup> The platform allows users to submit reviews of games.<sup>123</sup> The fan reaction to this migration was so severe, that for a period of time, *Overwatch 2* became the worst reviewed game on the platform.<sup>124</sup> In 2026, Blizzard formally removed the numerical two from *Overwatch 2* and returned to just *Overwatch*, leaving many “fans puzzled and onlookers in disbelief.”<sup>125</sup> Despite the outrage, the original *Overwatch*

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118. Justin Carter, *Overwatch 1 Will Permanently Shut Down on October 2, Confirms Blizzard*, GAME DEV. (Sep. 15, 2022), <https://www.gamedeveloper.com/business/-i-overwatch-1-i-will-permanently-shut-down-on-october-2-says-blizzard> [https://perma.cc/8PZM-9MEQ].

119. Logan Plant, *Overwatch 2 PvE Hero Mode Canceled: ‘A Difficult Choice’*, IGN (May 17, 2023, at 18:26 ET), <https://www.ign.com/articles/overwatch-2-pve-hero-mode-canceled-a-difficult-choice> [https://perma.cc/E6VX-FD3U].

120. *Id.*

121. Eric Switzer, *I Wish I Could Get Past Overwatch 2’s Monetization and Enjoy the Game but I Can’t*, THE GAMER (Dec. 30, 2022, at 17:06 ET), <https://www.thegamer.com/i-wish-i-could-get-past-overwatch-2s-monetization-on-and-enjoy-the-game-but-i-cant/> [https://perma.cc/G4NT-FCVU].

122. *VR and PC Gaming Guide*, MISS. STATE UNIV. LIBRS., <https://guides.library.msstate.edu/c.php?g=1378302&p=10190658> [https://perma.cc/EZS8-PMTW] (last visited Feb. 2, 2026).

123. *Introducing Steam Reviews*, STEAM, <https://store.steampowered.com/reviews/> [https://perma.cc/PRB9-4YSK] (last visited Feb. 2, 2026).

124. Wesley Yin-Poole, *After Becoming the Worst User-Reviewed Game Ever on Steam, Overwatch 2’s Recent Reviews Jump to ‘Mixed’*, IGN (Feb. 21, 2025), <https://www.ign.com/articles/after-becoming-the-worst-user-reviewed-game-ever-on-steam-overwatch-2s-recent-reviews-jump-to-mixed> [https://perma.cc/A2PX-UEDK].

125. Michael McWhertor, *Blizzard Explains Why It’s Dropping the 2 from Overwatch 2*, POLYGON (Feb. 4, 2026, at 13:45 ET), <https://www.polygon.com/overwatch-2-name-change-blizzard-explains> [https://perma.cc/8CD7-HW27].

## DIGITAL GRAVEYARDS

remains essentially lost media,<sup>126</sup> highlighting the ineffectiveness of outrage in holding publishers accountable.

### V. CURRENT LEGISLATIVE RESPONSES TO DIGITAL OBSOLESCENCE

#### A. *Why Warning Labels Fail: California Assembly Bill 2426 and Other State Actions*

Despite the failures of litigation and fan backlash, states have tried to step in and respond to the criticism surrounding digital licensing.<sup>127</sup> A key problem is that state copyright laws are preempted by the U.S. Copyright Act.<sup>128</sup> Therefore, states must find a way around this copyright roadblock. California passed the Digital Property Rights Transparency Law, which ensures that “consumers clearly know and understand the nature of their transactions . . . includ[ing] the reality that they may not have genuine ownership of their purchase.”<sup>129</sup> Typically referred to as California’s Assembly Bill 2426 (“AB 2426”), the bill took effect January 1, 2025.<sup>130</sup> The Bill was codified in the California Business & Professions Code.<sup>131</sup>

AB 2426 applies to many types of digital goods but specifically covers a “[d]igital application or game,” which includes “any application or game [that uses] an electronic gaming device, computer, mobile device, tablet, or other device with a display screen . . . .”<sup>132</sup> In order to sell these digital games in California, “[t]he seller provides to the consumer before executing each transaction a *clear and conspicuous*

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126. “Lost media is a term that broadly refers to media—such as books, music, films, television and radio broadcasts, and video games—that are believed to no longer exist in any accessible format, or for which no copies can be located. This encompasses a wide range of visual, audio, and audiovisual materials.” See *Lost Media*, FANDOM WIKI, [https://aesthetics.fandom.com/wiki/Lost\\_Media](https://aesthetics.fandom.com/wiki/Lost_Media) (last visited Mar. 19, 2026) [<https://perma.cc/4UMJ-L5FU>].

127. See CAL. BUS. & PROF. CODE § 17500.6 (West 2025).

128. Alice J. Won, *Exhausted? Video Game Companies and the Battle Against Allowing the Resale of Software Licenses*, 33 J. NAT’L ASS’N ADMIN. L. JUDICIARY 388, 407 (2013).

129. A.B. 2426, 2023–2024 Leg., Reg. Sess. (Cal. 2024).

130. CAL. BUS. & PROF. CODE § 17500.6 (West 2025).

131. *Id.*

132. *Id.* § 17500.6(a)(2).

statement that . . . [s]tates in plain language that ‘buying’ or ‘purchasing’ the digital good is a license [and] . . . full details on the license.”<sup>133</sup> To summarize, the new California law requires disclosure that the consumer is merely buying a license and should have no expectation of owning the game. Violation of the statute could result in damages up to \$2,500 per violation “and in serious cases, could expose companies to individual and class actions by consumers.”<sup>134</sup>

Early litigation suggests these disclosure rules barely address concerns of losing access to purchases.<sup>135</sup> In *Morehouse v. Apple, Inc.*, ebook consumers sued Apple after having download and access restrictions placed on the ebooks.<sup>136</sup> The court dismissed the claim because, while Apple had not disclosed that the consumers were only purchasing a license, Apple still made the ebooks available to download in some form.<sup>137</sup> Therefore, if the consumer has the ability to continue accessing the book, it is not enough to show injury for damages, even if it did not explicitly comply with the new rules under AB 2426.<sup>138</sup> The court’s decision suggests that loss of access would be acceptable so as long as the book was marked clearly and conspicuously as a license.<sup>139</sup> Applying this to a video game, any shutdown would be protected, so long as the game was marked clearly and conspicuously as a license at the time of purchase. The outcome

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133. *Id.* § 17500.6(b)(1)(B).

134. Robert Deng & Aaron D. Hendelman, *AB 2426: California’s New Law Strengthens Protections Against False or Misleading Advertisement Claims Regarding Digital Goods*, WILSON SONSINI (Dec. 20, 2024), <https://www.wsgr.com/en/insights/ab-2426-californias-new-law-strengthens-protections-against-false-or-misleading-advertisement-claims-regarding-digital-goods.html> [<https://perma.cc/E22N-G4BK>].

135. *See generally* *Morehouse v. Apple, Inc.*, No. 25-CV-02988-NW (N.D. Cal. Dec. 4, 2025), 2025 WL 3525573 (“Plaintiffs allege that Apple deceives consumers by making it appear that when consumers purchase an e-book or audiobook, they receive a copy of the book that could be accessed anytime, but, ‘some users have unexpectedly found that books they previously purchased were no [longer] accessible to them, despite having paid for them.’”).

136. *Id.* at \*1.

137. *Id.* at \*2.

138. *Id.*

139. *See id.* at \*2.

## DIGITAL GRAVEYARDS

raises significant questions over whether the law actually protects consumers or just provides a legal box for game publishers to check.

Another case is expected to test the application of AB 2426 to video games. In a lawsuit filed in January 2026, a plaintiff is suing video game retailer, GameStop.<sup>140</sup> The plaintiff purchased a digital copy of the fantasy video game, *Elden Ring*. GameStop sells copies of games digitally and physically.<sup>141</sup> Much like a gift card, the digital version provides a code that can be redeemed and downloaded on a console.<sup>142</sup> According to the plaintiff, “[n]owhere on this [GameStop] pre-payment page is there an affirmative acknowledgement that the consumer understands that he or she is receiving a license, or a clear and conspicuous notice that the thing they are purchasing is a revocable license to access the digital good.”<sup>143</sup> The case highlights a clear tension between the new rules and the slow-to-adapt retailers.

If the court finds that the mere presence of a redeemable code constitutes a transaction subject to AB 2426, retailers like GameStop would need to overhaul their checkout flows to include explicit license-only acknowledgments. On the other hand, the court may continue the trend seen in *Morehouse* by focusing on whether the consumer still has access, rather than the adequacy of the initial disclosure. If so, AB 2426 may fail to provide the substantive right to keep that many consumers desire. These early challenges suggest that while California has successfully mandated a change in terminology, it has yet to secure a change in the underlying power dynamic of video game purchasing. Unfortunately, AB 2426 may serve less as a protection of property and more as a formalized warning label that marks the final transition from game ownership to a permanent state of digital licensing.

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140. Complaint at 1, *Weber v. GameStop, Inc.*, No. 2:26-CV-00060 (E.D. Cal. Jan. 08, 2026) <https://www.classaction.org/media/weber-v-gamestop-inc-complaint.pdf>. [<https://perma.cc/B3SS-ATTN>].

141. *Elden Ring Nightrign - Xbox Series X, Xbox One*, GAMESTOP, <https://www.gamestop.com/video-games/xbox-series-x%7Cs/products/elden-ring-nightrign--xbox-series-x-xbox-one/422037.html> [<https://perma.cc/9RRL-PNR2>] (last visited Mar. 1, 2026).

142. *Id.*

143. *Weber*, *supra* note 140, at 11.

Several states have considered new laws similar to California's AB 2426. Maryland passed a law in 2025 that requires a disclosure that the purchase is for a limited license in "clear and conspicuous statement[s]."<sup>144</sup> New York is considering a law that would require similar disclosures to consumers.<sup>145</sup> Finally, an Arizona bill would provide similar disclosure requirements to California but also require the game publisher to disclose conditions or circumstances that might lead to the game being shut down or discontinued.<sup>146</sup> While legislatures are putting in work across the country to provide consumers with better advertising disclosures, their efforts stop at disclosures.

### B. *Stop Killing Games: European Union Petition*

While the United States has taken minimal action on video games at the federal level, the European Union ("EU") may prove to be more responsive.<sup>147</sup> Recently, a petition in the EU amassed over 1.3 million verified signatures.<sup>148</sup> While the exact policy is not concrete, the petition's "goal isn't to force companies to support their games in perpetuity, but to 'implement an end-of-life plan to modify or patch the game so that it can run on customer systems with no further support from the company being necessary.'"<sup>149</sup> The EU Commission is expected to respond to the petition in the coming months and it is not clear what stance it will take.<sup>150</sup> In the past, the EU has made

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144. Kirk A. Soderquist, D. Sean West & Noor Anne-Ayad Alanizi, *Maryland Imposes New Requirements on Businesses that Sell Digital Goods*, PERKINS COIE (Nov. 18, 2025), <https://perkinscoie.com/insights/update/maryland-imposes-new-requirements-businesses-sell-digital-goods> [https://perma.cc/P6UC-URRY].

145. *Id.*

146. H.B. 2010, 2026 57th Legis, 2d Reg. Sess. (Ariz. 2026).

147. Ted Lichfield, *Final Count for Stop Killing Games Petition Verifies 1.3 Million of Its 1.4 Million Signatures, Well Above the Minimum to be Formally Considered by EU Politicians*, PC GAMER (Jan. 25, 2026) <https://www.pcgamer.com/gaming-industry/final-count-for-stop-killing-games-petition-verifies-1-3-million-of-its-1-4-million-signatures-well-above-the-minimum-to-be-formally-considered-by-eu-politicians/> [https://perma.cc/9MFS-VJYH].

148. *Id.*

149. *Id.*

150. See *Past Actions & Results*, STOP KILLING GAMES INITIATIVE, <https://www.stopkillinggames.com/pastactions> [https://perma.cc/VYU2-KJVJ] (last visited Feb. 2, 2026).

## DIGITAL GRAVEYARDS

controversial consumer-forward rules, such as requiring Apple and all phone makers to use the same USB-C ports for charging.<sup>151</sup> This standard was later adopted in the United States, which critics have praised as a “major win” for consumers.<sup>152</sup> If game publishers want to be proactive, it may be wise to begin building online games that are more sustainable long-term, such as the options discussed in Part VI.

### VI. THE PRESERVED GAME AND STATUTORY REMEDIES FOR THE END OF VIDEO GAMES

While California’s disclosure-based remedy is a net positive in protecting consumers, as shown, it does not fully solve the problem.<sup>153</sup> This Note will advocate for two policies that better protect consumer interests and prevent consumer backlash against gaming companies: (1) preserved state or offline state updates for games, and (2) open sourcing of game code to allow gamers to run their own versions of an online game. The policies draw inspiration from the EU petition that received over 1.3 million signatures.<sup>154</sup>

#### A. *The Offline Mandate: Requiring Preservation Patches for Online Video Games*

The first requirement would be a preservation patch requiring any games licensed to consumers to include an update that makes the game available upon deactivation of official servers, either through an offline mode or private server hosting. This would require no further updates from the publisher after the final patch.<sup>155</sup> While many publishers

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151. See *Long-Awaited Common Charger for Mobile Devices will be a Reality in 2024*, EUR. PARLIAMENT NEWS (Oct. 4, 2022, at 17:50 GT), <https://www.europarl.europa.eu/news/en/press-room/20220930IPR41928/long-awaited-common-charger-for-mobile-devices-will-be-a-reality-in-2024> [https://perma.cc/2LDS-7XX8].

152. Cesareo Contreras, *The USB-C charging port on the new iPhone 15 is a major win for consumers, expert says*, NE. GLOB. NEWS (Sep. 14, 2023), <https://news.northeastern.edu/2023/09/14/iphone-15-charger-eu-legislation/> [https://perma.cc/X7CN-974U].

153. See *supra* Part V.

154. See *supra* Part IV.

155. See Paul Jones, *Knockout City: Private Hosted Server Edition*, VELAN STUDIOS (Apr. 25, 2023), <https://knockoutcity.com/updates/knockout-city-private->  
*footnote continued on next page*

might argue that developing such patches would impose a significant financial burden, there are notable benefits for game publishers and video game consumers that will be discussed in the next section.<sup>156</sup>

This sort of preserved state is not unheard of in the video games industry. One such example is *Knockout City*, an online multiplayer dodgeball game, which released private server tools upon shutdown.<sup>157</sup> Upon reaching the decision to shut down the servers, the small developer released a free preservation patch to ensure gamers would be able to continue playing the game.<sup>158</sup> The update provided the ability for users to host their own servers and ensured that gamers would keep access to all purchased content.<sup>159</sup> While it may not always be feasible in every case, this solution minimally burdens a developer and benefits fans.<sup>160</sup>

#### B. *The Penalty: Requiring Open Sourcing of Abandoned Games*

While a preservation patch is the ideal way to protect video game consumer interests, open-source code must also be available as an option. There will certainly be cases, whether technical or financial, where a game developer is simply unable to provide a preserved version. For example, it would be unreasonable to expect a game

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hosted-server-edition [<https://perma.cc/8MSW-8Q9J>] (explaining that the release of the final update for *Knockout City* effectively closed development on the game).

156. See *infra* Part VII.

157. Jones, *supra* note 155.

158. *Id.*

159. *Id.*

160. See, e.g., Comment, Gioduder12 (Mar. 23, 2024, at 13:58 UTC), on Turbostrider27, ‘Make a private hosted version of your game’: *Knockout City* dev’s top tip for studios shutting down a live service game is to give players the keys, REDDIT: R/PCGAMING (Mar. 23, 2024, at 09:13 ET), [https://www.reddit.com/r/pcgaming/comments/iblrvi4/make\\_a\\_private\\_hosted\\_version\\_of\\_your\\_game/](https://www.reddit.com/r/pcgaming/comments/iblrvi4/make_a_private_hosted_version_of_your_game/) [<https://perma.cc/BX96-YEY9>] (“Yeah no they’re 100% right. I’d be much more okay with certain games shutting down if this was their fate. Even if a fan server doesn’t pop up the ability to host my own small server and play with friends is good enough for me.”); Comment, ReallyGottaTakeAPiss (Mar. 23, 2024, at 14:07 UTC), on ‘Make a private hosted version of your game’: *Knockout City* dev’s top tip for studios shutting down a live service game is to give players the keys, REDDIT R/PCGAMING (Mar. 23, 2024, at 9:13 ET) (“I really wish some devs did this.”).

## DIGITAL GRAVEYARDS

company that is closing to create a final patch. In the case of a company unable to provide a final patch, open sourcing the code should be statutorily required. Open sourcing refers to releasing a game's source code for free, non-commercial public access.<sup>161</sup> Open sourcing of the code would allow gamers to reverse-engineer and keep the game they purchased running.<sup>162</sup> As an example of community success in this scenario, a group of gaming hobbyists, without permission from Ubisoft, reverse-engineered *The Crew* to attempt to revive the functionality of *The Crew*, an effort that took many team members.<sup>163</sup> It likely would have been a simpler process if Ubisoft had released the code to support this effort.

Open sourcing would better allow gamers to continue playing the games they purchased. Publishers might push back on releasing the source code of the game due to concerns over the release of trade secrets or unauthorized usage of intellectual property. However, this extreme remedy would encourage publishers to take the less burdensome remedy of the preserved version of the game. If a game publisher is unwilling to take even the step of providing a proper preservation patch to consumers, it does not seem reasonable to protect its trade secret or intellectual property ownership interests in a dead game.

### VII. THE VIDEO GAME PUBLISHER'S INCENTIVE: TURNING DEAD GAMES INTO PASSIVE INCOME AND LITIGATION SHIELDS

While the discussed preserved state should be statutorily required, preservation patches are also in the best interest of game developers. This Part will argue that game developers benefit more than the cost of preservation patches by (1) removing the damage element of litigation; (2) extending the revenue tail of video games; (3) improving

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161. Stephanie Susnjara & Ian Smalley, *What is Open Source Software?*, IBM, <https://www.ibm.com/think/topics/open-source> [https://perma.cc/8D29-TZXB] (last visited Feb. 2, 2026).

162. *Id.*

163. *About TCU, THE CREW UNLIMITED PROJECT: ABOUT*, <https://thecrewunlimited.com/about/> [https://perma.cc/R4SP-6JJX] (last visited Feb 2, 2026).

consumer goodwill and increasing company value; and (4) preempting any regulatory changes or requirements, specifically in the EU.

A. *Preservation Patches and Removing the Damage Element of Legal Action*

Voluntarily providing a preservation patch would benefit game publishers by eliminating essentially any damage claims in a lawsuit. While *Cassell v. Ubisoft* was eventually dismissed, it required multiple motions by Ubisoft to defend, taking well over a year, and requiring presumably expensive attorney's fees for Ubisoft to fight.<sup>164</sup> The damages in *Cassell* centered around the inability to play the game: “[plaintiffs] would not have purchased the Product, or would have paid substantially less for it, if they had known that the Product would no longer be a video game.”<sup>165</sup> If the game had remained playable, a judge would dismiss any claims requiring damages under a 12(b)(6) standard<sup>166</sup> since plaintiffs would not be able to show damages which are an essential element of most breach of contract or consumer protection claims.

Although AB 2426 does not require damages,<sup>167</sup> regulators would likely not prioritize action against a company that violated the rule but caused no damages since they have limited time and budgets.<sup>168</sup> Video game publishers can also enjoy a first mover advantage here,

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164. See, e.g., Defendant's Reply to Response to Motion 1, *Cassell v. Ubisoft Ent. S.A.*, No. 2:24-CV-03058 (E.D. Cal. 2024), <https://storage.courtlistener.com/recap/gov.uscourts.caed.455496/gov.uscourts.caed.455496.22.o.pdf> [<https://perma.cc/WGK4-24D8>]; Defendant's Motion to Dismiss 1, *Cassell v. Ent. S.A.*, 2:24-CV-03058 (E.D. Cal. 2024), <https://storage.courtlistener.com/recap/gov.uscourts.caed.455496/gov.uscourts.caed.455496.13.o.pdf> [<https://perma.cc/HN9Z-NM93>].

165. Complaint at 33, *Cassell v. Ubisoft Ent. S.A.*, 2:24-CV-03058 (E.D. Cal. 2024), <https://storage.courtlistener.com/recap/gov.uscourts.caed.455496/gov.uscourts.caed.455496.1.o.pdf> [<https://perma.cc/B9JT-LQEW>]; see Defendant's Motion for Extension of Time 1, *Cassell v. Ubisoft Ent. S.A.*, 2:24-CV-03058 (E.D. Cal. 2024), <https://storage.courtlistener.com/recap/gov.uscourts.caed.455496/gov.uscourts.caed.455496.16.o.pdf> [<https://perma.cc/3LYU-KVFL>].

166. FED. R. CIV. P. 12(b)(6).

167. CAL. BUS. & PROF. CODE § 17500.6 (2025).

168. See Aaron L. Nielson, *How Agencies Choose Whether to Enforce the Law: A Preliminary Investigation*, 93 NOTRE DAME L. REV. 1517, 1519–20 (2018) (discussing how agencies and regulators have limited budgets and must pick action carefully).

## DIGITAL GRAVEYARDS

since the publishers that begin proactively preserving games, may be able to shift the regulatory focus off themselves and towards more egregious violators. Overall, the preservation patch is a feasible<sup>169</sup> way to essentially eliminate or minimize damages since there is no loss of game for consumers to sue over.

### B. *How Game Publishers Can Turn Dead Video Games into Passive Income*

Preservation patches will improve revenue tails on video games. Running a video game server is expensive, sometimes costing hundreds of thousands of dollars per month.<sup>170</sup> Often, the cost of running a server can outpace revenue being brought in.<sup>171</sup> As an example, Japanese mobile game publisher, Visual Arts, told fans it would not be able to continue supporting its game if it was unable to bring in more revenue than the \$13,600 in server costs per month.<sup>172</sup> The ideal situation for a game publisher would be to discontinue the online components of a game, eliminating server costs, and continue selling a lower-priced version of the game.

A preservation patch would allow video game publishers to sell a limited-features version of the game at a lower price, thus continuing to generate revenue for the publisher.<sup>173</sup> In fact, entire online stores are dedicated to preserved forms of games such as Good Old Games, which has experienced significant growth in recent years, likely due to

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169. Jones, *supra* note 157 (illustrating medium sized developer that was able to create a preservation patch).

170. See generally *Amazon GameLift Servers Pricing*, AMAZON WEB SERVS., <https://aws.amazon.com/gamelift/servers/pricing/> (last visited Mar. 1, 2026) [<https://perma.cc/2CUS-4QYY>] (outlining the cost for running multiplayer servers via Amazon Web Services, sometimes costing hundreds of thousands of dollars per months).

171. See Koutaro Sato, *Japanese Mobile Game Reveals Monthly Server Cost of \$13.6k and Users Must Top this Sum in Purchases for the Game to Survive*, AUTOMATON (Aug. 3, 2023, at 12:38 JST), <https://automaton-media.com/en/news/20230803-20472/> [<https://perma.cc/62EY-E7Y8>].

172. *Id.*

173. See Liam Doolan, *Capcom Is Releasing an Offline Version of Mega Man X DiVE*, NINTENDO LIFE (Aug. 18, 2023, at 11:30 ET), <https://www.nintendolife.com/news/2023/08/capcom-is-releasing-an-offline-version-of-mega-man-x-dive> [<https://perma.cc/6BNX-XDET>] (discussing an offline version of a previously online only game sold for \$29.99 after the shutdown of the online servers).

gamers wanting preserved versions of games.<sup>174</sup> With only a little extra development to create a preserved version of the game, publishers can turn a dead game into passive income.

Many game servers are conveniently discontinued around the time of a sequel's release, but this might actually be shortsighted. For example, *Age of Empires 2*, is a real-time strategy game released in 1999 for the personal computer.<sup>175</sup> The continued popularity of *Age of Empires 2* resulted in the game being re-released in 2019 on multiple new platforms. A sequel, *Age of Empires 4*, released in 2021 and has also sold over four million copies.<sup>176</sup> Despite multiple sequels, *Age of Empires 2* has become so popular again that the publisher is releasing new add-on content as recently as 2026.<sup>177</sup>

Because products are often cheaper to sell years after the release, they can be far more profitable long-term for retailers and subscription providers.<sup>178</sup> An example, in a different industry, is movie studios signing lucrative deals with streaming company Netflix, turning old movies and television shows into significant profit.<sup>179</sup> Video games could also have incredibly long revenue tails and continue selling for decades, just like movies, if preserved. Unfortunately, most dead games, like *The Crew*, will never have the opportunity to develop

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174. Joseph Allen, *GOG Shares 2022 User Statistics Including Favorite Genres and More*, TECHRAPTOR (May 5, 2023, at 10:12 ET), <https://techraptor.net/gaming/news/gog-2022-user-stats> [<https://perma.cc/7UXB-89TV>].

175. *Age of Empires 2* was released in 1999 and received a rerelease in 2019. See *Age of Empires II: Age of Kings*, FANDOM: AGE OF EMPIRES WIKI, [https://ageofempires.fandom.com/wiki/Age\\_of\\_Empires\\_II:\\_The\\_Age\\_of\\_Kings](https://ageofempires.fandom.com/wiki/Age_of_Empires_II:_The_Age_of_Kings) [<https://perma.cc/4KSL-H7J6>] (last visited Mar. 1, 2026).

176. Jonas Mäki, *Age of Empires IV has Sold Over Four Million Copies*, GAME REACTOR (June 23, 2025, at 17:17 ET), <https://www.gamereactor.eu/age-of-empires-iv-has-sold-over-four-million-copies-1564103/> [<https://perma.cc/R2SS-7T8X>].

177. Age DE Team, *New DLC Available Now: The Last Chieftains*, MICROSOFT (Feb. 27, 2026), <https://www.ageofempires.com/news/new-dlc-available-now-the-last-chieftains/> [<https://perma.cc/6D4A-RXMR>].

178. See Chris Anderson, *THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE passim* (2006).

179. See John Koblin & Nicole Sperling, *In Search of Cash, Studios Send Old Shows Back to Netflix*, N.Y. TIMES (Dec. 15, 2023), <https://www.nytimes.com/2023/12/15/business/media/netflix-licensed-shows.html> [<https://perma.cc/HSZ2-XYUD>].

## DIGITAL GRAVEYARDS

a long-term revenue tail. Instead, publishers make them completely worthless by shutting them down and removing any possibility of future revenue.

### C. *Goodwill on the Balance Sheet: Increasing Acquisition Value through Consumer Loyalty*

Goodwill is an accounting term that refers to the difference between the purchase price of a company and the fair market value of the company's net assets.<sup>180</sup> It is the difference between the physical assets a company owns, like computers, offices, intellectual property, and the intangible value of key employees, processes, and customer relationships.<sup>181</sup> Microsoft purchased game publisher Activision in the largest tech acquisition ever, driven by nearly ten billion dollars in goodwill.<sup>182</sup> Ten billion dollars of goodwill illustrates that game publishers are sometimes worth more than the sum of their parts.<sup>183</sup> This intangible value of key employees, processes, and customer goodwill can be highly valuable in an acquisition in increasing the value of the company.<sup>184</sup>

This is not to say there is a one-to-one relationship between customer goodwill and sale value, but merely to say that game publishers may underestimate the value of customer goodwill on the balance sheet. These preservation patches often generate significant

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**180.** See, e.g., *What is Goodwill & Why Does it Matter*, ADAMS BROWN, (May 29, 2024), <https://www.adamsbrowncpa.com/blog/what-is-goodwill/> [<https://perma.cc/ZM2W-4A5A>].

**181.** *Id.*

**182.** *Activision Blizzard Announces First Quarter 2022 Financial Results*, ACTIVISION BLIZZARD (Apr. 25, 2022, at 7:30 ET), <https://investor.activision.com/news-releases/news-release-details/activision-blizzard-announces-first-quarter-2022-financial> [<https://perma.cc/5EUR-96P2>]; Ari Levy, *Microsoft Sets Record for Biggest Tech Deal Ever, Topping Dell-EMC Merger in 2016*, CNBC (Jan. 18, 2022, at 20:35 ET), <https://www.cnbc.com/2022/01/18/biggest-tech-deal-ever-microsoft-activision-set-69-billion-record.html> [<https://perma.cc/28NX-R7LJ>].

**183.** *Activision Blizzard Announces First Quarter 2022 Financial Results*, *supra* note 182; Levy, *supra* note 182.

**184.** See *Activision Blizzard Announces First Quarter 2022 Financial Results*, *supra* note 182; Levy, *supra* note 182.

goodwill.<sup>185</sup> Therefore, providing preservation patches may not only be beneficial for game publishers in terms of long-term revenue,<sup>186</sup> but also beneficial enough to increase the overall value of the company on the balance sheet.

*D. Preempting the European Union: Setting the Standard Before Regulators Do*

Video game companies that get ahead of potential regulation will benefit by avoiding costly reactive compliance. Studies indicate that proactive compliance with regulation can be almost three times cheaper than reactive compliance or noncompliance.<sup>187</sup> As discussed previously,<sup>188</sup> the EU will likely issue guidance for online game makers due to the success of the Stop Killing Games Petition. Proactive compliance would allow publishers to set a standard of care rather than a potentially more restrictive standard.<sup>189</sup> Under the regulatory phenomenon known as the Brussels Effect, the “EU is currently the only jurisdiction that can wield unilateral influence across a number of areas of law . . . international institutions can do little to constrain Europe’s global regulatory power.”<sup>190</sup> If game publishers wait, they could risk trying to catch-up with EU standards or proactive U.S. states. By adopting a preserved state architecture now, publishers can create a product that proactively meets forthcoming standards.

## VIII. CONCLUSION

The video game landscape has become a graveyard of purchased goods that exist only at the whim of game publisher lifecycles. While disclosure-based laws like California’s AB 2426 offer a necessary

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185. Susniara & Smalley, *supra*, note 160.

186. *Supra* Part VII.

187. See PONEMON INSTITUTE, THE TRUE COST OF COMPLIANCE: A BENCHMARK STUDY OF MULTINATIONAL ORGANIZATIONS 3 (2011).

188. See *supra* Part V.B.

189. See Ernie Smith, *How the ESRB Ratings System Changed Video Games Forever*, ASS’NS NOW (Sep. 19, 2019), <https://associationsnow.com/2019/09/four-ways-ratings-changed-videogames-forever/> [<https://perma.cc/B6zF-ANAA>] (describing how the video game industry has proactively set regulatory standards such as for video game age ratings before the Federal government took legislative or regulatory action).

190. Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. 1, 1 (2015).

## DIGITAL GRAVEYARDS

warning, they fail to provide a meaningful remedy for the systematic gutting of the products consumers thought they owned. Statutorily mandating a preserved state for games would not only benefit game publishers in economic ways,<sup>191</sup> but also game consumers by maintaining access to their digital and physical games. If legislators do not act, the video game graveyard will continue growing as gamers lose access to their games and purchases.

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<sup>191</sup>. See *supra* Part VII.

