

# Misrepresentation in Video Game Advertising

Brian, Jack, Katie, and Rares



# Posts

## Group Presentation Outline - Come for Donuts!

By [brian palaschuk](#) on November 13, 2022



## Ana de Armas Fans Sue Because She Was Cut Out of 'Yesterday'

By Gene Maddaus ▾



Photo by Evan Agostini/Invision/AP



### Moviegoer sues: Not enough driving in 'Drive'

claim. She first asserts that *Drive*'s preview and other advertising falsely promoted it as "a chase, race, or high speed action driving film," similar to *The Fast and the Furious* and that the preview failed to reveal that the film includes "many segments of slow paced, interpersonal drama," and is "an extremely graphically violent film."

# “No Man’s Sky”



# Result?



- “The summary description of the game made it clear that it was procedurally generated, that the game universe was essentially infinite, and that the core premise was exploration. As such, we considered consumers would understand the images and videos to be representative of the type of content they would encounter during gameplay, but would not generally expect to see those specific creatures, landscapes, battles and structures.”
- “We understood that the user interface design and the aiming system had undergone cosmetic changes since the footage for the videos was recorded. However, we did not consider that these elements would affect a consumer’s decision to purchase the game, as they were superficial and incidental components in relation to the core gameplay mechanics and features.”



# “Homescapes”





**“Not all images represent actual gameplay”**

## Result?

**“The ads must not appear again in the form complained of.”**



We acknowledged that the ads included text which stated “Not all images represent actual gameplay”, and we therefore considered consumers would understand that the exact gameplay featured may not necessarily be available. We nevertheless considered consumers would expect the Homescapes and Gardenscapes games would consist of a similar problem solving style. However, we understood that the Homescapes and Gardenscapes games in large part consisted of gameplay which involved a storyline about the renovation of a cartoon house or garden and ‘match-three’ style puzzle games.



# Differentiating Between the Two ASA Rulings

- No Man's Sky: advertisers are permitted to "show the product in the best light"
- Changing the "interface design and aiming system" are "superficial and incidental components in relation to the core gameplay mechanics." Agree?
- In Homescapes, on the other hand, the 'core gameplay mechanics' were completely misrepresented

# U.S. - Federal Trade Commission + Act



## Federal Trade Commission Act Section 5: Unfair or Deceptive Acts or Practices

### Background

Section 5 of the Federal Trade Commission Act (FTC Act) (15 USC 45) prohibits "unfair or deceptive acts or practices in or affecting commerce." The prohibition applies to all persons engaged in commerce, including banks. Under section 8 of the Federal Deposit Insurance Act, the Board has the authority to take appropriate action when unfair or deceptive acts or practices are discovered.

Responsibilities for enforcing the prohibition against unfair or deceptive practices as they apply to state-chartered banks are spelled out in a joint statement issued on March 11, 2004, by the Board and the Federal Deposit Insurance Corporation. That statement, which is included as an appendix to this chapter, describes in depth the legal standards for unfair and deceptive acts or practices, discusses the management of risks relating to unfair or deceptive acts or practices, and provides general guidance on measures that state-chartered banks can take to avoid engaging in such acts or practices, including best practices.

### Legal Standards

The legal standards for unfairness and deception are independent of each other, depending on the facts, an act or practice may be unfair, deceptive, or both. The legal standards are briefly described here.

### Unfair Acts or Practices

An act or practice is unfair where it

- Causes or is likely to cause substantial injury to consumers,
- Cannot be reasonably avoided by consumers, and
- Is not outweighed by countervailing benefits to consumers or to competition.

Public policy, as established by statute, regulation, or judicial decisions, may be considered with all other evidence in determining whether an act or practice is unfair.

### Deceptive Acts or Practices

An act or practice is deceptive where

- A representation, omission, or practice misleads or is likely to mislead the consumer;

- A consumer's interpretation of the representation, omission, or practice is considered reasonable under the circumstances; and
- The misleading representation, omission, or practice is material.

### Relationship of Section 5 to Other Laws and Ratings

Some acts or practices may violate both section 5 of the FTC Act and other federal or state laws. Other acts or practices may violate only the FTC Act while fully complying with other consumer protection laws and regulations. If a possible violation of the FTC Act is found, the examiner should consider whether other statutory or regulatory violations have occurred (the joint statement identifies laws that warrant particular attention in this regard).

In addition, if an illegal credit practice is identified through a review of FTC Act compliance, the examiner should consider whether the illegal practice would adversely affect the institution's Community Reinvestment Act rating pursuant to the regulatory requirements of 12 CFR 228.22(c).

### Compliance Risk Evaluation

Violations of section 5 of the FTC Act can present significant legal, reputational, and compliance risks for banks. This possibility intensifies the need for examiners to assess compliance with section 5 in conjunction with consumer compliance examinations, related supervisory activities, and consumer complaint investigations. Consistent with the Board's risk-focused consumer compliance supervision program, the need to assess compliance with section 5 should be considered when developing risk assessments, scoping an examination, or investigating a consumer complaint.

A determination about whether a particular act or practice is unfair or deceptive will depend on an analysis of the facts and circumstances. Although individual violations or complaints may appear isolated, they may, when considered in the context of additional information, including other violations or complaints, raise concerns about unfair or deceptive acts or practices.

Furthermore, the prohibition against unfair or deceptive acts or practices applies not only to all products and services offered by a bank, but to every stage and activity, from product develop-

# FTC Complaint - Tapjoy Inc.



UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

1723092

COMMISSIONERS: Joseph J. Simons, Chairman  
Rohit Chopra  
Noah Joshua Phillips  
Rebecca Kelly Slaughter  
Christine S. Wilson

In the Matter of  
TAPJOY, INC.,  
a corporation.

DOCKET NO.

COMPLAINT

The Federal Trade Commission ("FTC" or "Commission"), having reason to believe that Tapjoy, Inc., a corporation, has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Tapjoy, Inc. ("Tapjoy" or "Respondent") is a Delaware corporation with its principal place of business at 353 Sacramento Street, 6th Floor, San Francisco, CA 94111.
2. Tapjoy has advertised, marketed, or distributed virtual currency to consumers throughout the United States.
3. The acts and practices of Tapjoy alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

Tapjoy's Business Practices

4. Tapjoy operates an advertising platform within mobile gaming applications ("apps"). On the platform, Tapjoy promotes offers of in-app rewards (e.g., virtual currency) to consumers who complete an action, such as taking a survey or otherwise engaging with third-party advertising. Often, these consumers must divulge personal information or spend money. In many instances, Tapjoy never issues the promised reward to consumers who complete an action as instructed, or only issues the currency after a substantial delay. Consumers who attempt to contact Tapjoy to complain about missing rewards find it difficult to do so, and

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

**In the Matter of**

**TAPJOY, INC.,**  
**a corporation.**

FILE NO. 1723092

**AGREEMENT CONTAINING  
CONSENT ORDER**

The Federal Trade Commission ("Commission") has conducted an investigation of certain acts and practices of Tapjoy, Inc. ("Proposed Respondent"). The Commission's Bureau of Consumer Protection ("BCP") has prepared a draft of an administrative Complaint ("draft Complaint"). BCP and Proposed Respondent, through its duly authorized officer, enter into this Agreement Containing Consent Order ("Consent Agreement") to resolve the allegations in the attached draft Complaint through a proposed Decision and Order to present to the Commission, which is also attached and made a part of this Consent Agreement.

**IT IS HEREBY AGREED** by and between Proposed Respondent and BCP, that:

1. The Proposed Respondent is Tapjoy, Inc., a Delaware corporation with its principal office or place of business at 353 Sacramento Street, 6th Floor, San Francisco, CA 94111.
2. Proposed Respondent neither admits nor denies any of the allegations in the Complaint, except as specifically stated in the Decision and Order. Only for purposes of this action, Proposed Respondent admits the facts necessary to establish jurisdiction.
3. Proposed Respondent waives:
  - a. Any further procedural steps; and
  - b. The requirement that the Commission's Decision contain a statement of findings of fact and conclusions of law.
4. This Consent Agreement will not become part of the public record of the proceeding unless and until it is accepted by the Commission. If the Commission accepts this Consent Agreement, it, together with the draft Complaint, will be placed on the public record for 30 days and information about them publicly released. Acceptance does not constitute final approval, but it serves as the basis for future actions leading to final disposition of the matter. Thereafter, the Commission may either withdraw its acceptance of this Consent Agreement and so notify Proposed Respondent, in which event the Commission will take such action as it may consider appropriate, or issue and serve its Complaint (in such form as the circumstances may require).

# Falls v. Soulbound Studios LLC





# Ostrowski v. Nvidia Corporation

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# The Competition Act



Competition Bureau  
Canada



## False or misleading representations

**52 (1)** No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

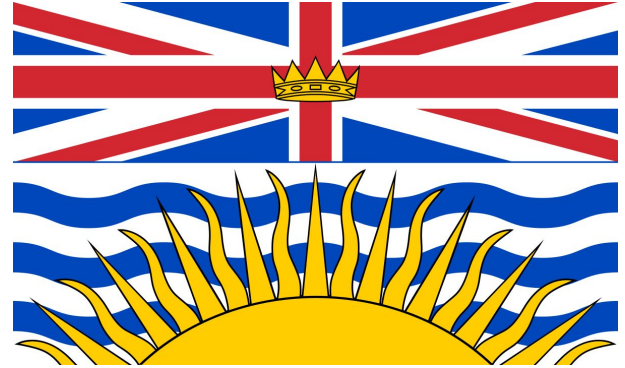
## Misrepresentations to public

**74.01 (1)** A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

(a) makes a representation to the public that is false or misleading in a material respect;

(b) makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation; or

# The BCCPA



## Deceptive acts or practices

4 (1) In this Division:

**"deceptive act or practice"** means, in relation to a consumer transaction,

(a) an oral, written, visual, descriptive or other representation by a supplier, or

→ (b) any conduct by a supplier

that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor;

→ **"representation"** includes any term or form of a contract, notice or other document used or relied on by a supplier in connection with a consumer transaction.



**CONSUMER  
PROTECTION BC**

# “Deceptive Act or Practice”



CONSUMER  
PROTECTION BC

(3) Without limiting subsection (1), one or more of the following constitutes a deceptive act or practice:

(a) a representation by a supplier that goods or services

(i) have sponsorship, approval, performance characteristics, accessories, ingredients, quantities, components, uses or benefits that they do not have,

→ (ii) are of a particular standard, quality, grade, style or model if they are not,

(iii) have a particular prior history or usage that they do not have, including a representation that they are new if they are not,

(iv) are available for a reason that differs from the fact,

(v) are available if they are not available as represented,

(vi) were available in accordance with a previous representation if they were not,

(vii) are available in quantities greater than is the fact, or

(viii) will be supplied within a stated period if the supplier knows or ought to know that they will not;

(b) a representation by a supplier

(i) that the supplier has a sponsorship, approval, status, affiliation or connection that the supplier does not have,

(ii) that a service, part, replacement or repair is needed if it is not,

(iii) that the purpose or intent of a solicitation of, or a communication with, a consumer by a supplier is for a purpose or intent that differs from the fact,

(iv) that a consumer transaction involves or does not involve rights, remedies or obligations that differs from the fact,

(v) about the authority of a representative, employee or agent to negotiate the final terms of a consumer transaction if the representation differs from the fact,

→ (vi) that uses exaggeration, innuendo or ambiguity about a material fact or that fails to state a material fact, if the effect is misleading,

# Unsettled Law in Canada

- No decisions yet in Canada under the Consumer Protection Legislation for video games.
- Consumer Protection is more focused on punishing suppliers than remedying consumers.
- Can sue privately for Breach of Contract or Misrepresentation.



# Canadian Contract Law

- If you sign something, you are presumed to have read and understood it (*L'Estrange v. F. Graucob Ltd.*)
- The more onerous a term, the greater procedural safeguards that must be followed (*Karoll v Silverstar*)
- General principles of interpretation always apply.



# How would you like to be remedied?

- Satisfied with injunction on the advertisement? (*Homescapes*)
- Term in contract prohibiting refunds unenforceable? (unlike *Falls*)
- Reimbursement under compliance order (CPBC) or order (CB)?
- Damages from the supplier for contravention of the *BPCPA*?
- Damages for feelings of disappointment?

# Damages for Disappointment?

- *Jarvis v Swan Tours*, 1973 (UK) - disappointed vacationer
- *Jamshidi v. 888517 Ontario Ltd.*, 2009; *Wilson v. Sooter Studios Ltd.*, 1988 - wedding photos were unsatisfactory
- *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30 - modern test

“The court must be satisfied: (1) that **an object of the contract was to secure a psychological benefit** that brings mental distress upon breach within the reasonable contemplation of the parties; and **(2) that the degree of mental suffering caused by the breach was of a degree sufficient to warrant compensation.**” (*Fidler*, para 47)

# Damages for Disappointment?

## Comparison: Vehicles

- *Wharton v Tom Harris Chevrolet Oldsmobile Cadillac Ltd.*, 2002 BCCA
  - “Luxury” vehicle was intended for pleasure use and been described as “high end” (para. 58)
  - Defective sound system
  - “It is clear that an important object of the contract was to obtain a vehicle that was luxurious and a pleasure to operate” (para 59)
- *Koubi v Mazda Canada Inc.*, 2010 BCSC 650
  - Not available under a class action suit due to individualized nature of the analysis (para. 145)
  - “Incidental frustration” does not incur damages (para 135)





Why have there been no video game cases in Canada?

Do you think the results of the cases discussed have been fair? Should there be stronger consumer protection legislation?

Should significant money spent and age of targeted consumers matter?

Do you think an object of video games is to secure a certain psychological benefit?

Should this be considered in any damages when an advertisement misrepresented the game?

In the age of boilerplate, is there a good balance between the principles of contract and consumer protection?

# **No Man's Sky Gets Steam Review Redemption, 5 Years Later**

Its been a journey back from the depths of deep space for those at Hello Games.