

S1:E7 - Unfinished Business: Legal and Practical Issues with Early Access Games

May 08, 2019



In this episode of LAN Party Lawyers, Steve and Nick explain the early access model for releasing games, explore the legal and practical considerations that come with it, and debate its impact on the gaming industry.

Transcript:

Nick: Welcome to the LAN Party Lawyers podcast, where we tackle issues at the intersection of video games, law and business. I'm Nick Brown.

Steve: And I'm Steve Blickensderfer.

Nick: And together, we are the hosts. But before we get going, we need to remind you that nothing we say is legal advice. Now today, Steve and I are going to talk about early access games. We're going to talk about what they are, we're going to talk about how they work, we're going to talk about why people use them and then some legal issues that arise, or can arise from early access games. Then we're going to have our 1v1 Showdown.

Steve: You're going to lose.

Nick: Well, we'll see about that. And then we'll talk about some takeaways, some things that we learned about early access games.

Steve: And that's going to be it. That's our episode.

Nick: That's it. Alright, well Steve, why don't you get us started? What is early access?

Steve: So early access in video games is a development phase, perhaps you can think of it that way. It is when you have pushed out a game, a version of the game to the public, the consuming public, before it is ready. Really, it's an incomplete game.

Nick: Mm-hmm.

Steve: But it's intended to be that way. It's like a beta, but you're paying for it. Or it's a truncated version of a complete game, right?

Nick: Right.

Steve: So it doesn't necessarily have to be incomplete. Usually it costs money for an early access game, but not always.

Nick: But there's a trade-off, right?

Steve: Right, it costs less money.

Nick: Right, you get a discount for buying a product that's incomplete.

Steve: Exactly, so with the discount comes a discount in expectations. So you give lower the expectations than a full AAA blockbuster release. How much lower? It really varies.

Nick: It's all over the place.

Steve: Exactly.

Nick: Wide variation in terms of the state of completeness of these games when they're released.

Steve: Right. You have very early builds and very early, early access games, and then you have more complete polished games that are probably ready to go, but they're going to release it now, polish off the last little bits, which sometimes that last 10% - 1% takes a lot of time.

Nick: Mm-hmm.

Steve: So they'll send out an early access version, which is pretty much ready to go, and so, you'll have a pretty big product. And, you know, with that comes the bugs...

Nick: Right, because the...

Steve: ...glitches.

Nick: ...bug testing is usually the last part of the development cycle.

Steve: Right, right. That's the polishing.

Nick: Right.

Steve: Basically putting your cursor everywhere and trying different variations to see, to make sure that the game is performing as expected.

Nick: But on the other hand, you can actually get to shape the final product by buying it.

Steve: Right, right. With the early access, there's even more of an incentive to create a line of communication with the users, like beta-testers almost, to try out the game and to give you feedback. So it's a great way to get early feedback on a game that may not be, that is not done yet. Yeah, so that in a nutshell is what early access is all about.

Nick: Right. And so what's the big deal with early access? Why are we talking about it here? Well, first of all, it is extraordinarily popular. We are seeing increasing numbers of games that are released in an early access state. Steam, which is Valve's PC publishing platform, started offering developers the ability to release games as public betas back in 2013. And current estimates indicate that between 2013, when it started, and 2015, there were about 700 early access games that had been pushed out. Some of them were pretty successful, DayZ is one of them that comes to mind.

Steve: DayZ, didn't play that one.

Nick: It was like a zombie game.

Steve: That's right.

Nick: I think it was originally taken from a mod of the ARMA franchise and they turned into kind of like a zombie survival game.

Steve: I was too busy playing Left 4 Dead.

Nick: Right. Well, DayZ was a huge hit when it was released in early access state and it really demonstrated that the early access model had legs and it inspired others to go the same route. And so now, fast forward, there are thousands of early access games on Steam and elsewhere. A 2017 study we found determined that about 15% of all of the games on Steam used an early access model, which is a huge number especially given how many games are on Steam total. Some of the ones that were in early access, they sold millions of copies while they were still in early access. Some of them sold as many as 29 or 30 million. So we're talking big numbers here.

Steve: I'd like to know how much that game ended up selling when it was final. Like 29 million for an early access is just incredible.

Nick: Right?

Steve: That's a good indication that you're on the right track.

Nick: Most games would be happy with that as a final number.

Steve: Absolutely.

Nick: So, believe it or not, I have a little skin in this game. My most played game on Steam out of all of them is an early access game.

Steve: That's crazy.

Nick: Yeah, I know. I never would have expected that. It's a game called 7 Days to Die.

Steve: Mm-hmm.

Nick: And it's essentially a zombie survival crafting game. You're dropped off and you start basically naked with nothing in the middle of the forest and your goal is to survive. And it's very harsh. It's very difficult and, boy, it is fun.

Steve: It's a lot like the Minecraft mechanics in that game are pretty obvious.

Nick: It's kind of like a mix of Minecraft and DayZ, honestly.

Steve: The realism of DayZ with the building of Minecraft.

Nick: It's a lot of fun. You know, it's kind of a moving target, right? Because it's still in early access and they're changing it over time. The game that I bought a couple years ago is not the same game that you can play now. But I did get a big discount on it. I got it for cheap because it was an early access.

Steve: 50%?

Nick: I don't remember what it was, but it may have been around there.

Steve: Mm-hmm.

Nick: But it definitely wasn't full price. And I got to say, you know, surprisingly to me, I have spent more than twice as much time, according to Steam, playing that game than any other game in my library including all of the AAA timesinks—all of the Civ[ilization] games, the XCOMs, the Fallouts, the Skyrim, which I've also put some time into. So, you know, I really got a lot of value out of that discount.

Steve: Yeah, you did. Well it's easy to see why these are popular and increasingly used as a way to publish content...

Nick: Mm-hmm.

Steve: ...because instead of having to incur all this debt and waiting until a product is finished, you literally can get paid to release a game that's incomplete. Yes, you have to take less money for it, but you're getting the stuff out the door, which is always a tough call when you're a developer—when is it

good enough? And sometimes when you've been developing a game for a long period of time, you don't know because you've kind of lost context if you're on a small team or just, you know, some people are better at it than others.

Nick: Well game development is just inherently unpredictable, right?

Steve: Right.

Nick: You never know what's going to happen. Some things that seem like they're going to be easy end up being hard and vice versa, and so early access games allow developers to get an influx of revenue earlier in the process instead of having to make as many triage decisions about what to keep, what to cut and what to just push out, because they are running out of their initial loans or running in bigger debt than they were able to expect from the beginning.

Steve: Right. And you can imagine this would be particularly helpful for small and indie developers.

Nick: Right.

Steve: Those that don't have, perhaps, the capital to, or I don't know, assets to get those large loans and develop those big teams. So, what you'll have is a product that can be put out in stages and that you can start getting money in between the stages and you can then help to develop your game.

Nick: And feed your family in the interim.

Steve: That's right. And, you know, stats are 88% of early access games are indie games.

Nick: Right.

Steve: Small developers, indie developers that are not otherwise working with the EA's of the world or the large publishers.

Nick: Right.

Steve: And so, it just happens to be that that's absolutely right. It does help them and they are using them.

Nick: The big publishers have a lot less incentive to release games in this state and take a discount, when usually they have the capital to front a full development and then push out a complete release.

Steve: But do you even want a AAA title in early access? I almost expect at this point that an early access game is probably going to be from an indie or small developer that I've never heard of before.

Nick: Mm-hmm.

Steve: And it gives me an opportunity to kind of test it out to see, do I like this game, am I committed to it when it's ready to go that I will buy it versus, you know, if it's the next big Star Wars game or something. Do I want an early access of that? Maybe.

Nick: Well, one benefit is that it allows the developers to get real time feedback on how the game is shaping up. They push a game out, you know usually you have to wait until the game is done, they put all their time and effort into it, they push it out, and then sometimes they'll get a torrent of bad feedback. We love the game but we hate this feature; the whole thing's garbage, and so, pushing it out in early access form allows, and usually that comes with, you know, there'll be forums or some way to contact the developers and give your feedback, and so it allows a line of communication from these early adopters, who by the way, are usually very eager and enthusiastic to play the game.

Steve: Right.

Nick: It allows them to give feedback to the developers before the game is pressed and goes gold.

Steve: And then another benefit to all of this is, if you handle that correctly and you have an open line of communication, you might get really good press out of it. People might be talking about, oh, this developer, he's on it, they listen to this feedback, they already implemented it, and, you know, some good things can come from that.

Nick: And it's, you know, additionally attractive to people that don't develop games, people that are usually just consumers, they can actually have a hand in the final product themselves.

Steve: Right. You can improve the quality of the game literally as if you were working on that development team, just simply by playing the game.

Nick: Right, so there are a lot of upsides. But, you know, of course there are some problems as well.

Steve: Yeah, there's some negative things.

Nick: You know, when you're buying an early access game, you really don't know what you're getting. Sometimes a developer's a little ambitious, you know, through no fault of their own, through no nefarious intent, sometimes they'll list a ton of features or plan a bunch of them for the final release, only later to find out that some of them don't work or some of them aren't feasible. As we said

earlier, there may have been some road blocks on the way that threw the development off course, and so, you know, it can really be an issue if you buy a game in early access, because you don't actually know what the final product's going to look like.

Steve: Right, and some features may be cut and the developer might not know it needs to cut something until after the early access and what have you. And some games are, you know, going to even more extreme examples.

Nick: Right.

Steve: You've got examples of games that have just literally been abandoned after they've been released in early access.

Nick: That's the worst, right?

Steve: Yeah.

Nick: One famous example we know about is a PC game called Towns.

Steve: Never played it.

Nick: I didn't play it either. Kind of glad I didn't at this point. It was released as part of the Steam Greenlight program, which was kind of a predecessor to the current early access model that we're talking about here. But for all intents and purposes, for the purpose of this conversation, it might as well be an early access game. And the game Towns sold over 200,000 copies at \$15 apiece. So...

Steve: That's a lot of dough.

Nick: No small success there. But then, for whatever reason, all further development was abandoned completely and the game was still in a buggy and unfinished state. And so everyone who dished out the money expecting to ultimately get a final product, I think they were pretty disappointed.

Steve: Oh yeah. You know, there are other games that were kind of stuck in the perpetual state of development, including Star Citizen.

Nick: Right. That's a game where they've pulled in a lot of money. And they've got a bunch of, you know, an extraordinary list of final features they're going to include. It looks like a fantastic game, but some people that have paid into it are kind of concerned because it's not out yet.

Steve: And then there's also the game that you just mentioned earlier, 7 Days to Die.

Nick: Yep, I bought it years ago. It's still not released, and it's a pretty different game now than it was when I bought it. I'm still happy, but, you know, things don't always turn out that way.

Steve: That's right. And some developers have even sold DLC for early access games, which is really, I don't, it's kind of oxymoronic in a way.

Nick: Well, and that was the consumer reaction too, when this happened. One example we know about is a game called ARK, where you, it's like a survival game and it involves dinosaurs and stuff. But, that game was released in early access and before they released the final version of the game, they actually released an additional set of downloadable content for the game for an additional fee. And that really angered some people because they're saying: wait, hold on, we've already given you money; you still haven't finished the game, now you're trying to sell us other stuff?

Steve: They were testing the waters for early access DLC.

Nick: Well, from what I understand, those waters were not friendly. It caused a bunch of uproar online and a lot of people were upset with that. So, I don't know how frequent that sort of thing is going to happen.

Steve: And this is not just a negative publicity kind of thing. This can actually result in some legal consequences depending on how poorly this goes.

Nick: That's right.

Steve: And so if it's not clear, for instance, what is being, what is involved in this early access game, and there's not enough disclosures and disclaimers, people might claim that they were, there was a classic bait and switch, right?

Nick: Right.

Steve: You sold me, I was told or represented that I was getting x and instead I got y, a much inferior product. And that could result in lawsuits. If there's a lot of people that are in the same position as you, you might face a class action lawsuit where everyone is collectively, together, suing this developer.

Nick: Right. And those suits can come in a few different types of theories. You know, one simple one would be a contract theory. You sold me a product that doesn't work. It's unfinished. It doesn't do what I bought it do. And so, you've breached either your express contract or you've breached an implied warranty of fitness or for whatever reason, you didn't hold up your end of the bargain even though I gave you my money. That's one of the theories.

Steve: Right. And then there's also a legal theory of deceptive trade practices. And this is, you find this for federal regulators and also at the attorney general level, you have, well, I'm sorry, for the federal government level, you have Section 5 of the FTC Act...

Nick: Right.

Steve: ...okay? And that prohibits unfair and deceptive trade practices. And then on the state level, you have the attorney generals enforcing, you know, state versions of the Unfair Trade Practices Act.

Nick: Mm-hmm.

Steve: And so that's pretty much in every state.

Nick: Right.

Steve: So you may have that, and then I think in all state's statutes, I may be wrong, but all, I think all state unfair trade practices can be enforced by a consumer to some extent. So...

Nick: Yeah, if you're a developer, you definitely don't want that to happen to you.

Steve: And you also, if you're doing shady practices with early access games, you might also open yourself up to regulators launching an investigation depending on consumer complaints. That could be the easiest way to get on a regulator's radar is when someone makes a complaint, enough people complain, and all of a sudden the FTC's looking into you're business.

Nick: Right. You do not want to deal with that. And so this is probably why we found that Valve's early access page on Steam actually tells users not to buy the game unless they're happy to play it in its current state. And so that's, you know, an attempt to be very open and honest that these games are not finished. Also, the early access page on Steam warns potential purchasers that the game might, in fact, never be finished. And this is an attempt to try to be open and honest and disclose to the buyers so they know what they're getting. The game might be finished. It might, you know, eventually, it might come out and, like, be the best thing you've ever played. But they want to make sure that before people buy it, they know that they're taking a risk in that regard, even though they are getting a discount and getting a benefit.

Steve: And so some places like Steam will have their refund policy also apply to early access games. But, you know, it's the same policy. It only applies if you've owned it for, at least as of recording, less than two weeks and played less than two hours of the game.

Nick: That's right.

Steve: And so that may not always be enough time for you figure out, well this is not what I was sold.

Nick: Especially if, for example, the one that is sold is really in great shape for the beginning part of the game, but only towards the end is development falling off. In which case, two hours may not be enough time to figure out that you're not getting a full product if you didn't notice that when you bought it.

Steve: Okay, Nick. I think it's time to switch gears here and move on to our 1v1 Showdown. This is the part of the episode where we're going to go head to head and debate opposite sides of an issue. The issue that we're going to take is you're going to be the early access fan boy...

Nick: You know it.

Steve: ...talking about how selling games in early access is good for business. Good luck with that one. I'll be the early access hater, where selling games in early access is bad for business.

Nick: Always a hater.

Steve: So Nick, why don't you try to convince me? It's not going to work, but you can at least try.

Nick: Alright, well, see how this does. The first thing that's really important is that early access games provide money to support development of games that either would not exist otherwise, or would not exist in nearly as robust a fashion. It allows for games that would otherwise be impossible to develop by allowing indie developers to get a stream of revenue early on and allow them to manage their development and allow them to feed their families before they release the game and not have to make really tough triage decisions about whether to go ahead and release a game that is not everything they want it to be, just to meet their development and their financial limitations.

Steve: That's a low blow, Nick, bringing in their families.

Nick: Well, I got to say, it leads to better games at the end of the day, Steve.

Steve: That's argumentative.

Nick: And that's good for you and me and everybody's families.

Steve: Objection.

Nick: Early access purchasers also get a say in the game development. That's more transparency and communication than we're used to in full releases. Not only do they help fund the development,

but then they get a pipeline to talk with the developers about features they think work or don't work, about features they'd like to see, about future content they'd like and that type of discussion, again, leads to better games, which is great for you and me. And you know, if you have a problem with early access games, like I'm pretty sure Steve's about to, you can wait for the final product. There's no obligation to buy them early. If you're all scared and you feel it's too big of a risk for you, you can just wait.

Steve: Nick, but what happens when the game never comes out? You just described, I don't know, however many games that are still in development limbo. I can't ever buy them.

Nick: And you don't have to is my point. And any games that do abuse the model, like you're concerned about, that can be addressed. In fact, Valve has, as an example, pulled certain deceptive games from Steam that they thought over-promised or under-delivered and they offered refunds for them. So there is a safety net that exists if, as Steve suggests, you step unwillingly into the terrible world of early access games.

Steve: Who's guarding the guardians, Nick?

Nick: I don't know. Further, you know, as we mentioned earlier, usually the early access games are cheaper, so you're saving money and there's no additional cost when they release, and so you ultimately get the full game for cheap, just for buying early and for taking the risk that the game might turn out a little differently than you expect. And finally, you know, at the end of the day, it just helps get games to market, by giving developers more funding options and more communication on how to make their games better. At the end the day, that's more games for us, that's better games for us, everybody wins.

Steve: I don't know if necessarily flooding the market with more games is good for business, Nick. Because, you know, flooding the market with broken toys, it doesn't work. It's not good for business. So, let me start off with my first point. What sense does it make to pay money to get an unfinished product and do a beta tester's job? Okay? You just flipped the script on me. You should be paying me to test your game and to tell you if it works or not.

Nick: I don't think anyone is going to pay you for that, Steve.

Steve: Well you should because I'm not about to pay you money to tell you that your game has bugs here, there and everywhere, because we all know that with early access games that's the issue. Second point, Nick, is that the potential for abuse in early access game publication is huge. It allows for that bait-and-switch concept that we talked about earlier where you promised one thing and you end up delivering something quite inferior instead. And so it allows for this abuse and this predatory practice that otherwise should not be encouraged by allowing for a model that, you know, creates

incentive to get money quick and earn a quick buck just to release a game that isn't even ready. In addition, the developers have no obligation to finish a game once they get your money. So even if you have a developer who's otherwise has that good intent to try to release the game, you have problems there because you've taken away the finish line, in a sense, with this early access model. Now they're just, you know, they might not necessarily feel the need to finish the game and so that's a problem. And this touches on my third point which is going to be this early access allows for this game development limbo.

Nick: Who doesn't like a good game of limbo?

Steve: Well not with my early access and my money, Nick. Usually developers, as I said, have this big incentive to finish a game but when you're constantly figuring out, you know, is this good enough? Is this good enough? When you don't have a deadline, that's, you've lost that time when you say, you know what, just get this out the door and you need that to make a good game. And when you take that away in early access models that creates a problem with this game development limbo.

Nick: Yeah, you're right, that really sounds terrible allowing developers to keep improving their games.

Steve: Well, Nick, you want to have a finished product, you don't want to have a perfect product. Because we all know that software isn't perfect and it's going to have bugs and stuff, it's just kind of the nature of things. But, with an early access game, they get their money upfront and they just lose that incentive to finish. And so, the last thing I want to talk about is a product that changes, the chameleon product, okay? You bought an early access game that you really liked, it was cool, about racing, and all of a sudden, they add dinosaurs and whatever, and now you've got a dino-racing game.

Nick: Alright, I'll go on record, I want that game. I'll buy it right now.

Steve: Well I didn't sign up for dino-racing and so what happens is early development can lead to games that are quite different than what they started off in, in early access. And you might have liked it initially, but you didn't like where it ended up. And it might have been because of that open line of communication you were boasting about where gamers started influencing the development and it led it to a different place than it otherwise should have been. And one last aspect of this is, is actually hardware changes, we have game developers who are literally on the cutting edge of technology when they start making a game.

Nick: Literally.

Steve: Literally, Nick, on the precipice where they can fall off at any minute, and all of sudden you have an early access game taking years to make and this line keeps moving and all of sudden before

you know it, you got a finished game you can't even play on your hardware, whether PC, console, whatever because the goal line kept being moved.

Nick: Time to upgrade.

Steve: Time to upgrade. Well, Nick, I think I thoroughly handed that one, handed you a smackdown right there.

Nick: Mm, I don't know, I think your arguments were unfinished.

Steve: Alright, we're going to have to let the listeners decide on that one.

Nick: Alright, well, I can confidently say I wasn't convinced. But we do have some takeaways for people that are listening, for developers and publishers, make sure to balance the need for revenue with your realistic development goals and your expectations. You do not want to take on this early access, you know, take advantage of this model and then end up getting yourself in trouble because you were focused on the revenue when really your development goals were a little bit ambitious. Being too ambitious with your goals, even if you fully intend to meet each and every one of them, can anger consumers and it can invite the legal problems we discussed, even if it's just government investigations or even if it's in the form of, you know, bad press. But also consider, that early access gets you early feedback and hopefully some positive reviews and buzz that'll attract more players and may end up ultimately working as a form of advertising. At the end of the day, make sure that your ads and your promises are realistic and then make sure you live up to them. Be very clear about the development prospects, if there's a chance the game won't get finished, disclose that; if there's a chance that you're going to take an overhaul or that the game might not take, you know, might not reach all the features that you've launched or advertised or some of them are just, you know, the type of thing that you're hoping to do, just disclose that, make sure that's clear, open and honest and you should minimize some of your risk.

Steve: There's also some takeaways if you're the gamer. First is to understand that what you're getting. You know, don't just blow by the fine print because sometimes it will lead to some, you know, important disclosures in there and you may not be wanting to put your money in a game that is telling you that this is in a really early stage or, you know, it's a little bit more polished. Just understand what you're getting into and don't be surprised so much when you're getting a game that's not perfect because it's by definition not going to be perfect.

Nick: Right.

Steve: Also, balance the risk of do you want to play it now or later? For the most part, early access is not supposed to be this perpetual undone state of a game, it should be completed at some point. So

maybe figure out do you want to play it now or do you want to play it later? You might read the reviews and then find out that it's improved over the life of the early access stage...

Nick: Mm-hmm.

Steve: ...or it's not, so you might want to understand that now. And finally when you do buy that early access game, consider giving feedback because that real benefit to this is to open that line up to the developer, they're soliciting your feedback, they want to know is it fun, are they enjoying it, is it doing what we intended it to do? Because at some point, that feedback becomes invaluable and it will really make an impact in the good games.

So, Nick, those are our takeaways, that was our challenge, this wraps up our episode of early access games. We hope you enjoyed it. Stay tuned and be on the lookout for other episodes on our season one of the LAN Party Lawyers Podcast. Nick, unless you've got anymore to add?

Nick: That's all I've got, Steve.

Steve: Game on.

Nick: Game on.

Related Practices

[Esports and Electronic Gaming](#)

[Media, Entertainment, Music & Sports](#)

©2024 Carlton Fields, P.A. Carlton Fields practices law in California through Carlton Fields, LLP. Carlton Fields publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information and educational purposes only, and should not be relied on as if it were advice about a particular fact situation. The distribution of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship with Carlton Fields. This publication may not be quoted or referred to in any other publication or proceeding without the prior written consent of the firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our Contact Us form via the link below. The views set forth herein are the personal views of the author and do not necessarily reflect those of the firm. This site may contain hypertext links to information created and maintained by other entities. Carlton Fields does not control or guarantee the accuracy or completeness of this outside information, nor is the inclusion of a link to be intended as an endorsement of those outside sites.