Game Over for Walled Gardens

August Gebhard-Koenigstein*

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ABSTRACT

The console wars—competition for market share among console manufacturers—have always been tied to platform exclusivity. A robust exclusive games library draws customers into purchasing console hardware, growing the console's player base. Network effects then amplify this growth, attracting even more players and developers. This dynamic facilitates the establishment of "walled gardens," allowing console manufacturers to lock users into specific hardware, social networks, and content libraries that they cannot easily escape.

Platform exclusivity and walled gardens pose significant harms to consumers, developers, and competition. These harms are compounded by the increasing concentration of the gaming sector. This Note argues that intervention to promote an open and interoperable console gaming ecosystem is warranted. Antitrust law may at first glance seem a natural fit for such intervention, but it is ill-suited for remedying the harms at issue. In an industry with three dominant players, there is no monopoly for antitrust law to prevent. Furthermore, modern antitrust's atomistic approach to anti-competitive conduct cannot sufficiently address the types of harms wrought by exclusivity and closed platforms. This Note argues instead that a targeted legislative framework offers a more effective solution, drawing on successful precedents both domestic and international.

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I. INTRODUCTION

Microsoft's $68.7 billion acquisition of video game publisher Activision Blizzard in 2023 was the largest in its history, costing almost three times as much as its 2016 acquisition of LinkedIn.[1] The merger's initial announcement sent shockwaves through the gaming world. It raised countless questions among consumers, competitors, and regulators. Chief among them was whether Microsoft would continue to publish Activision Blizzard's blockbuster franchises—like *Call of Duty*—across platforms or make them exclusive to Microsoft hardware.[2]

Exclusivity has been a core front in the "console wars" for market share among console manufacturers. Video game consoles, like Microsoft's Xbox and Sony's PlayStation, are specialized home computers designed for video game playing.[3] The consoles with the most sought-after exclusive titles gain a competitive edge in drawing players into their ecosystem. Network effects then amplify this advantage, as a growing player base attracts more players and developers. This enables platforms to establish "walled gardens," where they can tightly control what happens within the "walls" of their platforms—locking users into specific hardware, social networks, and content libraries from which they cannot easily escape.[4] Although walled gardens are not impenetrable—cross-platform gameplay and design are both technically feasible and increasingly in demand—the Activision Blizzard acquisition underscores how an open, consumer-friendly paradigm is far from entrenched. The threat of exclusivity and closed platforms continues to cast a long shadow over console gaming.

Consumers should not face artificial barriers that prevent them from experiencing new content, seamlessly switching between consoles, connecting with their friends across platforms, and generally enjoying gaming's full potential as an accessible, shared experience. To preserve the progress made in cross-platform gameplay and design and to prevent the rise of a different but similarly restrictive form of exclusivity—specifically service exclusivity, where

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[1] Tom Warren, *Microsoft Completes Activision Blizzard Acquisition, Call of Duty Now Part of Xbox*, VERGE (Oct. 13, 2023, 5:46 AM PDT), https://perma.cc/2BKQ-ZEFM.

[2] Chris Kerr, *UK Competition Regulator Says Microsoft's Activision Blizzard Deal Could "Harm Rivals,"* GAME DEVELOPER (Sept. 1, 2022), https://perma.cc/K4FN-CQQ4.

[3] *Video Game Console*, PCMAG, https://perma.cc/T6KH-QH56.

[4] *See* Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 967 n.2 (9th Cir. 2023) ("Many game consoles—including the Microsoft Xbox, Nintendo Switch, and Sony PlayStation—provide ecosystems that can . . . be labeled 'walled gardens.'").

gaming companies use exclusive content to compete over subscription sign-ups rather than hardware purchases—the law should intervene. It can do so by promoting an open and interoperable console gaming ecosystem. Interoperability refers to "the act of making a new product or service work with an existing product or service."[5] In the gaming context, it entails enabling platforms and games to more easily share data and functionalities, breaking down consoles' walled gardens in the process.

This Note argues that a targeted regulatory framework is needed to promote interoperability and to address the harms of exclusivity and closed platforms. Part I provides a history of exclusivity in the video game console context, an overview of the business incentives driving closed platforms, and a discussion of the state of the industry today. Part II justifies governmental intervention by explaining the harms that exclusivity and closed platforms cause to consumers, developers, and competition. Finally, Part III examines the kinds of intervention that could remedy the harms posed. It argues that the legal remedy of antitrust is ill-equipped for the task before proposing that a targeted regulatory framework is both desirable and viable.

II. EXCLUSIVITY AND CLOSED PLATFORMS: PAST AND PRESENT

From *Final Fantasy XI* (released in 2005) to *Fortnite* (released in 2017 and still popular in 2025), there are many success stories demonstrating the technical and economic feasibility of cross-platform gameplay and design, and sometimes account portability. Nevertheless, walled gardens remain prevalent in the video game industry. Business incentives and technical considerations resulting from both technical necessity and a desire to control users' experiences continue to be the key drivers of exclusivity and closed platforms.

Early on, hardware limitations constrained the potential for multi-platform games. Atari's first home console in 1976, for instance, supported only one game: *Pong*.[6] However, exclusivity soon also became a strategic priority for platform manufacturers. At first, executives sought to increase hardware sales by securing home console rights to popular arcade games.[7] They assumed arcade-goers would be more inclined to buy a home console if they could play

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[5] Cory Doctorow, *Adversarial Interoperability*, ELEC. FRONTIER FOUND. (Oct. 2, 2019), https://perma.cc/7JWR-724Q.

[6] *Atari PONG, The Home Systems*, PONG-STORY, https://perma.cc/J4Z6-X5AZ (last visited Nov. 8, 2024).

[7] Dave Parrack, *Platform-Exclusive Games Might Be a Thing of the Past: Here's Why That's Good*, MAKE USE OF (Apr. 27, 2024), https://perma.cc/XH2P-RFUU.

their favorite arcade games on it. This same logic underpins the importance of exclusives generally—they can differentiate platforms and pull in customers. In the 1990s, a consumer who wanted to play *Sonic* had to buy a Sega console. If she also wanted to play *Mario* or *Zelda*, she would have to buy a Nintendo console. If she could only afford one console, she would presumably buy the one that had the better exclusive games library.

The console wars—competition for market share among console manufactures—are thus inextricably tied to platform exclusivity. As such, console manufacturers have made it a priority to secure exclusive titles. Until 1992, when the then-dominant Nintendo was sued by Atari for, among other things, antitrust violations, Nintendo had required developers to sign exclusivity contracts.[8] In exchange for the right to develop Nintendo games, developers committed to develop exclusively for Nintendo for two years.[9] While these types of contracts have not been used in the video game industry since and have been ruled anti-competitive in other industries, platform manufacturers have found other ways of securing exclusive titles.[10] These include internal development and vertical integration, technical integration and platform-specific features, and favorable contracting terms to external developers or publishers.[11]

Exclusive titles draw users into platforms' ecosystems. In doing so, they not only boost hardware sales but also now provide significant benefit to platforms' digital monetization strategies. After a consumer buys a console, the console manufacturer has increased control over various revenue streams the consumer might contribute to. Within their walled gardens, manufacturers can generate revenue from subscription services (such as Xbox Game Pass and PlayStation Plus), digital game sales and downloadable content (DLCs), and in-

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[8] Robin S. Lee, *Vertical Integration and Exclusivity in Platform and Two-Sided Markets*, 103 AM. ECON. REV. 2960, 2965 (2013).

[9] *Id.* at 2965.

[10] *Id.* at 2962 n.4, 2965.

[11] *See, e.g.*, Richard Gil & Frederic Warzynski, *Vertical Integration, Exclusivity, and Game Sales Performance in the US Video Game Industry*, J. L. ECON. & ORG. 143, 149 ("[T]he strategic advantage for console firms to vertically integrate at this stage . . . is that they can preclude the development of the game for other platforms."); Gillen McAllister, *How Developers Are Using PS5's DualSense Controller and 3D Audio to Make Their Games More Immersive*, PLAYSTATION.BLOG (July 29, 2022), https://perma.cc/4P9X-62QN (providing examples of ways in which developers are designing games around the PlayStation's DualSense controller); WORLD INTELL. PROP. ORG. (WIPO), MASTERING THE GAME: BUSINESS AND LEGAL ISSUES FOR VIDEO GAME DEVELOPERS 262 ("Publishers may elect to release a game on a single platform, or release unique content for a certain period of time in return for possible development and/or marketing costs and/or improved placement on the CM's storefront.").

game purchases. It is no surprise, then that the big console manufacturers often subsidize their consoles, selling them at or below cost.[12] Confidential documents inadvertently disclosed by Microsoft during its litigation with the FTC over the Activision Blizzard acquisition revealed that, in 2021, the company planned a $1.5 billion subsidy to meet its console price targets.[13] In short, manufacturers recognize the value and profitability of continuous engagement within their ecosystems, whereby they can capitalize on long-term revenue streams after consumers have made the up-front investment into their hardware.

Still, platform exclusivity is not an immutable feature of the video game industry. Prior to Cory Doctorow coining the term in 2014, a trio of well-known court decisions in the 1990s had already embraced the concept of "adversarial interoperability."[14] These cases involved the reverse engineering of software components within video game consoles and game cartridges. In finding such reverse engineering permissible under copyright law, even when the reverse engineering programmers had made intermediate copies, the three courts allowed games to be played across different platforms regardless of whether the manufacturers intended them to be compatible. The Ninth Circuit in *Sega Enterprises v. Accolade*, the first-decided and most cited of the trio, explicitly pointed to the public benefit derived from an increased number of independently designed video games.[15]

In the early 2000s, when Microsoft's Xbox and Sony's PlayStation 2 dominated the video game platform landscape, there was largely content and release date parity.[16] This parity, however, came at a significant cost to Microsoft. It had launched the Xbox as a direct challenger to the PlayStation 2

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[12] Tom Warren, *Microsoft Would Like to Remind You the Xbox Definitely Makes Money*, VERGE (May 6, 2021, 7:22 AM PDT), https://perma.cc/JF2P-TNKP (quoting a Microsoft executive saying "The console gaming business is traditionally a hardware subsidy model. Game companies sell consoles at a loss to attract new customers. Profits are generated in game sales and online service subscriptions.").

[13] Wesley Yin-Poole Hollister, *FTC Blames Microsoft for Devastating Xbox Court Document Leak*, IGN (Sept. 19, 2023, 8:59 AM), https://perma.cc/7SYB-UFML; Sean Hollister, *Read the Full Unredacted Email Where Microsoft Reacts to Sony's PS5*, VERGE (Sept. 19, 2023, 10:12 AM PDT), https://perma.cc/3PF6-T6FC.

[14] *See* Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510 (9th Cir. 1992); Atari Games Corp. v. Nintendo of Am. Inc., 975 F.2d 832 (Fed. Cir. 1992); Sony Computer Ent., Inc. v. Connectix Corp., 203 F.3d 596 (9th Cir. 2000); *see also* Cory Doctorow, *The Coming Compuserve of Things*, BOING BOING (July 19, 2014, 10:34 PM), https://perma.cc/2UEL-35BS.

[15] *Sega Enters.*, 977 F.2d at 1523.

[16] MARK A. LEMLEY & SONALI MAITRA, VIDEO GAME LAW 484 (2024).

after the PlayStation 2 had been on the market for over a year.[17] Per a former Xbox executive, Microsoft had to "write really big checks" (ranging from $5 million to $20 million) to game developers to secure content because, unlike Sony, it did not have an "install base [it] could point to."[18] In addition to the PlayStation 2's larger player base, platform familiarity also helped Sony attract and retain developer support. Developers already knew how to work with the PlayStation 2's Emotion Engine and did not need to adopt completely new workflows and technology for their new games.[19]

Microsoft was ultimately fairly successful in securing content and release date parity, but the expenses it incurred highlight the structural challenges in overcoming the stranglehold of exclusivity. The availability of legal reverse engineering can only go so far in addressing these challenges, and its relevance as a feasible tool for promoting interoperability has significantly diminished since the 1990s. This decline can be attributed in large part to increasingly complex technologies, as well as the prevention of interoperability through contractual agreements (such as terms of use) and the use of restrictive provisions in intellectual property laws.[20] Reverse engineering's viability as a long-term fix to exclusivity and closed platforms is limited, as it simply cannot on its own break down the structural and legal barriers that have evolved to enforce walled gardens in the gaming industry.

These barriers became even more pronounced with the introduction of the next generation of Microsoft and Sony consoles, the Xbox 360 (released in 2005) and PlayStation 3 (released almost exactly a year later in 2006).[21] Differences in hardware architecture between the two consoles disrupted the relative parity that had been achieved for the consoles' previous generations, with the PlayStation 3's more complex architecture posing technical challenges

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[17] Dan Ackerman & Darren Gladstone, *Microsoft Xbox at 20: Looking Back at the Original 2001 Review*, CNET (Nov. 15, 2021, 4:05 AM PDT), https://perma.cc/DBH8-R2QG.

[18] Evan Campbell, *Former Xbox Exec Says Millions Were Spent to Get Games Parity with PS2*, GAMESPOT (Aug. 22, 2023, 9:26 AM PDT), https://perma.cc/Q23W-SL45.

[19] Juliet Childers, *PS2 vs. Xbox: Which Console Was Better?*, GAMERANT (Dec. 16, 2020), https://perma.cc/ZV25-V64S.

[20] See Johannes Deichmann et al., *Cracking the Complexity Code in Embedded Systems Development*, MCKINSEY & CO. (Mar. 25, 2022), https://perma.cc/6U9C-Z4BK (complexity); Rahul Vijh, *Reverse Engineering and the Law: Understand the Restrictions to Minimize Risks*, IP WATCHDOG (Mar. 27, 2021, 12:15 PM), https://perma.cc/63XC-SWRK (contractual agreements); Mark A. Lemley, *The Splinternet*, 70 DUKE L.J. 1397, 1424 (2021) (intellectual property laws) ("[A] number of legal tools, including the Computer Fraud and Abuse Act and copyright law, have been used increasingly to try to prevent interoperability.").

[21] *BBC Archive: The First 8 Generations of Video Game Consoles*, BBC (Sept. 22, 2021), https://perma.cc/9K7A-BF9T.

to developers of cross-platform games.[22] In public comments, the CEO of Sony Computer Entertainment stated that this complex and unusual architecture was a deliberate choice.[23] He admitted the architecture was more complicated but also had more to offer—as developers grew more comfortable with it, they could further maximize game performance, giving the console a longer shelf life.[24] A more cynical interpretation, however, is that Sony intended to draw developers' focus to the PlayStation 3 while reducing their investment in content for Microsoft's Xbox 360.[25]

In this era of diminished parity, Microsoft and Sony doubled down on exclusivity. Both implemented loyalty rewards programs, incentivizing players to play and download more content on each respective console.[26] They intensified their focus on in-house game development by investing in existing in-house studios, creating new ones, and acquiring others.[27] Both companies also entered into temporary exclusive deals (also called "timed exclusives") with independent game studios, paying them in exchange for the exclusive availability of their game on one console for a limited time following release.[28]

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[22] *See* LEMLEY & MAITRA, *supra* note 16, at 484; Don Reisinger, *Sony: PS3 Is Hard to Develop For—On Purpose*, CNET (Feb. 28, 2009, 2:54 PM PT) https://perma.cc/M5N3-7ZRB (quoting a game studio employee) ("We had to play catch-up on the PS3 because of the memory constraints and how it renders; how it processes is just different. And it's harder on the PS3."). *See also* Daniele Paolo Scarpazza, Oreste Villa & Fabrizio Petrini, *Programming the Cell Processor*, DR. DOBBS (Mar. 9, 2007), https://perma.cc/V6NZ-D9KU ("Software that exploits the Cell's potential requires a development effort significantly greater than traditional platforms. If you expect to port your application efficiently to the Cell via recompilation or threads, think again.").

[23] Chris Faylor, *PS3 Intentionally Hard to Develop for, Says Sony*, SHACKNEWS (Jan. 20, 2009, 2:29 PM), https://perma.cc/77FD-9TAV.

[24] *Id.*

[25] It has been speculated that Sony used a similar strategy for the PlayStation 2, rewarding those studios that "developed exclusively or primarily for the PS2," while those that went to the competition "ran the risk of falling behind." Matthew Byrd, *Why PlayStation 2 Games Were Notoriously Difficult to Develop*, DEN OF GEEK (July 19, 2022) https://perma.cc/XV5K-2V9X.

[26] *See* Don Reisinger, *Sony to Offer Rewards for Playing Games on PS3*, CNET (Sept. 19, 2014, 3:01 PM PT), https://perma.cc/X6JW-RESA; Alex Sassoon Coby, *Microsoft Unveils Xbox Rewards*, GAMESPOT (Dec. 1, 2010, 9:46 AM PST), https://perma.cc/HKY4-PPRD.

[27] *See* LEMLEY & MAITRA, *supra* note 16, at 484. *See also, e.g.*, Alisa McAloon, *Xbox Plans to Ramp Up In-House Development Efforts*, GAME DEV. (Nov. 5, 2017), https://perma.cc/SQS4-YMRR; Kai Delmare, *PlayStation Boss Says Sony May "Bolster Our In-House Capability" with More Studio Purchases*, GAMESRADAR (Oct. 27, 2020), https://perma.cc/Y336-FFS6; Josh Coulson, *Sony to Invest an Additional $183M into PlayStation Exclusives over the Next Year*, THEGAMER (Apr. 28, 2021), https://perma.cc/8PMY-C5BR.

[28] *See* Alex Newhouse, *E3 2017: Xbox Boss Clarifies What "Console Launch Exclusive" Means*, GAMESPOT (June 13, 2017, 1:24 PM PDT), https://perma.cc/BQ4D-CZN6; Adrian Werner, *Sony Secures PS5 Exclusives from Other Publishers*, GAMEPRESSURE (Aug. 9, 2020, 6:46 PM), https://perma.cc/AD3B-97SR.

Additionally, beginning with Sony's "PlayStation Now" service in 2014, the two platforms launched content subscription services, allowing users to download and play a selected array of first-party and third-party content for a monthly payment.[29] The exclusivity wars have extended to these products, with Microsoft claiming Sony pays developers for "blocking rights" to prevent their content from being available on Xbox's Game Pass subscription service.[30] Finally, even popular games designed and released for multiple platforms have at times included exclusive extras, like skins and DLCs, available only on a particular console.[31]

Some cracks have begun to resurface in consoles' walled gardens in recent years. Technological advances have made it easier than ever for studios to develop games for multiple consoles. Cross-platform game engines like Epic Games' Unreal Engine and Unity Technologies' Unity 3D allow developers to deploy the same code across a variety of platforms.[32] These engines also provide a robust array of features for optimizing performance and ensuring consistency across platforms, giving developers room to focus more on their content and less on technical challenges.[33] Nowadays, some of the most popular video games in the world, like *EA Sports FC* (formerly *FIFA*), *Fortnite*, and *Call of Duty* even support cross-platform multiplayer gameplay.[34] An Xbox gamer in Georgia can play a virtual soccer game online on *EA Sports FC* against her PlayStation gamer best friend in Pennsylvania. This would not be possible without console support. It was Xbox in 2016 that became the first ever console to offer online cross-platform gameplay support to any developers that wanted

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[29] Mike Snider, *Xbox and PlayStation: How Sony and Microsoft Changed the Way We Play Video Games*, USA TODAY (Nov. 14, 2020), https://perma.cc/JCC9-X9XE.

[30] It is unclear whether Sony actually pays for "blocking rights." It may just be "paying for exclusive rights for its own streaming services." Tom Warren, *Microsoft Claims Sony Pays for 'Blocking Rights' to Keep Games off Xbox Game Pass*, VERGE (Aug. 10, 2022, 12:29 PM PDT), https://perma.cc/4LLU-YBDK. Alternatively, perhaps, its publishing contracts with developers include clauses preventing some games from being published on any rival subscription services. *Id.*

[31] *See, e.g.*, *Play as the Joker*, ARKHAM WIKI, https://perma.cc/U4D4-ABNR (last visited Nov. 19, 2024) (PS3 Exclusive DLC for *Batman: Arkham Asylum*); Ben Kuchera, *Microsoft Pays $50 Million for Exclusive GTA IV Downloadable Content*, ARS TECHNICA (June 18, 2007, 7:37 AM), https://perma.cc/ZU6G-QXSB; *Batman™: Arkham Knight PlayStation®4 Exclusive Skins Pack*, PLAYSTATION STORE, https://perma.cc/G435-NWZA.

[32] *See* juegoadmin, *What Makes Cross-Platform Game Development Popular in 2024?*, JUEGO STUDIOS (Jan. 23, 2024), https://perma.cc/FXA2-8AL9.

[33] *See, e.g.*, Jon Brodkin, *How Unity3D Became a Game-Development Beast*, DICE (June 3, 2013), https://perma.cc/A94R-XBXA.

[34] *See Full List of Cross-Play Games*, TRUEACHIVEMENTS, https://perma.cc/T5HA-WQM4 (last updated Nov. 20, 2024).

to have it for their games.[35] Thirty months later, after a "comprehensive evaluation process," Sony reluctantly followed suit.[36]

Despite these shifts, and as weary gamers know all too well, consoles have not abandoned exclusivity—it may in fact even be taking new forms. The landscape has not drastically changed because the core business incentives for console manufacturers remain consistent. Although fully exclusive games may be less common than before, timed exclusives remain widespread.[37] Moreover, even as manufacturers embrace multi-platform development, they tend to do so selectively. Microsoft, for instance, has been more open to moving away from strict platform exclusivity.[38] Yet, it continues to secure certain high-profile games—such as *Starfield* (released) and *Elder Scrolls VI* (upcoming)—as exclusives for Xbox and PC.[39] Sony, on the other hand, maintains a strategy of scheduled exclusives for its PlayStation 5 and revealed in 2021 that it had spent $329 million on exclusive publishing agreements and partnerships.[40] Documents from *Epic Games v. Apple* further revealed Sony's practice of charging publishers royalties to enable online cross-platform gameplay.[41] Sony required Epic to agree to a revenue-sharing model for *Fortnite* to protect its console revenue against potential losses to competing platforms.[42]

In addition to the continued significance of exclusivity for consoles' business strategies, the nature of exclusivity is itself evolving. As subscription services and cloud gaming become increasingly important sources of revenue for console manufacturers, service exclusivity could one day become the

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[35] Kyle Orland, *Microsoft Opens a Crack in Console Gaming's Decades-Old Walled Garden*, ARS TECHNICA (Mar. 27, 2024, 8:58 AM), https://perma.cc/8EXR-ZAAV.

[36] Kyle Orland, *Sony's Walled Garden Cracks Open: Cross-Console Play Comes to PS4*, ARS TECHNICA (Sept. 26, 2018, 8:00 AM), https://perma.cc/EGB4-J6WN; Tom Warren, *Sony Really Hated PS4 Crossplay, Confidential Documents Reveal*, VERGE (May 3, 2021, 11:05 AM PDT), https://perma.cc/Q9VD-RSUE.

[37] LEMLEY & MAITRA, *supra* note 16, at 484.

[38] *See* Jason Schreier, *Xbox's 'Exclusive' Video Game Strategy Leaves Everyone Confused*, BLOOMBERG (Aug. 23, 2024, 10:00 AM GMT), https://perma.cc/PVK4-4TEY.

[39] *Id.*; Leah J. Williams, *The Elder Scrolls 6 Will Be Xbox and PC Exclusive*, GAMESHUB (Sept. 19, 2023), https://perma.cc/SJ3N-YU6X.

[40] Mark Lugris, *Sony Has Spent $329 Million Over the Last Year on Developing Third-Party PlayStation Studios Exclusives*, THEGAMER (Feb. 17, 2021), https://perma.cc/7YAS-CR5P. *See also* Jake Green, *Upcoming PS5 Exclusives - Release Schedule for Confirmed Games*, TECHRADAR (Apr. 15, 2025), https://perma.cc/5D57-5S64.

[41] Austen Goslin, *Epic Boss: We Paid PlayStation for Cross-Platform Fortnite*, POLYGON (May 4, 2021, 10:07 AM PDT), https://perma.cc/W8GW-G7UM.

[42] Sony required publishers to compensate Sony whenever the PlayStation's gameplay share for a title fell below 85%, effectively charging for cross-platform play when revenue was generated on other platforms. *Id.*

primary battleground of the console wars. Back in 2018, Microsoft Gaming CEO Phil Spencer proclaimed that Xbox Game Pass would be on "every device" in the future.[43] In January 2025, he confirmed that "[Xbox] games will show up in more places, no doubt."[44] Xbox seems to be on a quest to build a software "ecosystem" that would expand gaming access across multiple platforms rather than limit it to Xbox consoles, creating a device-agnostic experience by making its games, Game Pass, and cloud gaming services available wherever players choose to play.[45] In November 2024, the company launched the "This Is an Xbox" marketing campaign, inviting users on a range of platforms, including mobile phones, Amazon Fire TVs, and Meta Quest headsets, to "play with Xbox" by downloading Xbox's Game Pass service on those platforms.[46] In this vision, rather than merely choosing between *consoles*, gamers will also choose between *services*.

Xbox's adoption of this strategy may be a matter of necessity. Facing intense antitrust scrutiny over the Activision Blizzard acquisition, Microsoft pledged to keep popular titles like *Call of Duty* multiplatform for a decade, limiting its ability to leverage these games as exclusive incentives to purchase Microsoft hardware.[47] Microsoft, however, is far from the only major player to be treating live service and subscription models as key business areas.[48] Established console manufacturers, and perhaps new innovators seeking to challenge them, may soon be competing on an entirely new front. As such, while there has been a general trend towards multiplatform game development and cross-platform gameplay, policymakers should not assume that an open gaming ecosystem is an inevitability. A strategic shift by major gaming companies toward service-based models risks creating new walled gardens, where access to content becomes siloed across services, some of which may also be platform-specific. These strategies could replicate the harms seen in the traditional console wars and undermine the progress that has been made.

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[43] Eddie Makuch, *Xbox Game Pass Will Eventually Be On "Every Device," Phil Spencer Says*, GAMESPOT (Dec. 5, 2018, 5:10 PM PST), https://perma.cc/G93S-CCRK.

[44] Paul Tassi, *Xbox's Third-Party Path Seems Permanent, According to Phil Spencer*, FORBES (Jan. 27, 2025, 10:25AM EST), https://perma.cc/8WV2-XAJJ.

[45] *See* Rebekah Valentine, *How Xbox Is Changing the Nature of Exclusivity*, IGN (Jan. 17, 2024, 4:44 PM), https://perma.cc/824P-5BKV.

[46] Craig McNary, *This Is an Xbox*, XBOX (Nov. 2024), https://perma.cc/EL5L-6LRV.

[47] *See* Stephen Totilo, *Sony Signs 10-Year Deal with Microsoft to Keep Call of Duty on PlayStation*, AXIOS (July 16, 2023), https://perma.cc/6PAT-HBZ5.

[48] *See, e.g.*, Eric Lempel, *Discovery, Engagement, and Excitement: The Global Marketing of PlayStation Plus*, SONY INTERACTIVE ENT. (June 23, 2022), https://perma.cc/63YH-Q7YT.

III. WHY THE LAW SHOULD INTERVENE

Part I details why closed platforms and exclusivity have been and remain such a powerful force in gaming. Part II seeks to explain why this is problematic on three interrelated dimensions: (A) consumer interests; (B) developer interests; (C) the competitive landscape. These harms are significant enough to warrant a legal or regulatory remedy, and, due to the nature of related business incentives, it is not clear that they will abate without one.

A. Consumer Interests

Closed platforms and exclusives harm consumer interests. While the modern antitrust framework focuses primarily on "consumer welfare," which generally refers to the price effects resulting from market dynamics, consumer interests are not limited to costs.[49] They also include "product quality, variety, and innovation."[50] With respect to exclusivity, the primary theory of harm to video game consumers is fairly intuitive and rests on a few basic assumptions. First, video game users want to be able to access as many games as they can. Second, users want to limit incurring additional hardware costs. Third, those users that play online multiplayer video games want to be able to play those games with as many of their friends as possible. From the first two assumptions, it follows that users prefer that games be available on more than one platform, increasing the likelihood that they can access those games without needing to invest in more platforms. From the third, it follows that the users who play multiplayer video games online benefit from the ability to play those games with their friends on different platforms.

When platforms embrace exclusivity, whether through vertical arrangements like exclusive contracts and vertical integration or through first-party development, they limit consumer choice. These kinds of arrangements prevent consumers on competing platforms from "accessing exclusive content, products, or services."[51] They lock users into specific ecosystems—walled gardens. Restricting access like this forces consumers to either invest in multiple platforms or miss out on certain games and content entirely, creating an artificial barrier that reduces the overall accessibility and enjoyment of the gaming experience. Even when games are available across platforms, they may

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[49] *See generally* Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710 (2017).
[50] *Id.* at 731.
[51] Lee, *supra* note 8, at 2960–61.

not support seamless movement across devices. For example, a user who played *Red Dead Redemption 2* on Xbox and then bought it for PlayStation would need to start the game over from scratch.[52] Likewise, players of *EA FC* and *Throne and Liberty*, two hugely popular games with online multiplayer cross-play, might be surprised to find out that they too cannot port over their account and game progression data.[53] This creates significant, unnecessary inconvenience for players.

To make matters worse, for gamers that want to play online with their friends (which, these days, is most gamers), switching consoles becomes costly when exclusivity predominates.[54] If a group of friends wants to play an exclusive game, or one that does not support cross-play, each member must own the same console to play together. Exclusivity arrangements thus fragment the player base across different platforms, making it difficult or even impossible for friends using competing consoles to connect and play together, thereby also diminishing the social experience that is central to modern gaming.[55]

B. Developer Interests

Platform exclusivity can also harm developers. Proponents of exclusivity argue that exclusives allow developers to leverage console makers' proprietary technologies and access to their marketing resources to create games that maximize hardware potential and provide unique experiences.[56] There is certainly some truth to this argument, but not all developers benefit from exclusivity, nor does exclusivity come without costs to those developers who accept exclusivity arrangements. Just as users want to be able to access as many games as possible, developers want to be able to sell their games to as many

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[52] Portability is technically feasible, so these restrictions cannot simply be attributed to technical constraints. In fact, Rockstar Games—*Red Dead Redemption 2*'s developer—made an exception to its restrictions on portability for Stadia users after Google shut the cloud gaming service down entirely. *See* Chris Wallace, *'Red Dead Redemption 2' Stadia Player Can Now Transfer His 6,000 Hour Save to Another Platform*, NME (Oct. 22, 2022), https://perma.cc/24CW-MTQ3.

[53] *Cross-play in EA SPORTS FC*, EA HELP: OFF. SUPPORT (Oct. 16, 2024), https://perma.cc/KT3L-QFAH; *FAQ*, THRONE & LIBERTY, https://perma.cc/9XGD-U599 (last visited Dec. 10, 2024).

[54] "Social play beats solo play, and most gamers want to play with friends, whatever platform they're on." Anders Christofferson et al., *Gamer Survey: Young Players Reshape the Industry*, BAIN & CO. (Aug. 29, 2024), https://perma.cc/5WQG-9P3R.

[55] *See* Chris Arkenberg & Ankit Dhameja, *A Borderless World: Crossplay Brings Gamers Together*, DELOITTE (Aug. 25, 2022), https://perma.cc/XLV4-2LQS.

[56] *See* SMASH JT, *Are Exclusive Games Good or Bad for the Industry?* (Feb. 11, 2024), https://perma.cc/J3N7-U27P.

users as possible. Under an exclusivity agreement, their market is restricted to the user base of a given platform.

Ironically, exclusivity can even frustrate the success of consoles' most prized blockbuster games. A former Sony executive recently referred to exclusivity as an "Achilles' heel" for such games.[57] Development costs for these games can rival that of big-budget films, yet the size of their addressable market is reduced by exclusivity arrangements. As a simplified illustration: even if a blockbuster game released as a PS5 exclusive were to reach all estimated 129 million monthly active PlayStation Network users, its developers would still miss out on potential revenue from the estimated *500 million* monthly active users across Microsoft Gaming platforms and devices—assuming, for the sake of argument, that none of those 500 million users also have a PlayStation or would buy one to access the exclusive game.[58]

In addition to limiting a developer's market, exclusivity can breed dependency. If a platform's audience or engagement declines, the success of the developer's game will decline with it. Smaller independent studios in particular may feel pressure to comply with platform-specific demands to ensure ongoing support and funding because they lack leverage.[59] These studios may also be left out as subscription services like Xbox Game Pass grow more important to platforms. If gamers increasingly sign up for these kinds of services, they may cease to purchase individual games, and independent developers may have a more difficult time making their games available and reaching users on these services than larger independent studios, let alone first-party ones.[60]

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[57] Cameron Woolsey, *Helldivers 2 Proves That Exclusivity is Harmful to the Industry, Former PlayStation Boss Says*, DESTRUCTOID (Mar. 11, 2024, 1:17 PM PDT), https://perma.cc/KFT8-AYKT.

[58] Sony estimates it has 129 million monthly active PlayStation Network users as of December 31, 2024. *Business Data & Sales*, SONY INTERACTIVE ENT. (last visited Apr. 22, 2025), https://perma.cc/MF5E-5Y3M. In a July 2024 earnings call, Microsoft CEO Satya Nadella claimed its gaming division "now [has] 500 million monthly active users across platforms and devices." Tom Warren, *Microsoft's Cloud Revenues Rule Again in Q4, as Surface Continues to Dip*, VERGE (July 30, 2024, 1:13PM PDT), https://perma.cc/PB36-JGVS.

[59] *See* Chris Baraniuk, *Microsoft's Mega-Deal Worries Small Video Game Makers*, BBC (Feb. 7, 2022), https://perma.cc/S2M2-6P45.

[60] *See id.*

C. Competition

Compounding these harms to consumers and developers is the fact that the gaming sector as a whole is increasingly concentrated.[61] Three key players (Sony, followed by Nintendo and Microsoft) control almost all of the market share in console hardware.[62] They also heavily influence the types of games that reach their platforms through exclusivity agreements and first-party development. Considering the industry's profitability, one might expect more new market entrants seeking to challenge the big players and capture a portion of their profits. But there is a key barrier to entry: network effects. The gaming industry is characterized by network effects—the value of a gaming platform to the user increases as more players and developers join, creating a self-reinforcing cycle that encourages others to participate as well. This makes the industry vulnerable to a phenomenon economists refer to as "tipping."[63] When network effects are strong, the market "tips" towards the most popular networks. In console gaming, gamers will tend to gravitate toward the platform with the most robust community *and* attractive exclusives library, further strengthening that platform's position and creating a feedback loop that makes it challenging for competitors to gain traction.[64] In this kind of market, competition is "for the market, rather than in the market," other than by "sufficiently differentiated competitors."[65]

A highly concentrated market structure like this generally poses significant risks to consumer interests. As explained by former FTC Chair Lina Khan in her famous student note, *Amazon's Antitrust Paradox*, allowing such a structure to persist endangers consumers' long-term interests, from costs and product quality to variety and innovation, since "firms in uncompetitive markets need

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[61] *See* FORTUNE BUS. INSIGHTS, *Gaming Console Market* (last updated Nov. 4, 2024), https://perma.cc/5TAC-27NY; Joost van Dreunen, *Three Decades of Games Industry Consolidation*, SUBSTACK (Feb. 2, 2022), https://perma.cc/R34T-ME2Q.

[62] van Dreunen, *supra* note 61; Piers Harding-Rolls, *Console Market 2022 Review: Hampered by Lack of Hardware Availability*, AMPERE ANALYSIS (Feb. 28, 2023), https://perma.cc/LKC2-JLM4.

[63] *See, e.g.*, Jean-Pierre Dubé, Günter J. Hisch & Pradeep Chintagunta, *Tipping and Concentration in Markets with Indirect Network Effects*, 29 MKTG. SCI. 216 (2010).

[64] Arati Srinivasan & N. Venkatraman, *Indirect Network Effects and Platform Dominance in the Video Game Industry: A Network Perspective*, 57 IEEE TRANSACTIONS ON ENG'G. MGMT. 661, 671 (2010) (finding that "a higher degree of overlap of game titles across platforms had a negative impact on market share").

[65] Fiona M. Scott Morton & David C. Dinielli, *Roadmap for an Antitrust Case Against Facebook*, 27 STAN. J.L. BUS. & FIN. 268, 293 (2022).

not compete to improve old products or tinker to create new ones."[66] Dominant console manufacturers may face less competitive pressure to improve their hardware or software experiences, knowing they have a dedicated user base that seeks to play the console's exclusives. Thus, not only can exclusivity itself directly hurt consumers by limiting their choices and compromising their overall gaming experience, but it also plays a role in "tipping" the market and further inducing concentration, meaning that it indirectly harms consumers' interests as well.

Exclusivity arrangements generally raise competition issues because they may "deter entry or foreclose rivals," concerns which are exacerbated in the presence of network externalities.[67] Vertical integration in particular poses significant anti-competitive risks; it occurs when a console manufacturer acquires control over multiple stages of the gaming ecosystem, such as hardware production, game development, and content distribution. Owning both the platform (hardware) and the content (software) grants a console manufacturer *leverage* and *foreclosure*. The leverage theory, as advanced by critics of vertical integration, holds that vertical integration allows entities dominant in one market to extend that dominance to other vertically related ones.[68] The foreclosure theory, on the other hand, holds that firms use vertical integration to disadvantage unintegrated rivals by restricting them from additional opportunities.[69]

Vertically integrated console manufacturers can leverage their position to extend dominance to other lines of business and also to disadvantage competitors. By leveraging their strong position as console makers, they can negotiate exclusive deals with game developers, acquire more game studios, and produce successful first-party games. Console manufacturers can then limit competitors' access to essential gaming content or services, "foreclosing" them from parts of the market. Continued vertical integration grants console manufacturers greater control over the industry's inputs, allowing them to prevent competitors from "acquiring the same inputs that they need to be able to operate."[70] This strategic control is evident in the high quality of exclusive

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[66] Khan, *supra* note 49, at 739.

[67] Lee, *supra* note 8, at 2960.

[68] *See* Herbert Hovenkamp, *Robert Bork and Vertical Integration: Leverage, Foreclosure, and Efficiency*, 79 ANTITRUST L.J. 983, 986 (2014).

[69] *See id.* at 995.

[70] Clayton Alexander, *Note, Game Over? How Video Game Console Makers are Speeding Toward an Antitrust Violation*, 4 BUS. ENTREPRENEURSHIP & TAX L. REV. 151, 162 (2020).

content.[71] Consider games like *God of War Ragnarok* (PlayStation) and *Forza Horizon 5* (Xbox), both rated a rare 10/10 on IGN, and both published exclusively by one console's studio.[72]

Microsoft's recent acquisition of Activision Blizzard for $68 billion illustrates many of the anti-competitive concerns over vertical integration in the gaming industry. In an effort to assuage regulators' worries that it would foreclose Sony, Microsoft struck a deal with Sony to keep the *Call of Duty* franchise on PlayStation for the next decade.[73] Sony had previously accused Microsoft of "buying up irreplaceable content at incontestable prices to tip competition to itself."[74] Microsoft also had to relinquish Activision's cloud-gaming rights for fifteen years, to assure UK regulators that it would not gain excessive control over popular gaming content in the emerging cloud gaming market.[75] Gamers brought their own antitrust lawsuit, filed soon after the FTC failed to block the deal, alleging that Microsoft's acquisition could lead to Microsoft prioritizing Xbox versions of popular games like *Call of Duty* and increasing prices.[76]

The gamer lawsuit has since settled. And Microsoft, by making certain concessions, was able to overcome every other regulatory obstacle in its way and close the deal, the largest consumer tech acquisition since AOL's purchase of Time Warner over twenty years prior, in October 2023.[77] However, concerns over anti-competitive impacts and the potential risks to cross-platform gameplay linger. Furthermore, this acquisition is unlikely to be the last instance of vertical integration reshaping the gaming landscape, as companies continue to seek control over both content and distribution. This type of consolidation allows dominant hardware manufacturers to control a larger portion of the

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[71] *Id.*

[72] Andrew Smith & Seth G. Macy, *Every Modern Game IGN Has Given a 10/10*, IGN (Mar. 20, 2024, 7:50 PM), https://www.ign.com/articles/how-and-where-to-play-every-modern-ign-1010-game https://perma.cc/3SSV-JLSY.

[73] Tom Warren, *Sony Agrees to 10-Year Call of Duty Deal with Microsoft*, VERGE (July 16, 2023, 7:05 AM PDT), https://www.theverge.com/2023/7/16/23792215/sony-microsoft-call-of-duty-cod-deal-signed https://perma.cc/8JPZ-VARQ.

[74] Josh Sisco, *Feds Likely to Challenge Microsoft's $69 Billion Activision Takeover*, POLITICO (Nov. 23, 2022, 5:30 PM EST), https://perma.cc/599Y-ECN8.

[75] Dean Takahasi, *Microsoft Signs 15-Year Cloud Streaming Deal with Ubisoft in Latest Bid to Win Activision Blizzard Approval*, GAMESBEAT (Aug. 21, 2023, 11:49 PM), https://perma.cc/V4J6-BYJV.

[76] Winston Cho, *Microsoft Settles Gamers' Antitrust Lawsuit over $69B Activision Blizzard Buy*, HOLLYWOOD REP. (Oct. 14, 2024, 4:10 PM), https://perma.cc/6ND6-2VQ8.

[77] Kellen Browning & David McCabe, *Microsoft Closes $69 Billion Activision Deal, Overcoming Regulators' Objections*, N.Y. TIMES (Oct. 13, 2023), https://perma.cc/KE37-XA2N.

software ecosystem, effectively reducing the available market share for competitors, raising barriers to entry for potential new competitors, and also limiting opportunities for independent game developers who may struggle to access platforms on equal terms. All of this of course can further harm consumers for the reasons elaborated above.

IV. ASSESSING LEGAL AND REGULATORY REMEDIES

On the face of the harms described, antitrust law seems a natural remedy. Yet there are serious limitations to the efficacy of judicial remedies in the antitrust context, not least of which is the fact that any such remedy must be predicated on an antitrust violation. Subpart III.A explores whether closing a platform and pursuing a strategy of exclusivity is an enforcement violation, concluding that a path based on such claims would be an uphill battle for interoperability and cross-platform advocates to pursue. It proceeds to show that while there may be antitrust violations for which opening platforms would be a reasonable remedy, the utility of such claims in addressing the broader issue is restricted. Finally, Subpart III.B argues that a targeted regulatory framework, promoting interoperability, offers a more effective solution and can succeed where antitrust law falls short.

A. Antitrust Is Not the Answer

Antitrust laws grant courts broad equity powers.[78] As once remarked by Judge Wyzanski, courts in the antitrust field "have been accorded, by common consent, an authority they have in no other branch of enacted law . . . ."[79] In theory, then, courts reviewing antitrust cases brought against video game platforms have the necessary discretion to redress the harms that closed platforms create. For example, reviewing courts could restrict exclusivity agreements, require cross-platform compatibility and cross-play for multiplayer games (when developers seek it), mandate interoperability standards, and in extreme cases, require divestiture of certain parts of platforms' businesses (like forcing them to divest from game development). Even the most extreme of these options is not without relatively recent precedent. The district court judge

[78] *See, e.g.*, 15 U.S.C. § 25 (2018) (authorizing federal courts to "prevent and restrain violations" without specifying how); *see also* Herbert J. Hovenkamp, *Antitrust Harm and Causation*, 99 WASH. U.L. REV. 787, 838 (2021).
[79] *Id.*

in *United States v. Microsoft Corp.*, for instance, ordered Microsoft to be split up into two separate corporations, one dedicated to its operating systems business and the other to its applications business (although this order was later vacated on appeal).[80]

In reality, however, it is unlikely that we will see such judicial remedies employed in the video game context. Antitrust laws "do not give courts a roving mandate to fix markets in the absence" of proof that the laws were violated.[81] And the nature of the modern antitrust landscape makes it unlikely that such violations will be found. Modern antitrust law, per Mark Lemley and Robin Feldman, is "atomistic."[82] It is "deliberately focused on trees, not forests."[83] Where courts and agencies should ask whether the overall behavior of a company is reducing competition in the market, they instead "focus on a particular merger or challenged monopolistic practice in isolation."[84] Consequently, while platforms' strategic use of exclusivity arrangements and vertical integration may have significant anti-competitive effects, any antitrust action would be evaluated atomistically—focused on a specific transaction or anti-competitive practice—limiting the likelihood that cumulative impact of a platform's behavior on market competition will be recognized as a violation.

Of course, this begs the question of whether there are any specific violations for which judicially mandated remedies aimed at opening platforms could be appropriate. Perhaps the most obvious potential violation is platform makers' acquisitions of first-party studios. The big console makers are in an ongoing "consolidation war," with recent examples being Microsoft's acquisitions of Activision Blizzard and ZeniMax Media (the parent company of Bethesda Game Studios, among others) and Sony's acquisition of Bungie Studios (ironically, the developer of the original Xbox's "killer application," *Halo*).[85] There are two stages of possible antitrust action here: (1) pre-merger

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[80] *See* United States v. Microsoft Corp., 97 F. Supp. 2d 59, 64 (D.D.C. 2000); United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

[81] Herbert J. Hovenkamp, *Antitrust Interoperability Remedies*, 123 COLUM. L. REV. 1, 11 (2023).

[82] Robin C. Feldman & Mark A. Lemley, *Atomistic Antitrust*, 63 WM. & MARY L. REV. 1869, 1872 (2022).

[83] *Id.*

[84] *Id.* at 1874.

[85] *See* Katie Gerasimidis & Lisa Kaltenbrunner, *Fight for Fair Play: Antitrust Battles in the Gaming Industry*, ROPES & GRAY (Mar. 31, 2023), https://perma.cc/YYZ5-6XUX (discussing recent acquisitions); *see also Killer Application: What It Means, How It Works, Value*, INVESTOPEDIA, https://perma.cc/2PA9-4TR7 (updated Feb. 1, 2021) ("[T]he popular Halo first-person-shooter game series is widely credited as the killer application that built the success of Microsoft's Xbox game consoles.").

preventive review of certain proposed mergers by the FTC and the Department of Justice under the Hart-Scott-Rodino Act and (2) post-merger unilateral conduct cases brought under Section 2 of the Sherman Act.[86]

The merger review stage is unlikely to yield significant remedies of the sort needed to address the harms of closed platforms. Modern antitrust analysis generally accepts that vertical mergers have pro-competitive benefits and pose fewer risks to competition.[87] These mergers can generate efficiencies for consumers by lowering transaction costs.[88] This can make it an uphill battle for U.S. antitrust agencies to win their lawsuits, resulting in less frequent challenges of vertical mergers.[89] The court in *FTC v. Microsoft Corp.*, for example, discussed several procompetitive effects of the Activision Blizzard acquisition, such as the addition of *Call of Duty* to Microsoft's Game Pass subscription service, which the court said provide more consumers a "new, lower cost way to play the game" while "harm[ing] none."[90]

Moreover, antitrust agencies have in recent years been reluctant to settle merger cases with structural remedies—like divestiture of assets—despite these typically being the preferred approach for their effectiveness and simplicity.[91] Agency leaders have directly expressed that they now prefer blocking anti-competitive mergers outright.[92] This shift in enforcement strategy

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[86] *See Merger Review*, FED. TRADE COMM'N, https://perma.cc/BNT7-7KQA; *see also* U.S. DEP'T OF JUST., *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act: Chapter 1* (last updated Mar. 18, 2022), https://perma.cc/KKZ8-V9EG.

[87] *See, e.g.*, PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, ¶ 755c (online ed. 2023) ("Vertical integration is ubiquitous in our economy and virtually never poses a threat to competition when undertaken unilaterally and in competitive markets.").

[88] Koren W. Wong-Ervin, *Antitrust Analysis of Vertical Mergers: Recent Developments and Economic Teaching*, AMERICAN BAR ASSOCIATION (ABA) ANTITRUST SOURCE 1, 5 (2019), https://perma.cc/2CL9-P5LC.

[89] *See* Stephanie Hughes, *What the FTC's Microsoft-Activision Loss Might Mean for Future Mergers*, MARKETPLACE (July 12, 2012), https://perma.cc/2NJ6-5G29; *see also* Juliet Childers, *Vertical Merger Guidelines*, FED. TRADE COMM'N & U.S. DEP'T OF JUST. 2, (June 30, 2020), https://perma.cc/V66D-6J8L (noting that "vertical mergers often benefit consumers through the elimination of double marginalization, which tends to lessen the risks of competitive harm").

[90] Fed. Trade Comm'n v. Microsoft Corp., 681 F. Supp. 3d 1069, 1098 (N.D. Cal. 2023).

[91] Joshua M. Goodman & Ryan Hoak, *US Antitrust Agencies Take Stricter Approach to Structural Remedies amid Growing Concern*, *in* GLOBAL COMPETITION REVIEW, MERGER REMEDIES GUIDE 73–74 (Ronan P. Harty et al. eds., 5th ed. 2024).

[92] *See* Jonathan Kanter, Assistant Att'y Gen. of the Antitrust Div., U.S. Dep't of Just., Remarks to the New York State Bar Association Antitrust Section (Jan. 24, 2022) ("I am concerned that merger remedies short of blocking a transaction too often miss the mark . . . in my view, when the division concludes that a merger is likely to lessen competition, in most situations we should seek a simple injunction to block the transaction.").

has led to a corresponding increase in "litigating the fix." Because there is now less risk of going to court, merging parties are "more often proffering a proposed fix to the reviewing court in an effort to persuade the court to accept it, deny the government's request for injunction, and allow the transaction to close."[93] Litigating the fix poses a challenge for remedying closed platforms because it shifts the burden of proposing solutions away from regulatory agencies and onto the merging companies themselves.[94] The fixes proposed by companies are typically ones that were rejected by the reviewing antitrust agency.[95] They are often behavioral—such as Microsoft's pledge to offer *Call of Duty* on competing platforms for 10 years—and thus rely on ongoing compliance that is harder to monitor and enforce effectively.[96]

It is too early to tell whether these trends will continue under the Trump administration. While Wall Street had expected a more deal-friendly environment,[97] the DOJ's Antitrust Division and the FTC both confirmed in February 2025 that they would retain the Biden-era Merger Guidelines, in part because the guidelines "work best when there is stability across administrations."[98] Irrespective of whether or not the trend of "litigating the fix" continues, there are simply too many limitations for antitrust alone to be a viable solution for mitigating the harms of exclusivity. No antitrust rule requires interoperability in this context. At best, antitrust enforcement in the merger context provides a quasi-regulatory approach to discouraging exclusivity by conditioning merger approvals on specific standards of openness. But the limitations of such a quasi-regulatory approach are obvious: oversight is often insufficient, enforcement may be inconsistent, and any conditions imposed on mergers may lack the durability and adaptability needed to address evolving exclusivity practices in the market. Without a more robust framework, these

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[93] Sara Y. Razi, *Facing Reality: Litigating the Fix When Pre-Merger Negotiations Fail*, COLUM. BUS. L. REV. 39, 41 (2024).

[94] *See* Dan Papscun, *Microsoft-Activision Ruling Shows Preemption Strategy Strength*, BLOOMBERG (July 12, 2023, 1:45 AM), https://perma.cc/XYK2-QHEM.

[95] Steven C. Salop & Jennifer E. Sturiale, *Fixing "Litigating the Fix"*, 85 ANTITRUST L.J. 619, 620 (2024).

[96] John E. Kwoka & Diana L. Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, AM. ANTITRUST INST. 1, 21–22 (2011), https://perma.cc/B5UF-ENRT.

[97] David Wainer & Dan Gallagher, *As Trump Readies a Reset of Antitrust Policy, Look to These Sectors for Deals*, WALL ST. J. (Nov. 10, 2024, 7:00 AM), https://perma.cc/BDW2-SJ52.

[98] Memorandum from Omeed Assefi on Use of the 2023 Merger Guidelines to U.S. Dep't of Just. Antitrust Div. Staff (Feb. 18, 2025), https://perma.cc/96CX-Q8ER.

conditional approvals may do little to foster true interoperability or long-term competition.

Even if one assumes—and this is an unlikely assumption, as will be discussed in the next paragraph—that a platform manufacturer might, post-merger, be found to have violated the Sherman Act through unilateral conduct, the resulting remedies are also likely to be limited in their effectiveness. For example, if Microsoft, after fulfilling its promise to keep *Call of Duty* available on PlayStation for 10 years, then proceeds to foreclose by removing the game from PlayStation, a judge is more likely to implement behavioral remedies than structural ones (such as unwinding the consummated merger). While requiring Microsoft to divest from Activision-Blizzard would provide a clear remedy for the antitrust violation, it would also pose immense complexities and operational inefficiencies.[99] Breaking up the operations and assets of a combined entity to effectively restore competition in the affected market is an inherently difficult endeavor,[100] so judges are often reluctant to impose such a solution.[101] This leaves pro-interoperability advocates at square one when it comes to judicial relief in these cases: relying on behavioral and conduct remedies, which suffer from serious limitations.

The merger context—perhaps the most realistic target of antitrust enforcement in such an atomistic landscape—is unlikely to promote openness in any systematic or significant way. For that reason, it does not bode well for the prospects of antitrust law generally sufficing to address the harms of exclusivity and closed platforms. At its core, antitrust law worries about cartels or monopolization. But, with three dominant players in the console market, there is no monopoly for antitrust law to address. Yet the exclusivity problem and its corresponding anti-competitive effects still exist in the absence of monopoly power. Moreover, to the extent that antitrust law does enforce anti-competitive behavior by entities with enough market power to be price-makers instead of a price-takers, and assuming that the "Big Three" have such market

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[99] Herbert Hovenkamp, *Progressive Antitrust*, 2018 U. ILL. L. REV. 71, 99 ("The main reason antitrust does not go further is concerns about administrability.").

[100] Menesh S. Patel, *Merger Breakups*, 2020 WIS. L. REV. 975, 1007 (noting the "fundamental difficulties of unwinding consummated mergers, such as the inherent difficulty in breaking up the operations and assets of a combined entity in a manner that enables competition to flourish in the affected market").

[101] *See e.g.,* NCAA v. Alston, 594 U.S. 69, 106 (2021) ("When it comes to fashioning an antitrust remedy, we acknowledge that caution is key . . . . [C]ourts reviewing complex business arrangements should . . . be wary about invitations to 'set sail on a sea of doubt.'") (citation omitted); FTC v. Univ. Health, Inc., 938 F.2d 1206, 1217 (11th Cir. 1991) ("[O]nce an anticompetitive acquisition is consummated, it is difficult to 'unscramble the egg.'").

power, it is still unlikely that consoles' exclusivity practices and walled gardens would meet the threshold of an enforceable violation.[102]

The fragmentation of gaming as a whole also compounds the challenge of bringing a successful antitrust case against these consoles. Because market definitions can vary, market share calculations are often equivocal and subject to dispute.[103] The recent *Epic Games v. Apple* litigation is illustrative of this.[104] To win on its claim that Apple was a monopolist abusing its control over iOS developers, it was crucial that Epic succeeded in defining the relevant market as a single-brand market for iOS app distribution and payment processing.[105] Various prominent antitrust experts believed Epic had a strong argument.[106] After all, a user that already owns an iPhone is unlikely to incur the expense and burden of switching to a phone with a different operating system just to be able to access a specific app. In other words, once a user buys an iPhone, she is stuck with iPhone apps, and thus the relevant market should be apps on iOS devices. Neither the district court judge nor the Ninth Circuit were persuaded by Epic's proposed market, however, and instead defined the market as "mobile-games transaction[s]."[107] This threshold decision effectively doomed Epic's antitrust claims.

When judges define markets too broadly, they risk understating a company's market power, as critics believe was the case in *Epic Games v. Apple*.

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[102] *See* Alexander, *supra* note 70, at 168; Epic Games, Inc. v. Apple, Inc., 67 F.4th 946 (9th Cir. 2023) (holding that Apple's walled garden did not amount to an antitrust violation).

[103] *See* Daniel A. Hanley, *Redefining the Relevant Market: Abandonment or Return to Brown Shoe*, 129 DICK. L. REV. 571, 575 (2025) (describing the process of defining markets as being "almost entirely based on abstract, confusing, highly subjective, and unnecessary economic theory"); *see also* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 917 (2007) (Breyer, J., dissenting) ("The Court's invitation to consider the existence of 'market power' . . . invites lengthy time-consuming argument among competing experts, as they seek to apply abstract, highly technical, criteria to often ill-defined markets.").

[104] *See* Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898, 1032 (N.D. Cal. 2021) (concluding, after almost 20 pages of analysis dedicated to assessing Apple's market power, that "Apple is only saved [from a finding of monopoly power] by the fact that its share is not higher, that competitors from related submarkets are making inroads into the mobile gaming submarket, and, perhaps, because plaintiff did not focus on this topic."); Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 999 (9th Cir. 2023) (affirming district court's conclusion).

[105] *Epic Games*, 559 F. Supp. 3d at 1049 (noting that Epic's failure to prove Apple was an illegal monopolist was sufficient on its own to defeat Epic's unilateral conduct claim).

[106] *See, e.g.*, Mark A. Lemley & Sharon Driscoll, *Stanford's Mark Lemley on Epic Games Case Against Apple*, STAN. L. SCH. (May 10, 2021), https://perma.cc/CF4X-Q9EL; Brief of the Am. Antitrust Inst. as Amicus Curiae in Support of Plaintiff, Counter-Defendant–Appellant at 3, Epic Games, Inc v. Apple, Inc., 67 F.4th 946 (9th Cir. 2023) (No. 21-16506).

[107] *Epic Games*, 67 F.4th at 981 ("The district court's middle-ground market of mobile-games transaction thus stands on appeal, and it is that market in which we assess whether Apple's conduct is unlawful pursuant to the Sherman Act.").

Just as Apple successfully argued it competes with other platforms that facilitate transactions between consumers and developers, console manufacturers can make a highly plausible argument that they compete with mobile gaming, handheld gaming computers like Steam Deck, and PC gaming, among others. This dilutes the perception of concentrated market power within the console segment.[108] The existence of a broader gaming ecosystem allows console manufacturers to argue that their exclusivity practices do not stifle competition, as consumers have ample alternative platforms and devices through which they can access similar gaming experiences. For example, Microsoft CEO Satya Nadella claimed that even after its acquisition of Activision-Blizzard, Microsoft would be "a big player in what is a highly fragmented place," arguing that the market's fragmentation would prevent Microsoft from ever being a monopoly.[109] Even if antitrust law could theoretically address exclusivity and walled gardens, proving substantial harm to competition within such a fragmented market—if defined that way—becomes exceedingly difficult.

B. The Solution: A Targeted Regulatory Framework

Psychologist Abraham Maslow once observed, "it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail."[110] Antitrust law often suffers from this hammer-nail problem. There is a tendency among activists to want to use antitrust as a hammer for each and every nail that implicates consumer harm or other anti-competitive effects.[111] Yet antitrust often falls short of being the most effective tool, and an over-reliance on it risks overlooking alternative regulatory solutions better suited to address specific

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[108] See Ali Shutler, Microsoft CEO Doesn't Think Activision Blizzard Deal Will Be Blocked, NME (Feb. 4, 2022), https://perma.cc/FJ5V-EQ53 (quoting Microsoft CEO Satya Nadella saying "At the end of the day, all the analysis here has to be done through a lens of what's the category we're talking about, and what about the market structure?").

[109] *Id.*; *see also* Fabian Ziermann, *Assessing the World's Largest Gaming Acquisition Under EU Competition Law*, 14 J. EUR. COMPETITION L. & PRAC., 203, 211 (2023) (noting that Nadella's "statement may be somewhat correct when delineating the market based on revenue," but that "a different picture emerges once a genre delineation is considered").

[110] ABRAHAM H. MASLOW, THE PSYCHOLOGY OF SCIENCE: A RECONNAISSANCE 15 (1966).

[111] *See* A. Douglas Melamed, *Antitrust Law and Its Critics*, 83 ANTITRUST L.J. 269, 271 (2020) ("[A]ntitrust law cannot prudently address both economic welfare and the other objectives with which [populist] critics are concerned."); *see also* Mark A. Lemley, *The Contradictions of Platform Regulation*, 1 J. FREE SPEECH L. 303, 311-17 (2021) (commenting on the self-contradictory nature of antitrust complaints brought against big tech companies and noting that "antitrust isn't capable of giving everyone everything they seem to want from it").

issues.[112] This is certainly true in the video game console context, where an adaptive regulatory solution can better confront the industry's distinct competitive and consumer dynamics. The final portion of this Note will first show that successful, analogous precedent for such a targeted solution exists both domestically and abroad. Then, it will briefly describe the key provisions any such solution must include to address the harms of exclusivity and walled gardens in the console market.

A regulatory framework for the console gaming market can draw inspiration from existing legislation, both in the United States and abroad. One pertinent example in the United States is the Unlocking Consumer Choice and Wireless Competition Act (UCCWA), signed into law by President Obama in August 2014.[113] A 2012 rulemaking determination by the Copyright Office had made it illegal for consumers to unlock their cellphones.[114] Unlocking allows users to remove software restrictions imposed by mobile carriers to tie a given phone to their network. In essence, the Copyright Office's determination stood in the way of consumer choice and impeded their ability to change carriers without giving up their current cellphone, much like exclusivity and walled gardens tie consumers to one console and raise switching costs. After the White House came out in support of legalizing cellphone unlocking, Congress passed UWCCA, which received bipartisan support.[115] There is broad consensus that the legislation benefits consumers, and the FCC has even recently proposed rulemaking that would build upon UWCCA.[116]

Across the pond, the European Union enacted the sweeping and ambitious Digital Markets Act (DMA), now fully in effect.[117] The DMA includes various interoperability provisions, forcing "gatekeeper" platforms, i.e., big tech companies, to establish formal channels for interoperators.[118] Apple, for

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[112] Melamed, *supra* note 111, at 292 ("[S]erious thought should be given to the possibility of new laws and regulations to serve other objectives and, perhaps, to supplement antitrust law in protecting competition and economic welfare in certain sectors.").

[113] Unlocking Consumer Choice and Wireless Competition Act, Pub. L. No. 113-144, 128 Stat. 1751.

[114] Edward Wyatt, *F.C.C. Backs Consumers in Unlocking of Cellphones*, N.Y. TIMES (Mar. 4, 2023), https://perma.cc/FM8N-QPRS.

[115] Ezra Mechaber, *Here's How Cell Phone Unlocking Became Legal*, WHITE HOUSE BLOG (Aug. 15, 2014, 12:53 PM), https://perma.cc/R3VM-4S63.

[116] Promoting Consumer Choice and Wireless Competition Through Handset Unlocking Requirements and Policies, 89 Fed. Reg. 64843 (Aug. 8, 2024) (to be codified at 47 C.F.R. pt. 64).

[117] *About the Digital Markets Act*, EUR. COMM'N, https://perma.cc/Q2A8-9GT5 (last visited Nov. 21, 2024).

[118] *Id.*

example, is required to allow rival app stores on iOS devices.[119] The largest messaging services, like iMessage, WhatsApp, and Messenger, must also enable interoperability. This means allowing the ability to exchange messages with any new messaging services that demand it.[120] Gatekeepers also face a data portability obligation, requiring them to provide tools that facilitate users transferring their personal data easily between services.[121] It is easy to see how provisions like this could apply in the console gaming context, allowing users on different platforms to freely communicate, share data, play more games, and play multiplayer games online with one another.

It remains to be seen just how drastic of an impact the DMA will ultimately have, in large part because gatekeepers' compliance plans so far have arguably fallen short of what is required of them.[122] But as it pertains to interoperability, the DMA represents a massive step in the right direction. Per the Electronic Frontier Foundation, the DMA's interoperability provisions serve to "dismantle one of the biggest barriers faced by users who want to leave the tech giants' platforms: the choice between changing to a platform you prefer or staying behind on a platform where all your friends, communities, and customers are."[123] Console gamers likewise are all too familiar with the dilemma of choosing between staying on a platform with existing networks or switching to one that might better suit their needs, but that comes at a social and financial cost.

Having established that a regulatory framework is needed and that existing legislation offers useful models, the next task is to outline general recommendations for what a targeted framework in the video game console context should include. What follows is far from a comprehensive legislative design. Rather, it is meant to serve as a brief conceptual blueprint for what provisions such legislation should include and why. The critical areas that the legislation should regulate are portability, back-end interoperability,

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[119] Cory Doctorow, *EU to Apple: "Let Users Choose Their Software"; Apple: "Nah"*, ELEC. FRONTIER FOUND. (Oct. 28, 2024), https://perma.cc/24HV-N9R4.

[120] Mitch Stoltz et al., *The EU Digital Markets Act's Interoperability Rule Addresses an Important Need, but Raises Difficult Security Problems for Encrypted Messaging*, ELEC. FRONTIER FOUND. (May 2. 2022), https://perma.cc/8NZM-37JE.

[121] Ken Daly et al., *Unpacking Digital Data Laws Across Europe: Addressing the Digital Markets Act*, SIDLEY AUSTIN (Jan. 24, 2023), https://perma.cc/9836-JWQE.

[122] European Commission Press Release IP/24/1689, Commission Opens Non-Compliance Investigations Against Alphabet, Apple and Meta Under the Digital Markets Act (Mar. 24, 2024).

[123] Stoltz et al., *supra* note 120.

interoperability in development, the nature of and availability of exclusivity arrangements, and access to certain third-party services.

Portability is often described as the "low-hanging fruit" of interoperability policy.[124] In the video game context, it would entail granting users a right to take their accounts, content libraries, and data from one platform and move them to another, should they so choose. Any legislation addressing closed platforms and exclusivity should mandate portability. However, lawmakers would need to be careful to "avoid overly prescriptive orders that could end up hurting privacy," given the inherent difficulty in line-drawing around data, and the fact that one user's data could infringe others' privacy.[125] Additionally, portability on its own cannot suffice because, while it facilitates users leaving a platform, it does not "help them communicate with others who still use it."[126] As such, legislators would need to mandate back-end interoperability standards. These would ensure that users can interact and communicate seamlessly across platforms, whether through messaging, voice chat, or multiplayer gameplay. Perhaps the most important mandate here would be requiring platforms to enable cross-platform online multiplayer gameplay for any developers that request it, enhancing the social and functional connections that make gaming a worthwhile experience—connections that users not only enjoy but increasingly expect.[127]

A related measure should mandate certain interoperability standards in game development—at least for studios of a certain size.[128] Both developers and consumers would benefit from a more streamlined game development process. Interoperability would reduce redundant work for developers working on multi-platform games. Moreover, when games are more easily adapted to multiple platforms, developers can reach more users, enhancing accessibility for consumers and market reach for developers. Finally, increased interoperability in development would likely translate to a smoother user experience, with fewer technical inconsistencies and better support across platforms. Of course, these standards should not be overly rigid or prescriptive

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[124] Bennett Cyphers & Cory Doctorow, *A Legislative Path to an Interoperable Internet*, ELEC. FRONTIER FOUND. (July 28, 2020), https://perma.cc/QJP7-F7HS.

[125] *Id.*

[126] *Id.*

[127] Such a requirement would also necessarily entail requiring the major platform manufacturers to design their platforms to facilitate cross-platform online multiplayer gameplay if requested.

[128] Smaller, independent studios may lack the resources to efficiently comply with such standards and may be at greater risk of having their innovation inhibited if made to do so.

in a way that could stifle innovation by limiting the freedom of developers to experiment with platform-specific features. After all, the key idea behind introducing a streamlined set of interoperability standards is to free up redundant time spent adapting a game to multiple platforms, allowing developers to focus more on the unique creative and technical elements of the games they are developing.

Limitations on exclusivity arrangements go hand-in-hand with the above interoperability proposals. As things stand, there is a collective action problem—if one platform pushes for exclusives, it is difficult for others not to do the same. And even if only one platform were to embrace exclusives, some developers and consumers would still be drawn and locked into an isolated ecosystem. A collective action problem like this is ripe for regulatory intervention. Here, lawmakers need to strike a balance between limiting exclusivity arrangements and allowing for platforms to differentiate themselves. Possible solutions include: (1) restricting permanent exclusivity deals while permitting timed exclusives or permitting certain kinds of exclusive in-game content and feature enhancements; (2) setting reasonable upper time limits on timed exclusives (e.g., allowing games to be exclusives for a maximum of 6 months); and (3) regulating anti-competitive exclusivity practices following acquisitions (e.g., requiring that any existing franchises with large user bases remain available on multiple platforms). Adopting measures like these in tandem with interoperability and portability mandates will go far in fostering a more open and competitive gaming industry.

Finally, any regulation tackling the issue of closed platforms must promote access to certain third-party services. Just as the DMA requires Apple to allow third-party app stores on its operating system, lawmakers here must prevent platforms from blocking access to competing digital storefronts, streaming services, or payment processors. Not only will this ensure that consumers have the freedom to choose the services that best meet their needs, but it will hopefully lead to increased competition among service providers to give players the best content and deals. And console manufacturers may be less opposed to this kind of intervention than one might think. Xbox CEO Phil Spencer, for example, has expressed a willingness to one day open Xbox to third-party stores, noting that there is "real value" in allowing consumers to "decide the type of experience [they] have [by picking where to buy games]."[129]

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[129] Chris Plante, *Phil Spencer Wants Epic Games Store and Others on Xbox Consoles*, POLYGON (Mar. 26, 2024, 8:30 AM), https://perma.cc/7MV5-JRBC.

Though improbable, the idea that even a Republican-dominated Congress could draft and pass legislation containing these sorts of provisions is not radical. Gaming is a bipartisan pastime, enjoyed by nearly 200 million Americans across all demographics.[130] Legislators from both parties have a shared incentive to promote a bill that would improve the daily lives of many while harming very few. The remedies proposed not only have common-sense appeal but are technically feasible and are much less onerous for console manufacturers and game developers than they could be under another regime. Industry backlash may be more muted in the face of reasonable—yet still effective—government regulation, especially when accepting such legislation may stave off more burdensome rules could otherwise be imposed later, such as an American version of the much more comprehensive European DMA.

The existence of more consumer-friendly European laws like the DMA and the EU's Digital Content Directive could also be useful in providing Congress with political cover.[131] An alternative means of crafting this kind of legislation would be to incorporate the proposed provisions via what might appropriately be called something like the "Don't Hurt American Consumers More Act," requiring U.S. companies to treat American video game consumers the same way they treat European ones. To fend off attacks of overreach, legislators supporting intervention in this context could say they simply seek the non-discriminatory treatment and protection of American consumers. Regardless of how legislators ultimately frame the legislation, it is clear that a targeted regulatory framework for the promotion of a more open gaming ecosystem, as ambitious as it sounds, has at least a fighting chance of success if proposed in the halls of Congress.

V. CONCLUSION

When the Covid-19 pandemic shut the world down in 2020, cutting off individuals from their families, friends, and colleagues, video games served as a source of comfort and relief. The author of this Note can personally attest to that—navigating the pandemic alone from his studio apartment in an unfamiliar city would have been a far lonelier experience without the nightly

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[130] *2024 Essential Facts About the U.S. Video Game Industry*, ENT. SOFTWARE ASS'N, https://perma.cc/FDK5-39PV (last visited May 15, 2024).

[131] *See* Directive 2019/770, of the European Parliament and of the Council of 20 May 2019 on Certain Aspects Concerning Contracts for the Supply of Digital Content and Digital Services, 2019 O.J. (L 136).

Fortnite sessions he spent with his friends from back home. Jack was on his PC; Sean, Max, and Jordan were on their PlayStations; and the author and the vast majority of his other friends were on their Xboxes (network effects in action). The reason they settled on *Fortnite* was because it allowed them to communicate via voice chat and play together cross-platform.

At its best, gaming brings people together, offering not just entertainment but connection. This function is even more critical in challenging and isolating times. Fostering an open, interoperable gaming ecosystem will ensure that these connections remain accessible to everyone and reduce the indirect costs imposed by network effects, freeing both developers and consumers from the constraints of exclusivity and closed platforms. Targeted legislation is the best way to transform this vision into reality and break down gaming's walled gardens.