Using Research and Data in Video Game Legal Matters

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First of all, I want to thank everyone for coming and thank SMU for putting this together. I am going to talk a little bit about using research and data in legal matters. More specifically, I am going to talk about the importance of thorough research, up-to-date data, and understanding the data that you are using before you go into any sort of litigation.

Now, before I begin I have to convey a slight apology. This talk was originally supposed to be given by one of my colleagues, the Vice President of Financial Services and Communications at EEDAR. He was called away to Japan at the last minute. As he was running out of the office he said something about eating really fresh sushi, so I have been sent in his stead to give this talk today. There is one little caveat—since I am rather new to EEDAR, some of the topics I am going to talk about are not the topics I am most knowledgeable about. So if you have any questions at the end and want to go really deep into the business of EEDAR, I would be happy to put you in touch with people who could answer those questions.

Now, before you guys all tune out, assuming that I am not worth listening to, I will give you a little background information about who I am and why I am here. As I said, I am Director of Editorial Insights at EEDAR. I have been there for about a month. Prior to that I spent over five years at IGN, which is the leading Internet portal for video game information and reviews. I was involved with probably several thousand articles while I was there, reviewed hundreds of games, and appeared on TV. Basically I appeared anywhere that people would listen to what I had to say about video games. In my former life—before I realized that video games could actually be a legitimate business—I was involved with science education in New York. Prior to that I was involved with teaching myself about math, science, and physics. So, EEDAR exists at the crossroads of my two former careers, which is why I am so excited about starting there.

EEDAR is a video game research firm. It was founded in 2006 with the objective of providing meaningful data to the video game industry so that people can make better and more informed decisions, and therefore earn more money. It also allows all the creative minds to do what they do best.

As a leading video game research firm, we service over 90% of the video gaming industry in some form or another. We take an objective, fact-based approach to research. What that means in simple terms—when I try to explain this to my parents or my friends who do not really understand what I am doing—is that EEDAR is sort of like the *Pandora* for video games. We have an entire floor of researchers, and their whole job is to enter data into a database. That includes everything from video game title, publisher, developer, release date, every single review the game has ever received, what genre it is, what subgenre it is, whether it is a first- or third-person camera,

and whether it is a 2-D or 3-D style. All this is lumped into one giant database. Once you take all that data and wrap it in with a lot of other info that we bring in—such as sales data and market research—you can start to ask and answer some really interesting questions. In the past, some of these questions might have been cost-prohibitive, or even impossible to answer.

Some of the things we do at EEDAR are sales forecasting, in-depth and on-the-fly research, as well as custom research. We handle interesting "what-if" scenarios and questions such as: "What if I am running over budget and need to chop off the co-op feature in this game? What is that going to do for me in terms of editorial impact? What is that going to do in terms of review source? What is that going to do in terms of sales? If I have to delay this game three weeks, how is that going to impact my bottom line?" So basically, I am here to talk a little bit about what this data can do for you and the best way to use it. I am going to try to dispel a few myths and give a little bit of information, so that we have a top-level view of what is going on. Some of what I talk about might appear obvious, and some of it might appear obvious in retrospect. But in my experience I have found that the things that are the most obvious are also the most often overlooked.

So the first thing I am going to talk about is sales data. Essentially there are three leading groups worldwide for tracking sales data. In the United States there is the NDP group. In Europe, there is GfK. And in Japan, there is a company called Enterbrain. Part of the problem associated with sales data is that when these groups report sales data, it is taken as a stone-cold fact. This is largely perpetuated by the media. I do not want to bad-mouth any of these companies because a lot of the data they provide is very important, very valuable, and provides a great service to the industry. But the important thing to remember—especially when dealing with legal matters—is that these sources of syndicated sales data involve extrapolation. They are not one-to-one sales. If they report game X sold a million copies, a large part of that goes into the models that they have created to simulate what the real industry is doing. In some markets—especially in Europe and in a lot of emerging markets—they are actually tracking as little as 25% of the market directly. In a lot of places in Europe, it is very difficult and cost prohibitive to actually track what is happening at the retail level, so a lot of extrapolation is done. They all have different methodologies that are used to fill in the gaps. Some of these methodologies are quite accurate. However, none of it is currently reflective of the total industry sales. The questionable accuracy of this sales data is something you really need to know before going into a courtroom over the handling of a contract deal.

A large part of the reason that these syndicated sources are not exact is because the industry has exploded over the past few years. We are now able to buy games in more ways than we could fifteen years ago. I remember all I could do was to go to the local Funcoland, trade in my game, and get a new one. That was relatively easy to track. But now customers can buy games directly from the producers. There are digital means like Xbox Live, PlayStation Network, and Wii Ware. Of course, I do not think I need to remind anyone how important iTunes and Facebook have become to gaming, and

likewise how important gaming has become to those platforms. And then of course there is Steam, which completely dominates the PC market. They are by far the number one purveyor of PC video games. But all of these are closed networks, and it is very difficult for anyone to track these independently. None of these networks want to give out their sales data—it is proprietary information.

In order to get that information you would have to go directly to the publishers, come up with some sort of model, or do some sort of polling to figure out exactly how much money is coming into, and going out of, these different sources.

As we all know, polls are not exact science. They do a good job of summarizing what is going on, and you can get good estimations from them, but they are not 100% reliable. That is not to say that they are wrong. But before you get into a courtroom, it is important that you go and account for error variances and ask questions about your data sources carefully. The worst thing that you can possibly do is come into any discussion with something that works well as a media sound bite, but does not hold up under cross-examination. For example, consider this statement: "Factoring for digital and rental sales, Game X likely sold 840,000 units at $29.29 million in the European and Japanese markets." That might be a good estimate. It might be a good way of doing business. But the reality is that there is probably some sort of variance, or some sort of error associated with those figures. It is extraordinarily important to understand exactly what the error is, and how precise the data you are working with is.

Of course it is important to remember there is a difference between the number of units shipped to retail—what was sent to the stores—and the number of units sold through retail—the amount of product actually sold. It has become somewhat of a trend in recent months for publishers—either immediately upon releasing a game or several weeks later—to send out a press release saying: "We have shipped 1.5 million copies around the world." That sounds great, and it always grabs a new headline. Everyone reports that data. Everyone calls it a day. But the fact of the matter is that there are a lot of contracts that involve warehousing, and include buy-back clauses. Unless those games are actually sold through to the consumers, a lot of that revenue may never be realized. Make sure that when you are actually dealing with contracts or legal disputes, you must understand whether the numbers you are working with are sold through or shipped in, and you must understand the difference between the two. In other words, ask questions about the data. Make sure that you understand what numbers you are working with.

The next thing I am going to talk about is review scores. Review scores are very near and dear to my heart, because I spent six years dealing with them. A lot of contracts have the fabled *Metacritic* clause. Our suggestion here is to avoid these clauses at all costs. Aggregate review scores are designed for consumer consumption. If you actually go to Metacritic, you can click on the little "about" button and it will say "Metacritic's mission is to help consumers make an informed decision about how to spend their time

and money on entertainment."[1] There is nothing in there about how they want to settle business disputes, and there is nothing in there about how they want to settle legal disputes. They do not claim to be that, and they do not want to be that. The reason for that is they do not want to provide the methodology for how they calculate their scores.

For some aggregate scores, you immediately run into a simple problem. You might have a site like IGN, the most trafficked site on the Internet, with reviews that are viewed by maybe as many as a million people. IGN might give the game a score of 90. Then you have another guy who decided the game was no good and gave it a score of 50, and published that on his blog. When a review aggregator spiders both of those reviews, they are weighted the same and averaged out to equal 70. This is probably somewhat of an issue because most people are not actually reading that blog. The IGN review maybe got 700,000 people reading it, while the guy writing the blog maybe had a somewhat popular blog and managed to reach 10,000 people. This is great for him, but bad for games scored on Metacritic because the score of 50 is weighted the same as the score of 90. In reality, what you want is a weighted review. A weighted review is a more accurate assessment of the quality of the game or what the consumer perceives as the quality of the game. If you weigh these scores based on Internet traffic, you find that the score is actually closer to an 89 than a 70.

Obviously, there are more than two reviews going into these reports. You have as many as 50 reviews that are all lumped together on Metacritic. And they will actually say in their "About" statement that they use a weighting system.[2] They base the score on the stature and reach of the sites, but they will not tell you exactly how they do it. On many review aggregators, it is actually just a straight average. You can go do the math yourself. We did an informal study and looked at the difference between a perceived consumer-review score, and what was actually showing up on these aggregators. What we found is that when you weigh all the reviews by traffic numbers— which are freely available if you just locate them on Quantcast[3]—you find that perceived consumer reviews that are weighted based on traffic can have a variance of about plus or minus four. That means that if you get an aggregate score of 87 on Metacritic, that is actually going to be perceived by consumers as being anywhere from an 83 to a 91. That can have disastrous results on business deals that have *Metacritic* clauses. The difference between an 83 and a 91 can be millions of dollars in bonuses. People can lose promotions, and they can even lose their jobs. This can happen simply because Metacritic lumped reviews together and scored them at 87, when perhaps the actual game quality was better than that.

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1.   Metacritic, http://www.metacritic.com/about-metacritic (last visited Sept. 3, 2011).

2.   *Id.*

3.   www.quantcast.com.

There is also the issue of credibility. I am a bit of a *Jersey Shore* fan. Now suppose that, according to Google Insights,[4] Snooki is 1.3 times more popular than Roger Ebert. If Snooki says on *Jersey Shore* that *Transformers 2* is a great movie, a lot of people are going to hear her say that. But if Roger Ebert says that movie is crap, I am probably going to trust Roger Ebert more—even though he is not reaching as many people. Basically, if you are handling or negotiating a contract that has a blanket *Metacritic* clause, do not sign it. Come up with some way to define a method for realistically gauging the quality of your game. For example, this could be a preconceived methodology you work out with your partner that takes into account both the review score's reach and credibility. As long as you come up with some sort of methodology that is definable, it will actually hold up better in contract suits.

Part of the problem with using Metacritic ratings is that you cannot define them, and they can change on a whim if Metacritic decides to change their methodology. You might have a whole bunch of review scores one day, so it looks like the game has a score of 87 on Metacritic. Then the next day the guy who runs Metacritic decides this outfit is no longer credible, so he changes the methodology, and your review score actually changes. This can be pretty bad for business, especially considering you have no clue why the score changed.

As a critic, I often heard people say: "Your opinion does not matter. Nobody cares what you think. This is an awful review—the game is actually good!" When EEDAR and SMU conducted a study together, we found that there is actually a causal link between game-review scores and commercial sales.[5] It is more powerful than a correlation—there is a causal link. If a game scores well, it is going to sell better.

I will go a little bit into the study so that everybody understands it. A classic anchoring study was done. Three groups were brought in.[6] The first group was exposed to high review scores, the second group was not exposed to any review scores, and the third group was exposed to low review scores.[7] They were given *Plants v. Zombies* to play.[8] They played for about 20 minutes and then were asked to review the games themselves and award a score.[9] We found that those that were exposed to high review scores rated them
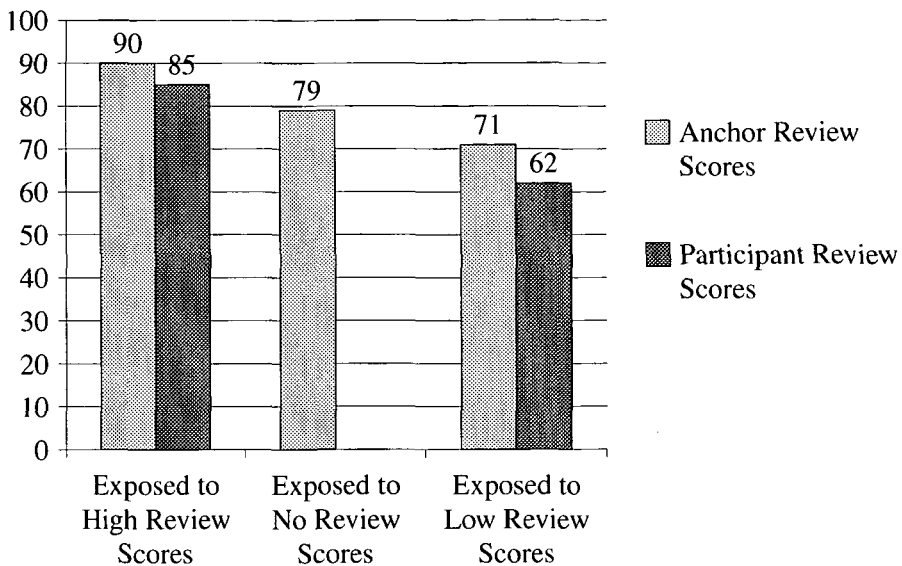
4.   www.google.com/insights/search/.

5.   Alexander Sliwinski, *EEDAR/SMU Study: Review Scores Affect Perceived Quality, Purchase Intent*, JOYSTIQ.COM (July 6, 2010, 8:30 PM), http://www.joystiq.com/2010/07/06/eedar-smu-study-review-scores-affect-perceived-quality-purchas/.

6.   *Id.*

7.   *Id.*

8.   *Id.*

9.   *Id.*

higher than those exposed to no review scores. And those participants graded the games higher than those exposed to low review scores.[10]

This study went one step further. At the end of the study everyone was offered ten dollars or a copy of *Plants v. Zombies*—essentially saying: "You can buy the game right now for ten dollars, or you can just take the money."[11] The people who were exposed to the high review scores at the beginning were more than twice as likely to take a copy of the game as the people who were exposed to the low review scores.[12] They were essentially buying the game right there on the spot.

Going even further, those people were found to be more likely to recommend the game to friends than people who were exposed to low review scores.[13] So not only are reviews going to matter in terms of sales, they can also have a multiplying effect—where a good review can actually equal more sales than just the number of people it reaches.

Now I am going to switch topics a little bit and talk about the use of experts in litigation. As many of you know—or as many of you will soon find out— the video game industry is a bit like the sitcom *Cheers*—where everybody knows your name. The industry brings in tens of billions of dollars every year, and there are some franchises worth billions of dollars. But despite these facts, the gaming industry is actually a very tight-knit community. Everybody knows your name very quickly, and nobody forgets when you do

10. *Id.*

11. Sliwinski, *supra* note 3.

12. *Id.*

13. *Id.*

something. It is a reality that in this industry the publishers and retailers have the money. They are the backbone of the industry. They call the shots, and are a very important part of the industry. Without them, no one would be putting up the money to make all these awesome games that we play.

The importance of publishers and retailers can create a problem when expert testimony is needed. No one wants to bite the hand that feeds them. If you have a publisher that is dominating the market, it is going to be very hard to find anyone that is willing to go into court and say: "Those guys are wrong, and I'm right." Because five years down the line, that expert might need to work with that publisher. No publisher is going to forget that you went into court and tried to cost them millions of dollars in a lawsuit. Everyone will remember your name, and that can cost you career-wise down the line. But it is very difficult to argue against good data. If you are going into court, you are always going to need a human to interpret the data. But backing the expert up with quality, well-researched data makes the expert's job easier. They do not have to shoulder any of the responsibility for it—they just go up there and say, "these numbers mean this." It is independent, it is objective, and it is readily available.

Now I will go through examples of bad use of data. Let's say that an expert goes into trial and says "Game X sold Y in 1984. Therefore, I *think* game Z released in 2011 would sell Y times 2 based on my twenty years of experience in video game sales and based on my knowledge of how that publisher operates." This would be a classic statement from an expert. But it can easily be torn apart in any sort of cross-examination. And, of course, opinion on the quality of the game is something that is subjective at best, and you never want to go in there with nothing more than an expert opinion.

Using quality data, however, allows you to go into the courtroom and say: "Game X sold Y in 2010. Therefore it is almost certain game Z would sell Y times 5, based on my analysis of market spends, retail distribution, retail promotions, pre-orders, awareness campaigns, intent to purchase, editorial coverage, and anticipated release time."

The more facts you use to back up the expert witness, even if a few of them fall apart under cross-examination, the more likely that the entire building is not going to fall apart. The expert is going to have tons of facts to stand on, and your argument is going to be hard to overcome.

The last thing I want to talk about is the problem of timing. While I just talked about how the video game industry is one where no one forgets anything, the fact of the matter is that consumers actually do forget. They change their habits. We have what we call the 5-year rule: if it happened 5 years ago, you should forget about it. If a game sold well five years ago, that has no bearing on a game's sales today. If you have any research from five years ago, that data is no longer valid. Consider the 2008 music-based peripheral game called *Guitar Hero*. *Guitar Hero* made lots of people lots of money. It was well received editorially, and everyone was happy—consumers ate it up. In 2010, *Guitar Hero* came out again, but the music industry had completely changed within the video game world—and we are just talk-

ing about a couple of years here. Based on projections made in 2008, you might say: "Wow! The music-game industry is going to keep sky-rocketing because we've seen exponential growth trends." But that data becomes no-longer-good very quickly. Part of the reason for that is that a feedback loop exists.
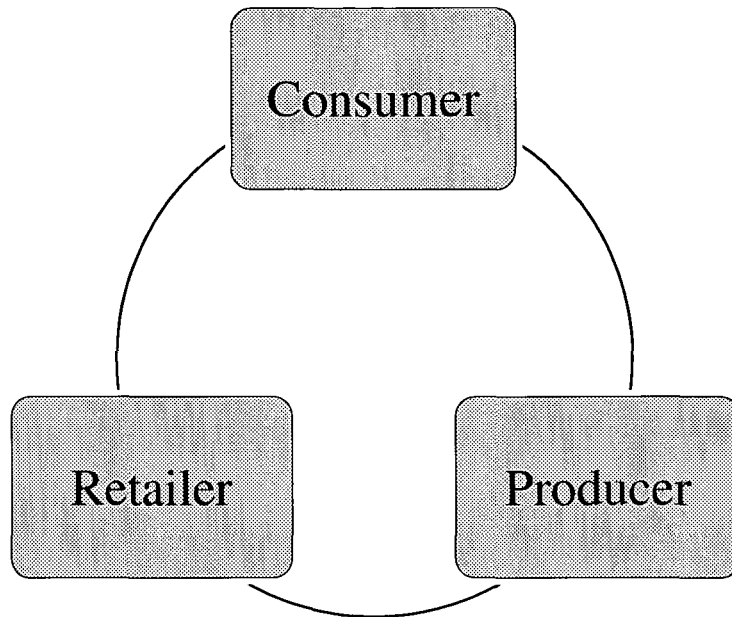
In any sort of industry there is feedback that exists between the producer of the product, the retailer, and the consumer. At the outset of the video game industry, feedback would move very, very slowly. Atari would make a Pac-Man game and ship it out to arcades. The arcade would put it out there in front of a bunch of gamers, and the gamers would fill the game with quarters. Then the guy running the arcade would come back to the producer and say "Pac-Man did really well; it brought me a lot of quarters. Do something more like that." And then the designers would say "Oh, ok . . . Miss Pac-Man!" They would make it, ship it out, and it would bring in even more quarters. Everyone is happy. And, all of a sudden, you start getting a lot of clones. But this feedback process was incredibly slow. Once things moved into the actual retail model where things were on storefronts, it was much easier to collect data. The feedback loop started to close. You could actually understand and collect the data at the point of sale when money was changing hands. You did not have to wait to count quarters. Things started speeding up even more once we hit the Internet age.

Now we actually have producers talking directly with consumers, getting feedback from them, and getting their sales data instantaneously. The feedback loop is actually moving so quickly now that feedback is happening before games are even being released. A game creator can begin working on

a game and receive feedback from both retail and consumers before the game is released. This allows the game creator to change course, change the scope of their game, and come up with a better product than they would have at the end of a single development cycle without all this feedback. What that means is that, as you get more and more data, there is more to analyze. But it also means the data expires faster. In some categories it expires faster than in others, but the important thing is that you always have the most up-to-date and relevant data, and that you understand whether it is still relevant, and whether it can actually be applied to what you are doing.

The video games are also very time sensitive in terms of releases. A delay of just one week can impact your sales by as much as 58%, and this can set off a flurry of legal issues. Normally, video games are delayed because of developers or publishers. Either they decided they needed more time to develop the game or they had quality issues. But as the videogame industry matures, there are all sorts of external forces that can cause delays in your video game. These may include manufacturing issues, platform approval, or sometimes just waiting on Xbox LIVE Arcade to bring your game out to market. I have heard absolute horror stories of independent developers just sitting on games waiting for them to get released. Contract developers might not return the work they were contracted to do on time, and that can affect the review stage of your game. Third-party licensors—or whether you are working with a franchise—can affect the release date of your game. All these things can substantially change your projected release date, and that can affect the actual amount of money that you are realizing from the product you are producing.

Let's take a quick look at one case study where this happened quite recently. In May of 2010, a group of highly anticipated games including *Alan Wake, Red Dead Redemption, Split/Second, Blur, ModNation Racers, Prince of Persia: Forgotten Sands, Lost Planet 2, Skate 3, 3-D Dot Game Heroes,* and more were all released within three weeks. If you looked at the general consumer sentiment at that point they all said: "Wow! Videogame producers are crazy. Why are they putting out all these video games at the same time?" But if you go back and look at what actually happened, *Alan Wake* went through an extended, prolonged development cycle and was remade several times over. *Red Dead Redemption* also suffered numerous delays that were well documented in the media. *Blur* was originally supposed to come out in the holiday season of 2009, but was delayed all the way to May of 2010. *Lost Planet 2* was supposed to come out in early 2010, and it managed to slip a couple months and come out in May. All of these games got delayed for various reasons and eventually launched on top of each other. Some of them did very well. *Red Dead Redemption* was a smash success right away. *Alan Wake,* it is no secret, did not perform up to the expectations. *Blur* was made by a studio that was just recently shut down. Capcom came out on record and said that *Lost Planet 2* underperformed.

It is important to remember that—although timing is so important—delays might occur. Thus, it is important to lock in rights for selecting alternative release dates with publishers, and to lock in rights for damages if

something were to happen. Make sure it is written into a contract with the third party that is helping you. That way, if their delay causes you to delay the release of your game and that results in fiscal harm, they are on the hook for it.

In summary, make sure you understand your sales data and the caveats. Sales data is largely very good, and good from a business perspective. But it is important to actually understand what goes into producing that sales data. Avoid aggregate reviews at all costs. I actually do not like them very much even for consumer data. They are very good if you just want to read through a bunch of reviews, and you want to go to one place and to click through them. But I do not think the one number sums up that whole list of qualities of the game, and it certainly does not work well for business practices. Make sure that you have a methodology for understanding the actual quality of your product in advance, and do not rely on some third party that has a methodology you do not understand or cannot prove. Make sure you back all your evidence with data. An expert without data is an expert that is going to get torn apart on the witness stand. And always remember that the video game industry is constantly evolving. Data expires more rapidly than ever, so make sure you have the most up-to-date and thoroughly researched data that you can possibly have. If anybody has any questions I would be happy to attempt to answer them, or be able to put them in touch with people who can.

QUESTION: How do you approach the question of ownership, both in the terms of the data you are working with and the data you are generating?

MR. BRUDVIG: A lot of the data that EEDAR actually collects is done in-house by our research team. We have an entire floor of researchers. They go in and collect quantifiable bits of data that cannot be argued against. These are facts. These are open for the public. It is just that nobody has bothered to do this type of research before. All of the other information that is brought into our game syndication service is licensed from third parties, so a lot of contracts are involved.

QUESTION: My question is regarding the clause that pursues damages due to delays in the release of the game. That is a door that swings both ways. I would think if it was me, as a publisher, with my money on the line, and the developer asked if I would put this clause in the contract, the first thing I would do is require the developer do the same thing. I would probably cringe because as we all know things come up during the process of developing a game. How would you suggest one protect himself as much as possible, since publishers have more to lose because it is their money on the line.

MR.BRUDVIG: That is a great question. Obviously you would not want to enter into any contract that you do not think you can fulfill. I would absolutely advise against guaranteeing you will make a particular release date if you are not sure you can. For the most part, these contracts are going to be entered when dealing with outside, external forces. If you are dealing with a contractor, make sure you protect yourself as a developer. If you are

dealing with any sort of thing that is not under your control, make sure you protect yourself.

QUESTION: On one hand you are drawing a causal relationship between the review scores and sales, and in the next moment you are saying "don't let them hold you to a score or target." Isn't that like giving with one hand and taking with the other?

MR. BRUDVIG: I am saying that there is a causal relationship, and I am also saying that you are going to want that in your contract—everyone is going to want it in the contract. What I am saying is make sure it is a methodology that has been previously agreed upon. The so-called *Metacritic* clauses are based on the aggregate review site. Nobody understands how they come about getting that score. You should sit down with the people that you are dealing with in the contract and say "this is how we want to judge the quality of the game." It could be based on reviews, and should always be independent. As long as people understand that we are going to take these certain reviews into account and weigh them this way, then people can actually agree upon something like that.

QUESTION: Just as a practical consideration, I have tried that—I have actually sat on both sides—on the publisher and on the developer side. On the publisher side, we try to give people options. For example, they pick six reviewers and we will take the best five out of six and release the product on a specific date. That worked well. But in dealing with many of the larger publishers, a lot of the bonuses are keyed in by finance and they do not care—they do not have the time or the inclination. So the pushback we received as developers is, either you agree that our finance credit analyst is going to look at Metacritic or we just will not give you the bonus. We would just take the clause out. And because it is extra money, you do not want to lose that. We have had that response a number of times, and I do not know how to protect against it.

MR. BRUDVIG: That is a great issue. That is one that honestly is difficult because, like I said, publishers and retailers hold all the money—they hold all the cards. And it can be very difficult for an independent developer who is just looking for financing. What I would say is to make sure that you have good legal representation. Have someone who is going to go to bat for you and fight for it. It is not something you are always going to win. This is just the hope or the goal. Do not go in saying: "We're going to shoot the *Metacritic* clause."

QUESTION: We are going to talk about this in the next panel, but I am curious to hear your thoughts on this. Basically you are describing how central data is to the industry, in all aspects. The next panel is about privacy, which really means controls on data. To what extent do you see regulation and privacy as a potential threat to these data-driven improvements in the innovation that you are talking about, and how do think that can be squared with the desire to give users control in a good way?

MR. BRUDVIG: That is a great question. There are obviously two sides to research. There is the direct research and there is indirect research.

The direct research route is going out there and collecting data yourself. You can also work with telemetry data where you just collect it directly from the consumer, sometimes without them even knowing about it. Of course, that is where you run into privacy issues. EEDAR does not deal with taking information directly from the consumers and lumping it together. I would imagine that it is going to happen exactly how it happens now: if you pop in *Mass Effect 2*, the very first thing that happens is that it says: "We tend to collect data, do you agree to this?" And then you are going to have a lot more legalese that goes along with that before the end of the game.

I think there is a real tension between ownership and privacy. For a long time, privacy principles have really been a proxy or substitute for ownership principles. The laws that dealt with privacy have taken care of these. But I think businesses like this, and the numbers you see in the advertising in this industry really drive it home that people are going to have to grapple with the question of who actually owns the data. There are a lot of questions as to whether someone can just part with data. Do they own it to begin with? What are the harmonizations of the laws of various countries? The default in Europe can be that the consumer owns it, compared to here in the U.S., where we tend to adopt the view that it belongs to whoever is the advocate or the collector of the data. I think it is an area that is really ripe for a lot of lawsuits, as well as business opportunity.