Using gaming tactics in apps raises new legal issues

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Credit: Julia M Cameron from Pexels

When new innovations emerge, there's always a temptation to say that we need to rewrite the rulebook for them. Gamification has been no exception.

Gamification refers to the use of elements from gaming, often by a smartphone app, to make ordinary activities like stock trading or rideshares more engaging. It can have powerful influences on our choices, sometimes in controversial ways.

For instance, users of gamified trading apps like Robinhood have suffered huge losses, often from trading too frequently and making outsized bets on meme stocks or other assets that were too risky for them.

By designing their interfaces to make stock trading look more like a game, were these apps steering their users into dangerous trading patterns?

Regulators are examining this issue. A March 2022 consultation paper by the Board of the International Organization of Securities Commissions (IOSCO) questions whether some gamification tactics should be banned.

Gamification's role in gig work has also raised legal questions. Gig workers seem to act a lot like employees, likely in part because of the gamification tactics that apps use to influence how, where and for how long they work.

But instead of following a growing number of courts and tribunals in Canada and abroad by confirming these workers should be treated as employees, Ontario's government is proposing that they be brought under a complicated new framework that would give them some, but not necessarily all, of the rights that come with employee status.

Gamification's challenge to law

As outlined in a report I worked on for the University of Toronto's

Future of Law Lab, legal decision-makers struggle with gamification. It challenges the distinction they've traditionally drawn between persuading people with information—which preserves their freedom of choice —and taking that freedom away through coercion or deception.

It's also possible to capture a degree of control over people's choices by carefully structuring and timing how you give them information, so as to exploit the mental shortcuts we all take when making decisions. Well-timed push notifications, leaderboards of popular stocks and arbitrary goals assigned to gig workers can all leverage these shortcuts to guide users towards choices that make apps money, but might not serve users' interests.

Traditional advertising does this too, of course. But unlike a billboard or a TV commercial, a smartphone app follows us around. It can also continuously test prompts and interfaces to identify the ones that do the best job of nudging us in the direction it wants.

Some say existing rules don't do enough to deal with gamification—that we need new ones to blunt gamification's influence on our choices. For example, in a virtual hearing for the U.S. House of Representatives Committee on Financial Services, economist Vicki Bogan called for bans on user interface features in trading apps that are "designed to increase more trading volume without regard to consumer priorities or risks." As noted above, IOSCO is considering similar measures.

Others say existing rules do too much—that they fail to recognize that even if gamification influences our choices, these choices are still technically ours to make. To avoid stifling innovation, apps need their own custom-built set of rules, like Ontario's proposed gig worker regime .

Leveraging law's flexibility

Both these lines of argument overlook the flexibility that's built into law. We can interpret old rules in new ways to reflect the reality that gamification and other digital engagement tactics can have powerful influences over people's behavior—and that this influence can be wielded in perverse ways.

Instead of crafting new rules for trading app design, regulators can treat gamification tactics that nudge users into certain investments or trading patterns like tacit investment recommendations. To the extent these tactics work to guide clients into unsuitable investments and trading, regulators can jump into action with their existing rulebooks.

Rather than creating a new category of rights for gig workers, we can recognize that gig workers who are led to act like employees, whether through gamification or other tactics, should be treated as such. Luckily, Ontario's proposals don't preclude ongoing efforts to secure these rights through litigation.

Innovation and regulation

Calling for new rules before making full use of the ones we have isn't just unnecessary. It's potentially harmful. If we choose to interpret existing rules in rigid or technical ways, so that we have to create new rules for every new innovation, we'll never catch up. As law falls further behind innovation, those who use technology to implement creative schemes for evading regulation will win out.

Gamification can do a lot of good, when deployed responsibly. It can make investing less intimidating. It can motivate users to learn new languages, new skills or healthier habits.

But apps shouldn't be able to profit from shaping their users' choices through gamification and then disclaim responsibility for these choices when regulators come knocking.

Law has tools for encouraging apps to exercise the influence they wield over their users' choices in a responsible way. We just need to use them.

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