Contracts as Private Law in Video Games and Immersive Entertainment

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Takeaways

• End-user license agreements (EULAs), terms of service (TOS), and terms of use (TOU) are contractual agreements between game players and the companies that operate the games. These agreements can overlap and have important differences.

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• Such agreements are highly customizable governing tools and are widely used in regulating and protecting digital games and their content, whether game operator or player generated.
• These agreements are subject to the traditional limitations under contract law, including unconscionability, modification, privity, and limited enforcement against minors.
• These agreements are favored by digital game operators in regulating most online disputes and will continue to evolve as a result of judicial and legislative developments in the digital games industry.

Introduction

“There are gods, and they are capricious, and [they] have way more than ten commandments. Nobody knows how many because everyone clicked past them.”

Video game users are generally constrained in their actions by the programming of the game. In the landscape of a digital world life is ubiquitously governed by contract law. Speech, conduct, and existence—in fact, everything that a player does or says—is constrained by a contract accepted prior to accessing the digital


3. For brevity, references herein may be made to “digital games,” “digital worlds,” “video games,” and “virtual worlds” to broadly refer to all types of digital games including the evolving space of virtual and augmented reality. The title of this treatise and this specific chapter references “immersive worlds,” a term to capture video games, virtual worlds, virtual reality, and augmented reality. While they all differ in meaningful ways, they are equally governed by contracts. Additionally, reference is made to players, users, and residents. These are used interchangeably throughout this chapter and should be viewed under the same umbrella when assessing legal obligations.
game itself. Such contracts are commonplace today. Most computer or smartphone users who have installed any software have confronted an installation screen requiring them to agree to specified terms of use as part of the software’s installation. These agreements are often referred to as “end-user license agreements” (EULAs), “terms of service” (TOS), or “terms of use” (TOU), along with the privacy policy and other legal documents. These labels are sometimes used interchangeably though the various types of agreements often differ in practice. These contractual agreements are the foundation of modern digital world governance. For example, EULAs typically govern an intellectual property license transaction such as a software license. TOU or TOS generally govern a broader set of issues including the software, use and access of a website, mobile app, chat forum, and any other services related to the user’s interaction with the game company.

This chapter addresses some of the most relevant legal issues that all three types of agreements currently present. Where different agreements raise distinct issues, they will generally be referenced by their discrete names. Otherwise, this chapter relies on more general wording by referring to them simply as “terms” or “TOU.”

4. See Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593 (E.D. Pa. 2007); Joshua A.T. Fairfield, Anti-Social Contracts: The Contractual Governance of Virtual Worlds, 53 McGill L.J. 427 (2008). The question of contract-governed online communities is increasingly important because community-governing contracts (end-user license agreements (EULAs), codes of conduct, terms of service (TOS), or terms of use (TOU)) have become the tool of choice for companies seeking to govern multimillion-member online communities, from Facebook to YouTube to World of Warcraft. Millions of people worldwide live significant parts of their lives in communities governed by these contracts. The law of contract is the only law consistently employed to govern these communities. See also Gerri L. Dreiling, Online Gaming Runs Afoul of Click-Wrap Contract and Federal Law, Mo. Law. Wkly., Sept. 26, 2005 (“In order to play the game, the user must click through ‘I agree’ boxes on both an End User License Agreement (EULA) and Terms of Use (TOU).”); Bettina M. Chin, Note, Regulating Your Second Life—Defamation in Virtual Worlds, 72 Brook. L. Rev. 1303, 1317–18 (2007) (“Before a user is allowed to access the services that the web site provides, she must assent to the terms of the agreement.”) (citing E. ALLEN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.1 (2d ed. 1998)).

5. See, e.g., MDY Indus., LLC v. Blizzard Entm’t, Inc., 629 F.3d 928, 937–42 (9th Cir. 2010) (discussing distinctions between contract law and copyright law as they pertained to Blizzard’s various contractual agreements with World of Warcraft subscribers and a third-party software company).
I. Purpose and Scope of Agreements

A. History of EULAs, TOS, and TOU Agreements

Digital worlds are numerous and heavily populated. They can also be quite profitable. They are used for countless purposes, including entertainment, academics, military training, medical treatment, legal advice, and commerce. Those who inhabit digital worlds often spend tremendous amounts of time within them—upwards of 20 hours a week on average by one estimate. That time is increasingly spent on mobile devices, which are now ubiquitous throughout society. Some players also have a financial stake in


the world above and beyond subscription fees. For example, some individual players, including corporations, collect substantial sums of money from operating businesses within the economy of virtual worlds. Given the time and money invested in digital worlds by players, it is not surprising those players often place great economic and emotional value in the characters, property, or other items they have acquired or created within that world.

Similarly, digital world creators and operators have a significant investment in the world itself. The world’s creators and operators have spent many hours designing, programming, testing, implementing, operating, and supporting the digital world, often at a cost of tens to hundreds of millions of dollars. The intersection of players’, creators’, and operators’ investments produces a common desire for the game to succeed. However, the respective investments of each stakeholder also create a prime opportunity for conflict and disagreements. How a digital game creator addresses and prevents those disagreements—in other words, how the world operator governs the game—is therefore a question of great importance to many of these users.


11. See Chin, supra note 4, at 1305–07, 1313–15 (discussing virtual residents of Second Life who have made thousands of dollars in real currency using virtual sales; also discussing corporations that have established a virtual presence in Second Life).


Digital games are largely governed by contractual agreements between digital game players and the company that operates the game. These agreements generally must be accepted electronically by players before they may gain access to the digital game. The actual “signing” or acceptance of the agreement often occurs either during the installation process—such as by expressly clicking an “Accept” or “I agree” button—or, more implicitly, such as by accessing the website or mobile app upon which the digital game is made available and upon which TOU are posted. If a user does not “accept” the agreement in the software installation model, the software or other registration process will abort and the digital game will remain largely if not wholly inaccessible to that individual. Like many consumer contracts, these agreements are nonnegotiable—either as a practical matter or as a contractual matter. Because the terms serve as gatekeepers to many digital

15. See, e.g., Andrew Jankowich, EULAw: The Complex Web of Corporate Rule-Making in Virtual Worlds, 8 TUL. J. TECH. & INTELL. PROP. 1, 5 (2006) (describing EULAs as attempts to “legally link” the online world and the physical world through the agreements that create private rules”). EULAs are also referenced as such colloquially by individuals outside legal fields. See, e.g., Wikipedia, End-User License Agreement, https://en.wikipedia.org/wiki/End-user_license_agreement (last edited July 16, 2018).

16. See Chin, supra note 4, at 1317.

17. World of Warcraft, for example, requires players to agree to the contractual documents during installation of the initial software and as part of installing many of its subsequent updates to the game world.

18. See Chin, supra note 4, at 1317 (“Before a user is allowed to access the services that the website provides, she must assent to the terms of the agreement.”) (citing E. ALLEN FARNsworth, FARNsworth ON CONtracts § 3.1 (2d ed. 1998)); see, e.g., Blizzard Entertainment, Blizzard End User License Agreement [hereinafter Blizzard End User License Agreement], http://us.blizzard.com/en-us/company/legal/eula.html (last revised June 1, 2018) (“This Agreement sets forth the terms and conditions under which [the users] are licensed to install and use the [Game].”); Linden Lab, Second Life Terms and Conditions [hereinafter Second Life Terms and Conditions], https://www.lindenlab.com/legal/second-life-terms-and-conditions (effective July 31, 2017) (“If you do not . . . agree [to the conditions in this TOS], you should decline this [agreement], in which case you are prohibited from accessing or using Second Life.”); Linden Lab, Terms of Service [hereinafter Linden Lab Terms of Service], https://www.lindenlab.com/tos (effective July 31, 2017).

19. Jankowich, supra note 15, at 7 (“Proprietors construct rules with little or no regard for the negotiating powers of prospective entrants. New entrants must either agree to the terms written by owners or decline to participate. When existing participants find these rules unsatisfying, their only option is to quit.”).
games, users either take them in the form presented or forfeit access to that game’s world.20

EULAs, TOS, and TOU are not, however, the only conceivable method of managing and protecting digital games and virtual worlds. For example, some early virtual worlds attempted to rely on self-governance by the world’s residents.21 Under a self-governance model, disputes are resolved by the residents themselves and overarching authorities appointed by the digital world operators are less prevalent.22 This model is found in some modern games.23 While aspects of these models are successful, there are structural issues to address, such as the speed of clearing backlogs of cases filed.24 Alternative structures still depend on the game provider, however, to issue deeper and full bans.25

Another example of alternative tools to combat toxicity in games is that of Blizzard with Overwatch. Blizzard uses traditional tools to ban players as well as reporting by players. The newest
element to this approach is the extent to which Blizzard goes to check for toxicity in the game, such as comments and postings to YouTube.\(^{26}\) This is not without issue though. Toxicity is a significant impact to game enjoyment while also being incredibly difficult to combat, even with new efforts, such as those by Blizzard.\(^{27}\)

Intellectual property regimes, such as copyright law, are another common source of protection for the actual content in the virtual world.\(^{28}\) Unlike governance under a strictly contractual agreement, intellectual property law protects certain features of the digital world itself.\(^{29}\)

While intellectual property law and self-governance both play a role in protecting and ordering virtual worlds,\(^{30}\) contractual agreements remain the dominant management tool.\(^{31}\) The ubiquity of

\(^{26}.\) See Erik Kain, *Blizzard Courts Controversy with New “Overwatch” Anti-Toxicity Measures*, FORBES, Jan. 29, 2018, 12:00 p.m., https://www.forbes.com/sites/erikkain/2018/01/29/blizzard-courts-controversy-with-new-overwatch-anti-toxicity-measures/#6470c4163ad6 (discussing interviews with Blizzard and the extent Blizzard takes to police toxicity with a careful note that the review of players on others sites is for noted support of toxicity in *Overwatch* itself and not general toxicity).


\(^{28}.\) See, e.g., Micro Star v. FormGen, Inc., 154 F.3d 1107 (9th Cir. 1998) (involving use of copyright protection for derivative works); see also Sheldon, *supra* note 2, at 762 (discussing why contract law is relied on over intellectual property law to address virtual world property rights).

\(^{29}.\) Patent law may also be used to protect inventions that make virtual worlds possible and inventions that are made possible or created within virtual worlds, as discussed in Chapter 3.


\(^{31}.\) See, e.g., Sheldon, *supra* note 2, at 762 (discussing why contract law is relied on over intellectual property law to address virtual world property rights).
EULAs, TOS, and TOU is not surprising. With millions of residents interacting in real time, virtual worlds are dynamic communities that are multifaceted, ever evolving, and, by definition, difficult to manage. Legal contracts offer numerous benefits as a method of governing such worlds. First, they are an express agreement between parties that can clearly demarcate the boundaries of what is permissible conduct and what is not. Second, they provide an enforcement mechanism should residents not comply with these rules—namely, termination provision(s). A termination provision states that if a digital world resident breaches the agreement, his or her account can be terminated, resulting in the resident’s exclusion from the game’s world. Third, the agreements offer companies

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32. See Molly Stephens, Note, Sales of In-Game Assets: An Illustration of Continuing Failure of Intellectual Property Law to Protect Digital-Content Creators, 80 Tex. L. Rev. 1513, 1521–23 (2002) (noting that standard theories of infringement are not stable, so EULAs are necessary); see also Sheldon, supra note 2, at 762 (arguing that contract law is relied on over intellectual property law both because contract law provides more flexibility and because intellectual property law is seen as inadequate by virtual world operators in addressing virtual world property rights).

33. See, e.g., Steven Johnson, Brave New World: Online Fantasy Worlds Put Our Democratic Ideals to the Test, DISCOVER, Apr. 2, 2006, http://discovermagazine.com/2006/apr/well-intro (“[A]s the last 5,000 or so years of human civilization make clear, any time large numbers of human beings gather together in one shared space without laws governing their behavior, problems inevitably arise.”); see also Julian Dibbell, Griefer Madness, WIRED, Feb. 2008, at 90 (describing “griefer culture” in virtual worlds and concluding that those who “grief,” or harass, in virtual worlds are more interested in annoying other participants than playing the game under the terms of the EULA). See also Mayer-Schönberger & Crowley, supra note 21, at 1794–97 (discussing two examples of community governance that failed due to the challenges virtual world governance poses).

34. See, e.g., Jankowich, supra note 15 (discussing the advantages and limitations of EULAs).

35. See, e.g., Blizzard End User License Agreement, supra note 18.


37. A point of contention between players and developers is when a player is banned or terminated, who owns the virtual goods and currency that the banned player has invested in in-game. Some argue that players have virtual property rights that are separate from the copyrights given to the developers. See Fairfield, supra note 7, at 1048. Normally, a person acquires property rights upon the transfer of ownership or title in a chattel. Virtual content in games like World of Warcraft or Second Life is typically licensed to players, with the ultimate
running digital games a buffet-style management approach: the game operators can pick whatever terms and restrictions they want and include them in the agreement. They might also attempt to dictate whether or how background legal principles, such as what is “property” and who owns it, will apply. Thus, a EULA, TOS, or TOU can be both comprehensive in scope and customized to fit each unique digital world. The agreements can even be used to attempt to allocate rights to digital world creators that are not otherwise provided for by law. For example, by stating in a EULA or TOU that a particular act is forbidden, the digital game operators might persuade users not to engage in that act, notwithstanding the fact that the act is otherwise lawful. Even if that portion of the agreement is for some reason not valid—for example, if it is against public policy—the mere inclusion of such ultimately unenforceable language can discourage a digital game resident from engaging in the “forbidden” act for fear of being excluded from the game.

B. Common Provisions in Modern Agreements

In an effort to provide wide-ranging protection to digital world operators and a smoothly operating environment, EULAs, TOS, and TOU are typically long and comprehensive. Some digital ownership and discretion as to who can use (or not use) remaining with the operator/publisher. See Blizzard End User License Agreement, supra note 18; see also Second Life Terms and Conditions, supra note 18. Yet there are Second Life players who earn enough money selling virtual items that the Internal Revenue Service requires those players to report the income on their taxes. See Second Life Wiki, Linden Lab Official: Required Tax Documentation FAQ, http://wiki.secondlife.com/wiki/Linden_Lab_Official:Required_Tax_Documentation_FAQ (last modified Feb. 10, 2014); see generally Leandra Lederman, “Stranger Than Fiction”: Taxing Virtual Worlds, 82 N.Y.U. L. Rev. 1620 (2007). To a player who earns an income from selling virtual items, even a temporary ban from the game can have a deep impact on his or her life.


39. It is worth noting that, in addition to EULAs, virtual world creators and operators have a yet more powerful tool for controlling their worlds: the software code that creates the virtual world. When an individual inside a virtual world attempts to take any action, that individual necessarily faces the simple question of whether the virtual world software allows for such actions to occur. If the virtual world does not allow the action, the action will not occur. For example, if a user
game and virtual world operators go so far as to use multiple, overlapping documents covering different aspects of the same overarching game.\textsuperscript{40} Given the multitude of digital games and virtual world types, the provisions of recent agreements vary. Some provisions are common. For example, most terms prohibit “harass[ing] or offend[ing] other participants, impersonating a staff member of the [virtual world] provider, defrauding other participants, and using [an] avatar to conduct illegal activity.”\textsuperscript{41} Many also contain arbitration and choice-of-forum provisions.\textsuperscript{42}

Another common provision is the “end of the world” clause, which is intended to allow the operator to cease operation of the virtual world at any time without liability to the world’s users.\textsuperscript{43} This power works in conjunction with the agreement’s termination provisions, which state that the operator may terminate individual users’ accounts. As noted previously, this power to exclude residents from the game is a powerful governance tool and thus a

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  \item attempts to take a book from a bookshelf in a virtual world, he or she will succeed or fail based on whether the software developer made that book movable or not. Similarly, if a user tries to say certain profane words or send a private message to certain people, depending on the profanity filters and communication settings of the virtual world, the profanity or private message will either appear on another user’s screen or not. By using these virtual laws of physics, virtual world creators control users’ behavior most directly and powerfully.
  
  EULAs, on the other hand, can only exert indirect control. EULAs establish prohibitions that do not themselves prevent the prohibited act from occurring, but instead authorize a punishment—such as removal from the virtual world—if the act occurs and is caught. Thus, by using the virtual world’s parameters, virtual world creators control users in a more powerful manner than EULAs ever will. \textit{See generally Lawrence Lessig, Code: and Other Laws of Cyberspace} (1999); \textit{Lawrence Lessig, Code: and Other Laws of Cyberspace, Version 2.0} (2006).


41. See, \textit{e.g.}, \textit{Age of Conan Unchained End User License Agreement}, supra note 36 (“Dispute Resolution”). \textit{See also} Sheldon, \textit{ supra} note 2, at 763–65 (reviewing provisions in the EULAs for 14 major online games).

42. See discussion \textit{infra} Section II.A.

43. Sheldon, \textit{ supra} note 2, at 768–69. See, \textit{e.g.}, \textit{Age of Conan Unchained End User License Agreement}, \textit{ supra} note 36 (“[T]he Service is provided by Funcom at its sole and absolute discretion and may be terminated or otherwise discontinued by Funcom at any time to time and from time to time without notice. . . .”); \textit{Blizzard End User License Agreement}, \textit{ supra} note 18, § 9(B) (“Blizzard may change, modify, suspend, or discontinue any aspect of the [game] . . .”).
significant contractual right. It is also a serious decision given the backlash that can ensue. It is also often a broad right. For example, Daybreak’s (makers of *EverQuest II*) TOS reads, “Daybreak reserves the right to suspend, restrict or terminate [player’s] access to or use of any Daybreak Game(s), at any time for any reason, in its sole and absolute discretion.” These “spirit of the game” provisions leave much to the discretion of virtual world operators.

In practice, game operators do indeed call on these termination provisions. Another increasingly popular addition is provi-

44. As two commentators described it:

Expulsion as an enforcement mechanism is effective because participants in virtual worlds for example incur significant social and financial costs when they are forced to leave. They not only have to leave behind a network of friends and their accumulation of social and other capital, but they are also forced to abandon the persistent narrative that they have constructed around their avatar. There are additional financial costs: the required use of credit cards for payment of the virtual world’s monthly fees ensures that individual participants are linked to specific credit cards (and thus, by approximation, people), making it difficult for individuals to re-register for a virtual world from which they have been banished.

See Mayer-Schönberger & Crowley, * supra* note 21, at 1793.


47. *But see infra* Section I.C (discussing possible limitations on broad language in such provisions).

48. See, e.g., Kayser, * supra* note 10, at 64 (discussing termination of University of Michigan professor Peter Ludlow’s account in *The Sims Online* for a story—reported in virtual newspapers but then picked up by real-life newspapers—on virtual child prostitution occurring in *The Sims Online*) (citing Eric Goldman, *Symposium Review: Speech Showdowns at the Virtual Corral*, 21 SANTA CLARA
sions that govern the exchange of real money (e.g., dollars or euros) for an in-game currency. Such provisions are, at times, fairly restrictive. A major reason for this is to limit the functionality of the in-game currency so as to not trigger deeper obligations of a fully open loop game currency with state money transmission laws or anti-money laundering obligations under the Bank Secrecy Act.

There has also been a growing move toward a profit model driven by discrete transactions in the game instead of a monthly subscription fee model. Under recent free-to-play models, instead of relying upon players paying a monthly subscription fee, the game is provided either free or at only a generally low initial cost (such as to buy the software and install it) and the players are then encouraged to spend real-world money to obtain benefits in the game world. For example, players might be able to buy powerful weapons, customize the appearance of their character in unique ways, obtain novelty items, or otherwise enhance their enjoyment in the game through the expenditure of real-world funds or “microtransactions.” These models often have accompanying terms provisions that govern such microtransactions.

Finally, in the event that a game operator concludes that the aforementioned provisions are insufficient to govern the digital world, the terms frequently state that the game operators may modify the agreement at will. Operators sometimes provide the

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49. For example, Blizzard’s EULA provides that money in your “Blizzard Balance” “has no cash value” and “does not constitute a personal property right.” Blizzard End User License Agreement, supra note 18, § 1(D)(i)(2).


51. Two classic examples of free-to-play companies are Zynga and PopCap, both of which contain a variety of free-to-play games that attract millions of players.


53. See, e.g., Blizzard End User License Agreement, supra note 18 (Blizzard reserves the right to modify the agreement at any time). For further discussion of this right, see infra Section III.B.
user with the opportunity to agree to the new terms. However, as with the user’s initial consent, the user is typically faced with a “consent or don’t play” decision when it comes to revisions.

C. Scholarly Criticisms of Terms: One Brief Example
The governance-by-contract model is not without critics. Commentators have expressed concerns with a variety of such agreements’ features. One commonly debated provision of these terms is the allocation of virtual world property rights. In virtual worlds, the residents can create a variety of virtual things, ranging from simple tools (e.g., swords or potions) to complex works of art (e.g., paintings, fashion designs, and even buildings). Some virtual worlds enable residents to exercise a marginal degree of creativity, such as by combining specific items in certain ways to create new products. For example, World of Warcraft gives players tools to combine certain plants to make potions or certain types of ore to make weapons. Generally though, World of Warcraft does not enable free-form combining of plants and ore. Minecraft and Second Life, on the other hand, enable and encourage substantially greater creativity. Minecraft actively promotes user creations on their website while making sure to outline permitted types of use in their terms and conditions. Linden Labs provides the players with tools to actually code and build their own assets in Second

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54. See, e.g., Reuveni, supra note 30, at 319–39 (considering models of intellectual property law and EULA law interaction).
55. For example, in World of Warcraft, virtual world residents have the ability to choose up to two primary “professions” such as blacksmithing, tailoring, engineering, or alchemy, through which they can create predefined objects. See, e.g., Blizzard Entertainment, World of Warcraft: New Player’s Guide Part Four, https://worldofwarcraft.com/en-us/game/new-players-guide/part-four.
58. Mojang, Terms and Conditions [hereinafter Mojang Terms and Conditions], https://account.mojang.com/terms?ref=ft#brand (last visited July 23, 2018) (“We are very relaxed about things you create for yourself. . . . We are also quite relaxed about other non-commercial things so feel free to create and share videos, screen shots, independently created mods (that don’t use any of our Assets), fan art, machinima, etc. . . . We are less relaxed about commercial things. . . . [Y]ou many not sell any merchandise that uses any of our Brands or Assets. . . .”).
Thus, there are at least two main approaches in virtual worlds to giving virtual residents creative control. Some, like *World of Warcraft*, enable limited creativity using game content. Others, like *Second Life*, encourage creativity with nearly no bounds.

Most terms purport to allocate all rights to virtual property to the virtual world owners or operators. Many also do not allow users to freely transfer virtual items for real-world currency, thereby restricting the possibility of cashing in for real money the hours of work the virtual world resident might have invested in creating or obtaining an item. Such allocations of rights to virtual
world operators can be unpopular. Even where the agreements allow users to own intellectual property rights, those rights are limited by the very nature of both the terms and the technology that makes such intellectual property creations possible. A major reason for this is to avoid legal obligations of a system that is open loop where users can cash in and out of the game. Where this is present, game providers can trigger obligations under state laws concerning money transmission. Other concerns are increased fraud, money laundering issues, and a host of other issues.

One particular concern is that games permitting users to cash out may receive the “Adults Only” (AO) rating from the Entertainment Software Rating Board, which specifies that rating category for content that includes “gambling with real currency.” The AO rating has far-reaching effects on a game’s profitability: all major video game console manufacturers prohibit AO-rated games from their platforms, and many retailers refuse to stock AO-rated games.

Currently, such creations often exist only within the server of a third party and are not able to be moved outside that environment. It is possible, however, that the migration towards microtransaction-driven financial models—transactions that are

64. It would be an oversimplification to state that EULAs that allocate virtual world property rights to virtual world operators are necessarily unfair. Some commentators have, however, argued that EULAs unfairly allocate rights. For further discussion by one of the most outspoken commentators in this area, see, e.g., Fairfield, supra note 7, at 1082–84 (arguing that “[b]y means of contract, virtual environment holders currently parlay their (legitimate) claim to the intellectual property in an environment into an illegitimate claim to all of the virtual property possessed by or developed by the inhabitants of the environment” and citing an example of a EULA that disclaimed virtual world resident property rights).

65. Linden Lab Terms of Service, supra note 18, § 2.5.


68. See Ben Kuchera, Why the Adults Only Rating May Be Pointless and Harmful to Games as an Art Form, POLYGON, Feb. 10, 2014, 8:01 a.m., https://www.polygon.com/2014/2/10/5362502/adults-only-rating-pointless-and-harmful-games-as-art-form (“Stores won’t carry games rated Adults Only, nor will Sony, Microsoft or Nintendo give them an official release on consoles.”).
often based on discrete sales of distinct digital goods—will also foster an increase in the rights a digital game player is allocated under the terms. Alternatively, the microtransaction model might continue to define such sales as merely an exchange of the player’s real-world currency for a discrete license tied to the newly obtained specific digital good.

**D. The Future of EULAs, TOS, and TOU**

Contractual agreements remain the predominant method of controlling digital world behavior today, just as they did at the time of publishing the prior edition of this book. However, the state of digital and virtual world governance is always in flux as new worlds, games, game content, updates, hacks, and mischief-making techniques emerge. Some commentators have suggested that the variance in these agreements’ terms will decrease over time. Different digital world terms may “eventually converge around the most permissive, least constrictive regulatory framework” because “participants in [virtual] worlds prefer a situation with more rights.” Under this theory, digital world residents would gravitate towards those worlds offering them the greatest freedom and the most rights. Alternatively, some commentators have suggested convergence will occur not around the most permissive regulatory models, but around the most stable, predictable, and time-tested models that prior worlds have successfully used. Still other commentators have suggested that neither model captures the likely evolution of EULAs, TOS, and TOU, and that the actual development of digital world governance will be an ever-shifting,

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69. Notably, some virtual worlds require players to re-sign EULAs whenever a new update is released. For example, in *World of Warcraft*, updates to the virtual world are mandatory, and if a user declines to install the update he or she loses access to the virtual world. Along with such updates, the operators of *World of Warcraft* may include a new EULA to be signed.

70. Mayer-Schönberger & Crowley, *supra* note 21, at 1812 (discussing commentators who have offered different theories on regulatory competition among EULA provisions).

71. *Id.*

72. *See id.*

rich blend of resident preferences.\textsuperscript{74} It is not clear if any of these theories is necessarily correct. Further, the move away from the subscription-based model is a meaningful change and it will be significant to see if the last few companies relying upon that model—most notably, Blizzard via \textit{World of Warcraft}—will join in the migration to free-to-play or persist in a subscription-based framework. A more cynical theory might posit that the usual companies (e.g., Blizzard) will continue to dominate the virtual world field in the short term with players looking more toward video game content than to the details of that game’s terms. Likely, all of these will work in tandem to shape future terms.

As new digital worlds evolve, they might follow the model cast by prior successful worlds such as \textit{Everquest}, \textit{World of Warcraft}, and \textit{Second Life}. Or, just as some recent worlds have diverged from prior models by adopting innovative contractual provisions, future digital worlds might chart new territory in the realm of virtual world rights and restrictions.\textsuperscript{75} Regardless of what comes of terms agreements in general, their importance in managing digital worlds cannot be overstated. They have thus far been, and will likely remain, a popular and effective tool for digital world governance. Given that importance and the underlying investments digital world creators, operators, and residents have in these games, their terms will remain a closely monitored area of the legal landscape. The remainder of this chapter thus addresses several recent developments in that arena, as well as issues likely to arise with the continued use of terms to govern digital and virtual worlds.

\textsuperscript{74} Id.

\textsuperscript{75} Compare Linden Lab \textit{Terms of Service}, supra note 18, § 2.3 (“You retain any and all Intellectual Property Rights you already hold under applicable law in Content you upload, publish, and submit to or through [\textit{Second Life}], . . .”), with Blizzard End User License Agreement, supra note 18, § 2(A) (“Blizzard is the owner . . . of all right, title, and interest in and to . . . the Games that are produced and developed by Blizzard (“Blizzard Games”), . . . and all of the features and components thereof.”).
II. Current and Potential Limitations on Terms and Agreements in Digital Games

This section addresses four primary concerns for terms and agreements in digital games: (1) the doctrine of unconscionability; (2) modifications of TOU; (3) privity of contract and its scope; and (4) enforcement of TOU with minors.

A. Unconscionability

The black letter law of unconscionability states that a contract that results from an unfair bargaining process (procedural unconscionability) that then leads to an unfair result (substantive unconscionability) can be unenforceable against the disadvantaged party.\(^7^6\) Unconscionability is a common law limit on contract drafters and therefore varies by state, but most states use a sliding scale\(^7^7\) — the more unconscionable one category is, the less is required in

\(^7^6\). See Restatement (Second) of Contracts § 208 (2008) (“If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract. . . .”). Many courts require that unconscionability be both procedural and substantive: an unfair process leading to an unfair result. See, e.g., Swift v. Zynga Game Network, Inc., 805 F. Supp. 2d 904, 915 (N.D. Cal. 2011) (“To be unenforceable, a contract must be both procedurally and substantively unconscionable.”); Higgins v. Superior Court of L.A., 140 Cal. App. 4th 1238, 1248 (Cal. Ct. App. 2006) (“Unconscionability has both a procedural and a substantive element, the former focusing on ‘oppression’ or ‘surprise’ due to unequal bargaining power, the latter on ‘overly harsh’ or ‘one-sided’ results. ‘The prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract. . . .’”) (citation omitted). However, both are not necessary in the same degree. Higgins, 140 Cal. App. 4th at 1249.

\(^7^7\). See Davidson & Assoc., Inc. v. Internet Gateway, Inc., 334 F. Supp. 2d 1164, 1179 (E.D. Mo. 2004) (“The prevailing view is that both procedural and substantive unconscionability must be present, although not to the same degree, before a court may exercise its discretion to refuse to enforce a contract or clause due to unconscionability.”). But see Brower v. Gateway 2000, 246 A.D.2d 246, 253–54 (N.Y. App. Div. 1998) (construing a standard form contract shipped with a computer, and noting that “[w]hile it is true that, under New York law, unconscionability is generally predicated on the presence of both the procedural and substantive elements, the substantive element alone may be sufficient to render the terms of the provision at issue unenforceable”).
another to find a contract or provision to be unconscionable and therefore unenforceable. Unconscionability is a central limit on contracts broadly. Courts apply this well-established doctrine to digital game terms and agreements. An instructive example for digital game operators concerns two cases involving Linden Research, Bragg v. Linden Research, Inc. and Evans v. Linden Research, Inc. Both Bragg and the Evans cases (Evans I and II)

78. See, e.g., Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593, 605 (E.D. Pa. 2007) (“The two elements operate on a sliding scale such that the more significant one is, the less significant the other need be.”) (internal citations omitted); Harrington v. Atl. Sounding Co., 602 F.3d 113, 118 (2d Cir. 2010) (“The district court found that the facts of this case satisfied New Jersey’s ‘sliding scale’ approach to unconscionability. . . .”).

79. See Restatement (Second) of Contracts § 208 (2008) (“If a contract or a term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract. . . .”). Although software licenses may be characterized as not constituting a sale of goods, many courts disagree, and will apply article 2 of the Uniform Commercial Code to purchases of software by analogy, no matter how characterized. See also ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1450 (7th Cir. 1996) (“Following the district court, we treat the licenses as ordinary contracts accompanying the sale of products, and therefore as governed by the common law of contracts and the Uniform Commercial Code. Whether there are legal differences between ‘contracts’ and ‘licenses’ (which may matter under the copyright doctrine of first sale) is a subject for another day.”). Thus, article 2’s unconscionability provision may be invoked. See also U.C.C. § 2-302 (pre-revision) (permitting the court to enforce part or none of a contract on the grounds that terms are unconscionable).

80. See David Horton, Unconscionability Wars, 106 NW. U. L. Rev. Colloquy 387, 387 (2011) (“The unconscionability doctrine has emerged as the primary check on drafter overreaching. The Court has repeatedly acknowledged that lower courts can invoke unconscionability to invalidate one-sided arbitration provisions, and . . . judges have done exactly that.”).

81. See Major v. McCallister, 302 S.W.3d 227, 232 (Mo. Ct. App. 2009) (Rahmeyer, J., concurring) (“[T]he same contract principles hold on the internet. When the consumer is presented with a contract of adhesion containing lengthy provisions and hidden terms, I believe courts should consider whether the process of assent or terms of the contract are unconscionable.”).

82. Bragg, 487 F. Supp. 2d 593.

83. See Evans v. Linden Research, Inc., 763 F. Supp. 2d 735 (E.D. Pa. 2011) [hereinafter Evans I]; Evans v. Linden Research, Inc., No. C 11-01078 DMR, 2012 WL 5877579, at *17 (N.D. Cal. Nov. 20, 2012) [hereinafter Evans II]. Evans I took place in the same court under the same judge (the Honorable Eduardo C. Robreno) as Bragg. The Evans I court transferred the case due to a forum selection clause to California. The next iteration, Evans II, will continue as the California court certified a subclass, but denied the main class.
serve as anchor points for this section because they highlight the novel issues of digital games, application of unconscionability to digital games, and the changes a digital game operator can make to prevent a finding of unconscionability.

The following sections address how courts apply black letter unconscionability law to the unique cases of digital games. The first two sections are procedural unconscionability followed by substantive unconscionability. The third section is the Federal Arbitration Act (FAA) because of the pervasiveness of arbitration agreements in digital game contracts, and recent case law defining the relationship of arbitration under the FAA with the doctrine of unconscionability. The fourth section covers federal and state consumer protection limitations on terms and agreements. States are heavily influenced by federal law, and state efforts to protect consumers may be in flux in light of the preemption of the FAA over conflicting state law. The analysis of the Linden cases is coupled with the U.S. Supreme Court case of *AT&T Mobility LLC v. Concepcion*. Emerging trends are noted where they differ from the Linden cases and *Concepcion*.

1. Procedural Unconscionability

The first prong in unconscionability analysis is procedural unconscionability. Procedural unconscionability arises from (1) imbalances in bargaining power, as in “take it or leave it” contracts, or (2) a finding of surprise, such as where the contract is confusingly worded. Two central factors for procedural unconscionability

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84. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339–41 (2011) (detailing the question before the court whether § 2 of the FAA preempts California’s *Discover Bank* rule, which classified most collective arbitration waivers in consumer contracts as unconscionable). *See also* Horton, *supra* note 80, at 14 (“[I]n *AT&T Mobility LLC v. Concepcion* Justice Scalia’s majority opinion . . . earned the support of only three other Justices . . . Because Justice Thomas provided the swing vote in *Concepcion*, and invited parties to address the link between § 2 and 4 [of the FAA] in the future, he ensured that unconscionability viability will become a flashpoint in the arbitration wars.”).


86. *See, e.g.*, Bragg, 487 F. Supp. 2d at 605 (“The procedural component can be satisfied by showing (1) oppression through the existence of unequal bargaining positions or (2) surprise through hidden terms common in the context of adhesion contracts.”).
analysis are the manner in which a contract is (1) presented, or (2) negotiated. An animating question for contract presentation in negotiation is the presence of a market alternative. The two cases of Bragg and Davidson & Associates, Inc. v. Internet Gateway Inc. are instructive.\textsuperscript{87}

The Bragg court found an arbitration provision contained in Linden Research’s TOU procedurally unconscionable.\textsuperscript{88} The court found that the TOS containing the arbitration provision was a contract of adhesion\textsuperscript{89} and that a contract of adhesion is procedurally unconscionable under California law.\textsuperscript{90} The court found that the “take it or leave it” nature of the contract\textsuperscript{91} and the lack of market alternatives available to consumers added to the procedural unconscionability of the TOS.\textsuperscript{92} Considering the question of surprise, the court concluded that the arbitration agreement was hidden in a lengthy paragraph labeled “General Provisions”\textsuperscript{93} and that

\textsuperscript{87} Compare Bragg, 487 F. Supp. 2d at 606 (“Moreover, there was no ‘reasonably available market alternatives [to defeat] a claim of adhesiveness.’”) (citations omitted), with Davidson & Assocs., Inc. v. Internet Gateway, Inc., 334 F. Supp. 2d 1164, 1179 (E.D. Mo. 2004) (“[T]he defendants had the choice to select a different video game . . . the court finds that the licensing agreements were not procedurally unconscionable.”).

\textsuperscript{88} See Bragg, 487 F. Supp. 2d at 607 (“Here . . . procedural unconscionability is satisfied.”).

\textsuperscript{89} See id. at 606 (“The TOS are a contract of adhesion.”). Contracts of adhesion are “standardized contract[s], which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only an opportunity to adhere to the contract or reject it.” Neal v. State Farm Ins. Co., 188 Cal. App. 2d 690, 694 (Cal. Ct. App. 1961).

\textsuperscript{90} See Bragg, 487 F. Supp. 2d at 605 (“The Court will apply California state law to determine whether the arbitration provision is unconscionable . . . [a] contract or clause is procedurally unconscionable if it is a contract of adhesion.”) (citations omitted). The Bragg court used California state law as both parties agreed California law applied. In addition, the TOS at issue contained a California choice-of-law provision.

\textsuperscript{91} See id. at 606 (“When the weaker party is presented the clause and told to “take it or leave it” without the opportunity for meaningful negotiation, oppression and therefore procedural unconscionability, are present.’ . . . Linden presents the TOS on a take-it-or-leave-it basis.”) (citations omitted).

\textsuperscript{92} See id. (“Moreover, there was no ‘reasonably available market alternatives [to defeat] a claim of adhesiveness.’”).

\textsuperscript{93} See id. (“In determining whether surprise exists, California courts focus not on the plaintiff’s subjective reading of the contract, but rather, more objectively, on ‘the extent to which the supposedly agreed-upon terms of the bargain are
II. Current and Potential Limitations on Terms and Agreements

the TOS failed to note the costs and rules of arbitration or provide a hyperlink with this information.94

Bragg remains at odds with national trends, in which standard form documents—especially online contracts—are routinely enforced.95 Because of this disparity, Bragg remains instructive because of how it compares with other cases, for example Davidson, which upheld similar take-it-or-leave-it agreements. The Blizzard TOS and EULA in Davidson required users to click buttons confirming they agreed to both contracts before they could install the software. The Davidson court emphasized two factors in its decision: market alternatives and notice of terms. A finding of procedural unconscionability failed in large part because the defendants in Davidson could simply select another video game and had notice they were subject to the relevant terms.96 For Bragg, the outcome was a stark contrast as the court determined there were no reasonable alternatives to Second Life because no other virtual world grants property rights to its users. Bragg also determined that the plaintiff did not have sufficient notice of terms as they were hidden and inconspicuous in a “General Provision” heading.97

Standard form contracts can avoid a finding of unconscionability due to surprise if the consumer is provided with the terms and is given a chance to reverse the purchase if unsatisfied.98 Contracts are generally not deemed one-sided where the consumer has the

hidden in the prolix printed form drafted by the party seeking to enforce the disputed terms.’ . . . Here, although the TOS are ubiquitous throughout Second Life, Linden buried the TOS’s arbitration provision in lengthy paragraph under the benign heading ‘GENERAL PROVISIONS.’”) (citations omitted).

94. See id. at 607 (“Linden also failed to make available the costs and rules of arbitration in the [International Commercial Court (ICC)] by either setting them forth in the TOS or by providing a hyperlink to another page or website where they are available.”) (citations omitted).


98. See ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452 (7th Cir. 1996) (“ProCD proposed a contract that a buyer would accept by using the software after having an opportunity to read the license at leisure.”).
option to go to a competitor, as is usually the case with digital games at the time of registration.99

To prevent a finding of procedural unconscionability, digital game operators need to review their drafting carefully, and their game offerings. The design of a game could be so unique as to have no market alternative.100 Unfortunately, Bragg is an outlier and the extent of market alternatives has not been fully defined or addressed by other courts.101

2. Substantive Unconscionability

The second prong in unconscionability analysis is substantive unconscionability, which focuses on overly harsh or one-sided results.102 Courts may focus on one term or terms in the aggregate to find substantive unconscionability.

The Bragg court focused on four factors in finding the arbitration provision at issue substantively unconscionable: lack of mutuality, cost of arbitration, the forum selection clause, and the

99. See Dean Witter Reynolds, Inc. v. Superior Court, 211 Cal. App. 3d 758 (Cal. Ct. App. 1989) (finding contract not unconscionable as contract of adhesion where other institutions offered differing terms). But see Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 985 (9th Cir. 2007) (“Although there is clearly some disagreement among the California Courts of Appeal over this issue . . . we have consistently followed the courts that reject the notion that the existence of ‘marketplace alternatives’ bars a finding of procedural unconscionability. . . . ‘[A]bsent unusual circumstances, use of a contract of adhesion establishes a minimal degree of procedural unconscionability notwithstanding the availability of market alternatives . . . .’”) (quoting Gatton v. T-Mobile USA, Inc., 152 Cal. App. 4th 571, 585 (Cal. Ct. App. 2007)).

100. See Bragg, 487 F. Supp. 2d at 606 (“Although it is not the only virtual world on the Internet, Second Life was the first and only virtual world to specifically grant its participants property rights in virtual land.”).

101. The Bragg court did not discuss the extent of market alternatives. Second Life was the only virtual world on the market, in the United States or overseas, but how is the market defined? If a digital game in the United States were to offer a real money auction house (like Blizzard’s Diablo III) complete with a banking license for the game operator (like Sweden’s award to Entropia Universe), could that constitute a game with no market alternatives (as there are none with that combination), or would the existence of other games with real-money trading and a bank license (though in different countries) balance out?

102. See Evans I, 763 F. Supp. 2d 735, 740 (E.D. Pa. 2011) (“The substantive component can be satisfied by showing overly harsh or one-sided results that ‘shock the conscience’”) (citing Bragg, 487 F. Supp. 2d at 605).
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First, it noted that the contract was void for lack of mutuality. Lack of mutuality exists when the stronger party has a choice of forums available and the weaker party is forced into arbitration. The court found that the TOU lacked mutuality because it provided Linden with several remedies, such as the right of self-help (i.e., terminating a user’s account) and the right to unilaterally modify the agreement, while Bragg’s only remedy was arbitration.

Second, the court found that the cost of arbitration was prohibitive. Courts have issued a variety of decisions on cost-sharing arrangements and arbitration. Some courts find fee-sharing agreements unenforceable when the cost of arbitration is greater than the cost the customer would bear if the complaint were filed in court. The Bragg court joined that trend by holding that the

104. See id. at 608 (“This lack of mutuality supports a finding of substantive unconscionability.”).
105. See id. at 607 (“Under California law, substantive unconscionability has been found where an arbitration provision forces the weaker party to arbitrate claims but permits a choice of forums for the stronger party.”).
106. See id. at 608 (“In effect, the TOS provide Linden with a variety of one-sided remedies to resolve disputes, while forcing its customers to arbitrate any disputes with Linden.”).
107. See id. (“Linden’s right to modify the arbitration clause is also significant. The effect of [Linden’s] unilateral right to modify the arbitration clause is that it could . . . craft precisely the sort of asymmetrical arbitration agreement that is prohibited under California Law as unconscionable.”) (quoting Net Global Mktg. v. Dialtone, Inc., 217 Fed. Appx. 598, 602 (9th Cir. 2007)).
108. See id. (“[F]or all practical purposes, a customer may resolve disputes only after [Linden] has had control of the disputed funds for an indefinite period of time,’ and may only resolve those disputes by initiating arbitration.”) (citations omitted) (quoting Comb v. PayPal, Inc., 218 F. Supp. 2d 1165, 1175 (N.D. Cal. 2002)).
109. See id. at 610 (“Accordingly, the arbitration costs and fee-splitting scheme together also support a finding of unconscionability.”).
110. See, e.g., Adkins v. Labor Ready, Inc., 303 F.3d 496, 503 (4th Cir. 2002) (“Nor are we moved to a contrary conclusion by the fact that [other courts] have found specific cost-sharing provisions in other arbitration agreements to be unconscionable”). See also, e.g., Riensche v. Cingular Wireless, No. C06-1325Z, 2006 U.S. Dist. LEXIS 93747 (W.D. Wash. Dec. 27, 2006) (cost-sharing in cases where consumer filing violated Rule 11 not unconscionable).