Law 423B Video Game Law

Professor: Jon Festinger

Final Paper

Contractual Issues in Videogame Law and Possible Labour Law (and other) Solutions

December 17, 2014

Megan Coyle, 46269007

Exam Code 1094

Introduction

Common contracts in the videogame law industry can be seen as severe, unnecessary, and surprising, or alternatively, as essential to producing and distributing games and game platforms. This paper will explore a proposed solution to common problems with these contracts based on labour law principles of collective bargaining, as well current developments in the law and other potential solutions which may help to alleviate some of the more troubling issues.

Terminology

I will use the term "gamer" inclusively to include not just hard core gamers, but everyone who plays video games of any sort, whether on console, PC, or mobile platforms, even if they do not self-identify as gamers. I make that choice deliberately, in light of the #gamergate phenomenon, to acknowledge the staggering numbers of casual gamers in the market.[1] Really, it's all about ethics in game journalism.[2]

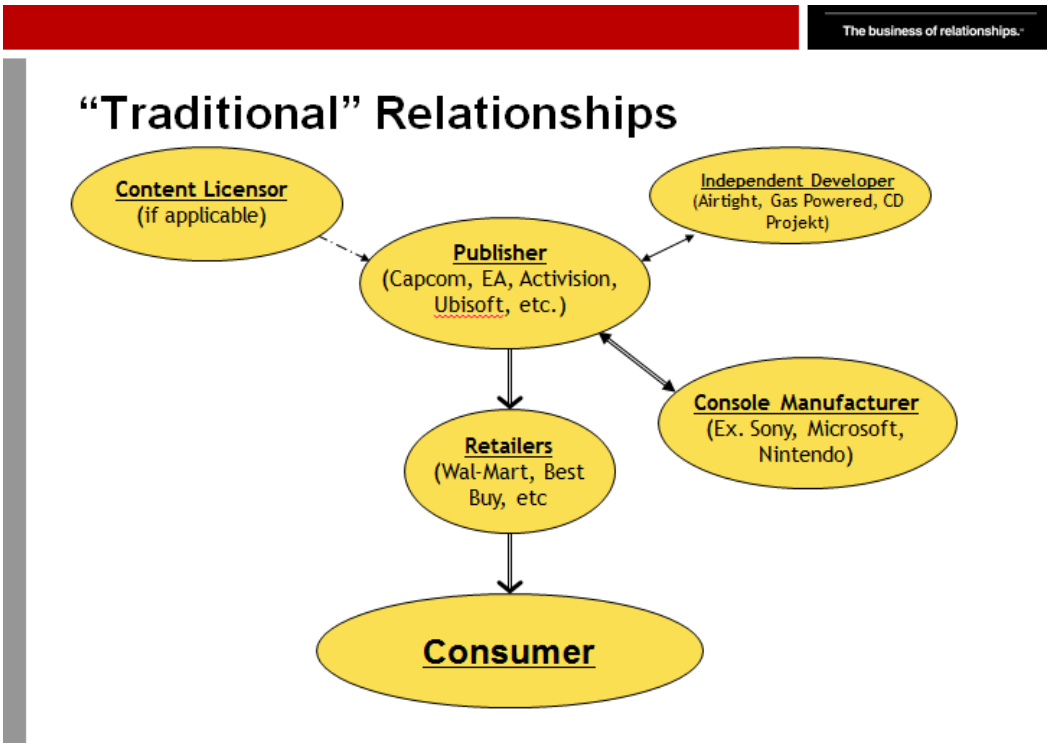
I will use the term "publisher" to mean the companies on the other end of the contracts from the gamers. I chose the term publisher because I like the centrality of it in the diagram below from Patrick Sweeney of Reed Smith, recognizing that sometimes those companies may actually be developers, manufacturers or other service providers contracting directly with the consumer.[3]

---

[1] As the Entertainment Software Association's annual report for 2014 shows, nearly half (48 percent) of gamers are female, and women over the age of 18 represent a significantly greater portion of the game-playing population (36 percent) than boys age 18 or younger (17 percent). Available at http://www.theesa.com/about-esa/industry-facts/ (Dec 10, 2014).

[2] For a recent, brief explanation of #GamerGate, see Thiago Alves Pinto, "'GamerGate' and Gendered Hate Speech" (OxHRH, 19 November 2014). Available at http://ohrh.law.ox.ac.uk/?p=14452&preview=true (Dec 12, 2014).

[3] Patrick Sweeney, *Negotiating Game & App Development Agreements*, presentation in Law 423B Video Game Law, February 13, 2013, University of British Columbia Faculty of Law at Allard Hall. Available at http://videogame.law.ubc.ca/ (Nov 19, 2014).



Ideas from Labour Law

In the third videogame law class of the year, guest speaker Roch Ripley was giving a presentation on "End User Licence Agreements and Terms of Use: How Contract Law has Overridden Common Law,"[4] when it first struck me that much of the language the courts were using was similar to that in labour and employment law. For example, in the introduction to a labour law casebook, the authors describe how

> the common law of employment, which treats employers and employees as free and equal contracting parties in the buying and selling of labour… is based on the notion of a contract of employment between employer and employee, formed by negotiation between individuals and enforced by the courts, much like the classic commercial contract… [while c]ollective bargaining… is based on the realization that the usually inferior economic position of the employee vis-à-vis the employer keeps the individual employment contract from being a satisfactory regulatory mechanism.[5]

[4] Law 423B Video Game Law, September 17, 2014, University of British Columbia Faculty of Law at Allard Hall. Available through http://videogame.law.ubc.ca/syllabus/ or at http://mediasitemob1.mediagroup.ubc.ca/Mediasite/Play/0a8f55a3de084cf8ae5625f3af79ad871d from 1:04:30.
[5] Bernard Adell et al, *Labour and Employment Law*, 8th ed, (Toronto: Irwin Law, 2011) at 5.

The common law of EULAs and TOUs also appears to treat publishers and gamers as free and equal contracting parties, based on the notion of a contract between publisher and gamer, formed by negotiation between individuals. But the reality is that such contracts are not formed by negotiation between individuals. They are imposed unilaterally on any gamer who wishes to access a game or platform. Theoretically, gamers could just walk away and not access the game or platform. That is what counsel argued in the June 20, 2005 oral argument in *Blizzard v BnetD*.[6] Beginning with the merits of click wrap versus shrink wrap (I will later explain why that is not a very meritorious argument), he states:

> It's not the old shrink wrap, where you ripped it off. You have to affirmatively say that I agree. It tells you what you can do and if you don't want to do it, you can take it back…. Somebody wants to take this back they walk right back to Best Buy or wherever and go six inches to the left or right and buy another game.

However, in the very next sentence he contradicts the ease by which a gamer can find a different game with a preferable EULA or TOUs, saying "[b]y the way, it's nowhere in the record that this end user licence agreement or terms of use are broader than any others. It's not in the record."

So walking away is easier said than done. Gamers can walk away as easily as anyone else can walk away from their iPhone terms of service,[7] for example.

---

[6] Eighth Circuit Court of Appeals, from 18:38. Available at https://archive.org/details/EighthCircuitCourtofAppeals. Decision: *Davidson & Associates v Jung*, 2005 US App LEXIS 18973 at **26 (8th Cir 2005).

[7] As an iphone user writing this paper, the last time Apple told me it was time to update my phone I tried to read the terms of service. After a few minutes of close reading, followed by a few minutes of scrolling in an attempt to find the important headings, I gave up and succumbed to the temptation to click "I agree," despite not have read much of it at all. When I tried to find it online later, a quick google search revealed my first problem – it asked me which software I'm using. Assuming it is the most recent (iOS 8.1 at time of writing), clicking on that brought me to a 471 page document (admittedly in multiple languages, with English taking up just 12 of those pages). Eleven of the paragraphs are all in capital letters, presumably to signal their importance. One of the earlier of these capitalized paragraphs helpfully suggests that if you do not agree, you may return your device for a refund (as if, having used the device for months or years, one could easily take it back or live without it simply in order to avoid the inscrutable terms and conditions). http://images.apple.com/legal/sla/docs/iOS81.pdf, accessed December 12, 2014.

I acknowledge that walking away from the ability to play or mod a game is, for most, not on the same level as the walking away from the ability to work where one is dependent on one's daily wage, one of the main concerns which drove the union movement and labour law legislation. However, for gamers, the inequality of bargaining power remains, and collective bargaining is still a potential solution to explore.

The idea for a labour law solution grew in class when Jon Festinger noted two double standards in such contracts. The first was that "since developers can (and do) customize your content, why not your EULA [end user licence agreement], TOS [terms of service] and privacy agreements?" And the second was "how many developers could survive the terms they impose on consumers?"[8] He proposed a potential ethical solution of embedding a "do unto others" algorithm rule-set which would permit us to use the digital bits of others if we share ours to the same standard. But as I could not stop thinking about another potential solution in labour law, that is the main one that I will explore in this paper.

Taking "customize" to potentially include some form of negotiation, I wondered why, even if publishers could not go so far as customizing EULAs, TOS or TOU [terms of use] with each individual, could they not carry out at least some degree of customization in the form of negotiated contracts for different segments of users? As Ryan Calo says, "even with better anonymization or security, firms can still obtain sufficient information for digital market manipulation, and the mediated consumer is never really hidden from the firm."[9] Therefore, it should not be too difficult to figure out a way to tailor the contracts as well. For example, gamers who just want to play might be willing to sign more restrictive EULAs or TOUs than those who like to modify (mod) games or portions of games.

---

[8] Law 432B Video Game Law, Talk 7, Part B "Connecting" October 15, 2014, University of British Columbia Faculty of Law at Allard Hall at slide 31. Available through http://videogame.law.ubc.ca/syllabus/.

[9] Ryan Calo, "Digital Market Manipulation," *George Washington Law Review*, Aug 2014 Vol 8 No 4 at 1042.

I then worried that placing gamers into discrete contractual groups may go against Festinger's argument regarding the evolution of a single standard for users as creators and creators as users. However, that evolution into a single standard is only applicable in copyright law, and therefore could be supportive, as he goes on to say that "if copyright law is reaching towards unity and equality of creators, consumers and users, then contractual terms are tearing that utopian vision apart."[10] By assuming different starting points for publishers and gamers, authors of EULAs and TOUs not only divide people into separate groups; they also force the groups apart through the strict terms of these unilateral contracts. The stricter the terms, the wider the (potentially fabricated) gulf becomes between the publishers and the gamers.

Of course, it makes sense that the authors do this, as they are most likely lawyers who draft them to give their clients, the distributors, maximum rights. Further, many likely do not consider the connective (or remixing) aspect of creativity to be truly creative.[11] And as Don McGowan, general counsel for Pokémon explained, many distributors see such contracts as permissive and enabling,[12] and so getting rid of them altogether is probably not going to be the most appropriate solution.

Returning to the labour law quote that "collective bargaining… is based on the realization that the usually inferior economic position of the employee vis-à-vis the employer keeps the individual employment contract from being a satisfactory regulatory mechanism,"[13] the same realization is applicable in the context of the usually inferior economic position of the gamer vis-

[10] Law 423B Video Game Law, October 1, 2014, University of British Columbia Faculty of Law at Allard Hall at slide 4. Available through http://videogame.law.ubc.ca/syllabus/.

[11] "In this case, independently created must mean creation of some *new*, some, something that goes beyond what was there before." June 20, 2005 oral argument in *Blizzard v BnetD*, Eighth Circuit Court of Appeals, from 24:18. Available at https://archive.org/details/EighthCircuitCourtofAppeals. Decision: *Davidson & Associates v Jung*, 2005 US App LEXIS 18973 at **26 (8th Cir 2005).

[12] Law 423B Video Game Law guest lecture, October 15, 2014, University of British Columbia Faculty of Law at Allard Hall.

[13] Bernard Adell et al, *Labour and Employment Law*, 8th ed, (Toronto: Irwin Law, 2011) at 5.

à-vis the publisher, which keeps unilaterally imposed EULAs and TOUs from being satisfactory regulatory mechanisms. Further, in accordance with a post-structuralist view of gaming which decentralizes the developer and replaces it with the gamer,[14] where the game is nothing without the gamers, it makes sense to increase the importance of the views of the gamer in any agreement reached.

What is missing in the videogame context, which could perhaps be borrowed from the labour law, is collective bargaining. As well as putting more power into the hands of gamers, collective bargaining can also be seen as a rational process of persuasion,[15] by which each side comes to better understand the other, thereby making it easier to come to an agreement that is fairer for all. Gamers will be enlightened about the struggles that publishers go through to bring their products to the market, while publishers will be better informed about what gamers want out of their games. This should allow publishers to bring better products to the market, which gamers would then like to buy. The benefits should flow both ways. Further, publishers should be able to lose some of their fear regarding what gamers wish to do with their products, by understanding what types of mods gamers would like to make and for what purpose. Publishers may be more willing to extend more rights to gamers who are not going to use the mods they make for commercial purposes.[16] Gamers may be more willing to actually read and abide by EULAs and TOUs that are shorter and less all-encompassing than current agreements. Bringing gamers and developers together in shared understanding in contract allows for a parallel with the merging of the two in copyright, and also accords with the post-structuralist conception of

[14] Law 423B Video Game Law, October 8, 2014, University of British Columbia Faculty of Law at Allard Hall at slide 14. Available through http://videogame.law.ubc.ca/syllabus/.
[15] Bernard Adell et al, *Labour and Employment Law*, 8th ed, (Toronto: Irwin Law, 2011) at 344.
[16] Competing commercial purposes being what most of the EULA videogame cases show distributors are really afraid of.

videogames that sees them as a merger of the creativity and connection of the developer and the gamer.

Good Faith

Recently, the Supreme Court of Canada discussed the issue of good faith in relation to the performance of contracts in *Bhasin v Hrynew*. After a historical excursion and survey of current common law doctrines, writing for the Court, Cromwell J said:

> In my view, it is time to take two incremental steps in order to make the common law less unsettled and piecemeal, more coherent and more just. The first step is to acknowledge that good faith contractual performance is a general organizing principle of the common law of contract which underpins and informs the various rules in which the common law, in various situations and types of relationships, recognizes obligations of good faith contractual performance. The second is to recognize, as a further manifestation of this organizing principle of good faith, that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations.[17]

Festinger asked us to imagine how it would work if it applied to EULAs and TOUs.[18] If good faith were implied, and the publishers were well aware that nobody was ready their contracts or agreeing to them in any real sense, then it could become far more difficult for publishers to enforce them, particularly for minor violations which gamers might have inadvertently done in good faith reliance (however unfounded) that the contract they agreed to would not be as onerous as it was. But I think that it would be more powerful to imagine a duty of good faith in actually creating the contract in the first place. There is precedent for such a duty in labour law.

Duty to Bargain in Good Faith

In labour law in BC, the duty to bargain in good faith is statutorily enshrined in s 50(a) of the *Canada Labour Code*[19] and similarly in s 11 of the BC *Labour Relations Code*,[20] which

[17] *Bhasin v Hrynew*, 2014 SCC 71 at para 33.
[18] Law 423B Video Game Law, November 29, 2014, University of British Columbia Faculty of Law at Allard Hall at slide 35. Available through http://videogame.law.ubc.ca/.
[19] RSC 1985, c L-2, s 50.

states that "[a] trade union or employer must not fail or refuse to bargain collectively in good faith in British Columbia and to make every reasonable effort to conclude a collective agreement." Such provisions ensure that conditions will be determined by mutual consent as neither side can keep important, germane information from the other, and help each side to better understand the other's position. In *Royal Oak Mines v Canada (Labour Relations Board*), the Supreme Court of Canada considered the duty to bargain in the *Canada Labour Code* in the context of the employer's refusal to bargain about particular issues. The court stated that "as a general rule the duty to enter into bargaining in good faith must be measured on a subjective standard, while the making of a reasonable effort to bargain should be measured by an objective standard which can be ascertained by a board looking to comparable standards and practices within the particular industry."[21] Admittedly, current standards within the videogame industry would probably not be of great help, as the problems with EULAs and TOUs are widespread. How to change the industry standards? Collective bargaining! Yes, there is a circularity there. Something more is needed, and I will suggest that that something is a role that consumer associations could play.

Implementation

While workers accomplish collective bargaining with their employers through unions, gamers could accomplish a form of collective bargaining with developers through consumer associations. The duty to bargain in good faith could be "discovered" in the common law as in *Bhasin v Hrynew*, or it could be statute based, as it is in labour law. If the legislature were amenable, the duty might find a good home in consumer protection legislation. Here in BC, that

[20] RSBC 1996 ch 224.
[21] [1996] 1 SCR 369; 1996 CanLII 220 at para XLII.

would be the *Business Practices and Consumer Protection Act*,[22] which already exists to protect consumers. Section s 9(1) states that a supplier must not commit or engage in an unconscionable act or practice in respect of a consumer transaction. A "consumer transaction" is defined in s 1 as

> (a) a supply of goods or services or real property by a supplier to a consumer for purposes that are primarily personal, family or household, or
> (b) a solicitation, offer, advertisement or promotion by a supplier with respect to a transaction referred to in paragraph (a).

Supplying the software for a game, or services by which to access a game, could fall within the definition in (a). Alternatively, one could consider EULAs and TOUs offers under (b), which are accepted, according to the terms of most of the agreements, as soon as they are installed or used. Either way, they appear to be covered.

I would argue that the very act or practice of making gamers agree to such long, all-encompassing contracts, containing such large quantities of conditions and clauses, is already unconscionable. Many of the contracts contain severe restrictions, reservations of rights for the publisher, granting of rights by the gamer to the publisher, consents to use of data, disclaimers of warranties, limitations of liability, non-refundable fee clauses, and quite startling injunctive relief, indemnification, and anti-class action clauses. Many of the restrictions on gamers and reservations of rights for publishers are contrary to common law and statutory principles of copyright such as fair dealing.[23] For example, s 29 of the *Copyright Act* states that "[f]air dealing for the purpose of research, private study, education, parody or satire does not infringe copyright."[24] While some US case law, such as *Davidson & Associates, Inc v Internet Gateway* indicates a willingness of the courts to allow contract

[22] SBC 2004 ch 2 ("*BPCPA*").
[23] I.e. the EULA and TOU at issue in *Davidson & Associates, Inc v Internet Gateway*, 2004 US Dist LEXIS 20369 (ED Mo 2004), aff'd 2005 US App LEXIS 18973 (8th Cir 2005). See also fn 11.
[24] RSC, 1985, c C-42.

to dominate copyright, in Canada a court may decide differently on similar facts. (A discussion of the Canadian perspective is included below under the heading "Other Options".)

Studies done on EULAs and privacy policies in general indicate that their readability level is that of a college graduate, much higher than that of the average user.[25] And that's for those who actually try to read them in the first place. Agreement to EULAs and TOUs has been called, dramatically but perhaps truthfully, "the biggest lie on the web."[26] It is startling to think about it from this perspective - that we lie every time we agree.[27] But do we really agree, for example, that a publisher is *irreparably* harmed every time we do anything contrary to all those terms we never read, and that this harm could go beyond damages? I am not so sure about that, and yet, have almost certainly agreed to such clauses. A small study on EULAs in online games found that 62% of participants did not read any of the EULA, while only 3% read all of it. As just one small illustration of the disconnect between clicking "I agree" and actual agreement, 65% did not believe that it was reasonable for a service provider to give their information to third parties, even though they had all "agreed" to that clause in the EULA.[28]

Another study estimated that it would take, on average, 244 hours per year, or 40 minutes a day, to read all of the privacy policies to which the average internet user is

---

[25] Jens Grossklags and Nathan Good: *Empirical studies on software notices to inform policy makers and usability designers*, School of Information, University of California Berkeley. Presentation at: Usable Security (USEC'07), Lowlands, Scarborough, Trinidad/Tobago, February 15-16, 2007. In: Proceedings of the Eleventh International Conference Financial Cryptography and Data Security (FC'07), Lecture Notes in Computer Science (LNCS), No. 4886, Springer Verlag, 2008, pp 341-355, at p 349. Available at http://people.ischool.berkeley.edu/~jensg/research/usec.html. (Nov 29, 2014).

[26] http://www.biggestlie.com/. (Dec 14, 2014).

[27] http://blogs.law.harvard.edu/vrm/2012/06/04/coming-to-terms/. (Dec 14, 2014).

[28] Florence M Chee, Nicholas T Taylor and Suzanne de Castell, *Re-Mediating Research Ethics: End-User License Agreements in Online Games*, Bulletin of Science, Technology & Society 32(6) 497 –506, 2012 SAGE Publications, at 500. Available at http://www.academia.edu/2976765/Re-Mediating_Research_Ethics_End-User_License_Agreements_in_Online_Games. Dec 15, 2014.

exposed, costing the United States alone about $781 billion in opportunity cost value of the time to read them.[29] As EULAs often include terms referencing privacy policies, these would need to be read in conjunction with the contracts, and so those estimates are actually significantly lower than they would be if they included EULAs and TOUs as well.

This paper will not even touch on the issue of how EULAs and TOUs function with the massive numbers of children who access, download, and play videogames. There has been no real legal test of EULAs for children,[30] but it is interesting to consider how they can consent when they do not have legal capacity.

In Australia, a consumer association has already taken action with regard to some of the problematic clauses. Actually, it is more than just a consumer association – the Australian Competition and Consumer Commission ("ACCC") is the country's competition regulator and self-proclaimed "national consumer law champion."[31] In a media release, the ACCC described the issues as including that consumers were not entitled to a refund for any games sold by Valve via Steam in any circumstances (reminiscent of the non-refundable fee clauses in TOUs), and that Valve had excluded, restricted or modified statutory guarantees and/or warranties that goods would be of acceptable quality[32] (reminiscent of the disclaimers of warranties in EULAs, though many do point out that the user may have additional rights under applicable local law). So far the only published decision is that of the Federal Court of

---

[29] Aleecia M McDonald and Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 4 ISJLP 543 (2008-2009).
[30] Jon Festinger, Chris Metcalfe, and Roch Ripley, *Video Game Law*, 2d ed (Markham: LexisNexis Canada, 2012) at 104.
[31] https://www.accc.gov.au/. (Dec 5, 2014).
[32] Australian Competition and Consumer Commission, *Full steam ahead: ACCC institutes proceedings against Valve for making alleged misleading consumer guarantee representations*, Release Number MR 219/14, Aug 29, 2014. Available at http://www.accc.gov.au/media-release/full-steam-ahead-accc-institutes-proceedings-against-valve-for-making-alleged-misleading-consumer-guarantee-representations. (Dec 5, 2014).

Australia in *Australian Competition and Consumer Commission v Valve Corporation*,[33] in which Jagot J allowed an application for substituted service. The decision notes that the

> originating application seeks declarations, injunctions and ancillary orders relating to alleged breaches of the Australian Consumer Law by the proposed respondent, Valve Corporation, relating to the making of representations to consumers in Australia via a website known as the "Steam platform", which representations are said to be false and misleading or likely to mislead or deceive because they are representations in contravention of various sections of the Australian Consumer Law.[34]

If a direct argument (that the act or practice of making gamers agree to long contracts containing many severe conditions that nobody reads is unconscionable) were unsuccessful, it may also be possible to argue that particular provisions in the contracts are false and misleading or likely to mislead or deceive because they are representations in contravention of Canadian consumer law. However, given that our governmental consumer protection organization, the Office of Consumer Affairs, does not describe itself as a champion of consumer protection but rather more softly, as having a mandate to promote consumer affairs,[35] and the fact that it is more policy oriented than litigious, a different organization would have to be found to bring an action against a publisher for their "unconscionable" EULAs or TOUs. The Competition Bureau, as an independent law enforcement agency, would be the more likely choice, and does investigate deceptive marketing practices and when materially false or misleading representations are made knowingly or recklessly to the public.[36]

Of particular interest in *Valve* are the reasons to allow substituted service. Jagot J noted that

---

[33] [2014] FCA 1018 (*Valve*).
[34] *Australian Competition and Consumer Commission v Valve Corporation*, [2014] FCA 1018 at para 4.
[35] Office of Consumer Affairs, http://www.ic.gc.ca/eic/site/oca-bc.nsf/eng/ca02556.html. Dec 5, 2014.
[36] Competition Bureau, http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00125.html. Dec 5, 2014.

> the evidence adduced… is to the effect that the alleged representations which are said to be misleading and deceptive or likely to mislead and deceive are continuing; they are being made to users of the Steam platform in Australia, which is said to involve some 1.4 million people…. If that method of service is used, then it is apparent that the relevant documents can be served not only with little cost and expense but, more importantly, in a very timely manner – perhaps in one or two days – as compared to the time and expense which is likely to be involved in service outside the jurisdiction.
>
> …Notwithstanding the fact that the alleged misleading and deceptive conduct is said to have been taking place since the inception of the Australian Consumer Law, in circumstances where the alleged conduct is said to be continuing and involves such a large number of people, it does seem to me that there are substantial case management benefits for the Court in allowing substituted service.[37]

The court's discussion of both the large numbers of people who are potentially exposed to such consumer transactions, as well as their ongoing nature, demonstrates the court's concern about the issue, and a desire to resolve it quickly.

In Washington, a lawsuit has been filed alleging "unfair or deceptive" trade practices against Big Fish.[38] It was launched as a class action by a representative plaintiff rather than a consumer organization. Motions are ongoing, with the latest development on December 8, 2014 simply being an order extending the time for filing a joint status report to December 19 2014.

Despite such legal developments, the law might be singularly ill equipped to respond to technological changes due to its slow and incremental pace of change. Festinger theorized "that concepts of Law & Justice can never adequately resolve issues related to communications because communications memes proactively define the future meanings of Justice & the forms Law will take."[39] In response, I suggest that implementing a collective bargaining framework with a duty to bargain in good faith will bring communication to the forefront of legal analysis.

---

[37] *Australian Competition and Consumer Commission v Valve Corporation*, [2014] FCA 1018 at paras 10-11.

[38] *Carnahan v Big Fish Games, Inc*, US District Court Western District of Washington at Seattle, Docket Number 2:14-cv-01182; Matthew Handrahan, *Big Fish accused of "unfair or deceptive" trade practices,* (gamesindustry.biz: Aug 7, 2014). http://www.gamesindustry.biz/articles/2014-08-07-big-fish-accused-of-unfair-of-deceptive-trade-practices. December 5, 2014.

[39] Law 423B Video Game Law, October 15, 2014, University of British Columbia Faculty of Law at Allard Hall at slide 54. Available through http://videogame.law.ubc.ca/syllabus/.

Where communication plays a primary role in shaping contracts which are truly agreed upon by the parties, the law will be better placed to see them as inherently just.

Other Options:

Standardizing Contracts

This option goes in almost the opposite direction of my proposed solution. Instead of bargaining for customized contracts, standardize them.[40] This could also be done with the assistance of a consumer association, or alternatively, the industry itself could set the standards. It may behoove the industry to do just that, particularly if legal actions with regard to unfair terms in EULAs and TOUs such as the ones discussed above are successful and begin to proliferate.

Greater Warnings

Make EULAs and TOUs look like the startling warnings on cigarette packages. Perhaps this would goad gamers into reading them more closely. However, given the studies discussed above on the difficulty of the contractual language and the amount of time that it would take for people to read all of them, this is unlikely to have much of an effect. As well, people still smoke despite such warnings.

Strict Interpretation

Interpret EULAs and TOUs *contra proferentum* as contracts of adhesion.[41] This could also be combined with many of the other potential solutions, though likely not though the labour law style collective bargaining solution if the contracts are negotiated fairly.

No Contracts

[40] As suggested by, *inter alia*, http://www.biggestlie.com/.
[41] As suggested by classmates in the *EULAs and TOS as Adhesionary Contracts* discussion post, available at http://videogame.law.ubc.ca/2014/10/22/eulas-and-tos-as-adhesionary-contracts/.

Get rid of EULAs and TOUs altogether. After all, as Johanna Blakley points out, in the fashion industry designs are copied and "modded" all the time, and yet the industry as a whole is not only economically viable, but also very creative and successful.[42] Further, every constraint on creativity is just that - a constraint. If gaming and modding are creative, and if one considers creativity as democratization of thought, it becomes apparent that such constraints are not something that we would want to have.[43] However, some form of privacy policy would likely still be required.

If EULAs and TOUs did not exist, the videogame industry could also rely on intellectual property law. As Festinger points out, there were causes of action other than violation of EULAs and TOUs in all relevant cases.[44] However, as discussed above, distributors often see such contracts as performing an important enabling function.

Moral Rights and User's Rights

An increase in the importance of user's rights is already occurring in Canada. In 2012, the Supreme Court of Canada released five decisions ("the pentalogy") which clarified Canadian copyright law and built on earlier cases in confirming the importance of user's rights. In *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, Abella J described the evolution of copyright law, noting:

> In *Théberge v Galerie d'Art du Petit Champlain inc.*, 2002 SCC 34 (CanLII), [2002] 2 SCR. 336, this Court noted that copyright requires "a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator" (para. 30).
> …

[42] Lessons from fashion's free culture, TedX 2010. Available at https://www.youtube.com/watch?v=zL2FOrx41N0 or through http://videogame.law.ubc.ca/syllabus/.
[43] Law 423B Video Game Law, November 26, 2014, University of British Columbia Faculty of Law at Allard Hall at slide 39. Available through http://videogame.law.ubc.ca/.
[44] Law 423B Video Game Law, October 15, 2014, University of British Columbia Faculty of Law at Allard Hall at slide 35. Available through http://videogame.law.ubc.ca/syllabus/.

> *CCH*[45] confirmed that users' rights are an essential part of furthering the public interest objectives of the Copyright Act. One of the tools employed to achieve the proper balance between protection and access in the Act is the concept of fair dealing, which allows users to engage in some activities that might otherwise amount to copyright infringement. In order to maintain the proper balance between these interests, the fair dealing provision "must not be interpreted restrictively": *CCH*, at para. 48.[46]

The s 29 test for fair dealing involves two steps. The first is to determine whether the dealing is for one of the allowable purposes in s 29, and the second assesses whether the dealing is fair. To assess whether the dealing is fair, the court will consider six "fairness factors for guidance: the purpose, character, and amount of the dealing; the existence of any alternatives to the dealing; the nature of the work; and the effect of the dealing on the work."[47] In *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, Abella J, writing for the majority, stated that

> fair dealing is a "user's right", and the relevant perspective when considering whether the dealing is for an allowable purpose under the first stage of *CCH* is that of the user (*CCH*, at paras 48 and 64). This does not mean, however, that the copier's purpose is irrelevant at the fairness stage. If, as in the "course pack" cases, the copier hides behind the shield of the user's allowable purpose in order to engage in a separate purpose that tends to make the dealing unfair, that separate purpose will also be relevant to the fairness analysis.[48]

As *Access Copyright* was about photocopying materials for educational purposes, it used the term "copier." However, one could imagine that, applied in the gaming context, a Canadian court might be more willing to look at the importance of a "gamer's right" to game, and by gaming, create. This could include modding, to a degree that does not tend to make the dealing unfair.

---

[45] *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13.
[46] [2012] 2 SCR 326, 2012 SCC 36 (CanLII) at paras 8, 11.
[47] *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, [2012] 2 SCR 326, 2012 SCC 36 (CanLII) at para 14.
[48] *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, [2012] 2 SCR 345, 2012 SCC 37 (CanLII) at para 12.

Alternatively or in addition, considering a gamer's play a performance of the game could bring them within the protection of moral rights in the *Copyright Act*.

Legislative Action

The legislature could introduce statutory provisions to make EULAs and TOUs shorter and in plain language, as Assembly Member Ed Chau tried to do in the California legislature in February, 2013 for privacy policies.[49] However, the complexity of the issues can make short contracts impossible, and plain language insufficiently clear.

Alternatively, the *Business Practices and Consumer Protection Act* "unconscionable act or practice" provisions could be used as discussed above, or as a defence for a gamer in the event of an action initiated by a distributor.

Alternate Lobbying Strategies

One could look to doctors, for example, who "have been very successful in advancing their economic interests through lobbying, negotiations, public appeals, and even work stoppages."[50] However, given the working conditions of many doctors and other professionals such as lawyers, which typically start out with gruelling residencies or articling periods followed by years of "putting in the work" (i.e. the long hours) while under constant stress, whether these advances are as positive as they are often thought to be is questionable.

This also raises the question of the working conditions of many workers in the videogame industry, as it may seem to be putting the cart before the horse to explore bringing fairness to gamers as consumers before bringing it to the people who create the very games at issue. However, this paper focussed on the analogy between the reasons for collective bargaining in

[49] Available at http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0201-0250/ab_242_bill_20130206_introduced.pdf.
[50] Bernard Adell et al, *Labour and Employment Law*, 8th ed, (Toronto: Irwin Law, 2011) at 156.

labour law and in videogame contracts, not on labour and employment law problems in the videogame industry itself.

Conclusion

In conclusion, there are many different strategies with which to approach the problem of draconian, creativity dampening EULAs and TOUs. Introducing some form of consumer association to bargain collectively with distributors on behalf of gamers is one potential solution inspired by the labour law context. It could help to increase understanding and commonalities between distributors and gamers, leading to more user-friendly contracts and greater creativity. Combined with a possible trend of the courts in Canada, Australia, and elsewhere becoming more receptive to user-friendly interpretations, I am hopeful that the future for all players in the game industry is bright.