

Merchant & Gould

An Intellectual Property Law Firm

Crafting the Laws of a Virtual World By: Blake Sorensen

Introduction

Developing rules for managing users' behavior in a virtual world is like inventing a legal system from scratch. Although perhaps not the best tool for the jobⁱ, these rules typically rely on contract law principles in the form of Terms of Service/Use and End User License Agreements (referred to herein as "Terms").ⁱⁱ The challenge to authors of these Terms is to balance the competing interests of making the virtual world's operator commercially successful, protecting that company from lawsuits or outside interference, keeping true to the virtual world's design and vision, and managing and responding to the users' expectations.

Unfortunately, many operators disregard this balance or rely on outdated boilerplate in the rush to get to market, resulting in expensive litigation and bad publicity. For example, the virtual world of Second Life[®], "where users can create content, not just consume it,"ⁱⁱⁱ has been wildly successful. Linden Lab[®] the operator behind Second Life[®], recently celebrated the fact "that Second Life[®] residents have transacted the equivalent of more than one billion US dollars with each other while spending more than one billion hours in Second Life[®]."^{iv} Their road to success, however, has come with a few speed bumps, such as an invalidation of a standardized arbitration clause, which may have been avoided with different Terms.^v

The aim of this article is to present three key aspects that should be considered when drafting Terms to suit each virtual world in light of users' varied expectations and interests.^{vi} First, enforceability concerns are reviewed in light of recent case law. Next, the ownership of content within the virtual world is discussed in light of the users' expectations and the design of the virtual world. Finally, the need to include a code of conduct in the Terms is examined.

Enforceability

The Terms are contracts, held to the same standards and subject to the same defenses as other contracts. Thus, the general principles of ensuring that a valid contract exists between two parties - the operator and the user - must be met. For example, the user must have the opportunity to fully review the Terms.^{vii} The Terms must be based on some consideration^{viii}, acceptance must not be procured through fraud or duress, and, perhaps most importantly,

the terms must not be unconscionable.

Unconscionability is generally evaluated according to both procedural and substantive components; the more unfair the procedure, the less severe the substantive unconscionability need be and vice versa.^{ix} The procedural component can be shown via unequal bargaining positions or surprise from hidden terms while the substantive component is based on harsh or one-sided results that shock the conscience.^x

The Terms for accessing virtual worlds are usually considered contracts of adhesion because the license agreements are presented to potential users as “take it or leave it”, standardized contracts.^{xi} If the users have objections, assuming they actually read the Terms, their only option is to decline the Terms and be denied entry to the virtual world. Although this evidence of procedural unconscionability may be contested by showing that there are reasonably available market alternatives^{xii}, few companies want to say, “if you don’t like our terms, go play use our competitor’s version – it’s all the same.” Furthermore, the focus on unique features of the virtual world in marketing campaigns can be used as evidence that there are no reasonable alternatives.^{xiii}

Other evidence of procedural unconscionability may result from the arrangement of the challenged provisions, such as where an arbitration clause is buried in a lengthy paragraph under a “General Provisions” heading.^{xiv} Breaking out each clause under a clearly defined heading is therefore an important first step.^{xv} Providing important details in the Terms, such as estimated costs and the rules of arbitration under a selected arbitration organization,^{xvi} may also be viewed as offsetting the harshness of an adhesion contract.^{xvii}

From a practical standpoint, operators should assume that, if challenged, their Terms will be starting off from a disfavored position. This should be offset by making sure that the Terms are designed to offer as much substantive equal footing as is practical. For example, one important factor here is ensuring an equal range of remedies, such as by requiring both the user and the company to first submit any disputes to arbitration.^{xviii}

Expectations of Ownership

Users of virtual worlds tend to have expectations of how the Terms, particularly regarding ownership of user creations, should be handled. Even where the Terms specifically say that a user’s character or avatar remains the property of the operator,^{xix} the users often feel entitled to some form of ownership interest, including the right to sell their account or items acquired within the virtual world.^{xx} Virtual world operators, however, often wish to maintain control and ownership of the virtual property themselves.

In general, the more customization allowed within the virtual world, the greater the sense of ownership among participants in the virtual world. For example, the virtual worlds of “World of Warcraft®” and “Second Life®” offer vastly different avatar customization options along with different Terms provisions covering the ownership

of and responsibility for those customizations.

In World of Warcraft® (WoW), users are given a few basic choices for their avatar’s appearance when it is created, such as hair color and style. Any options for customization, such as different equipment, are created, designed, and coded for the virtual world by the operator, not by the users.^{xxi} Users can configure a few aspects of their avatars’ appearance and gain access to new equipment, virtual currency, greater levels, and power, creating a sense of entitlement and ownership of the character.

WoW’s Terms allow only the sale of a user’s copy of the software and, with it, the right to access the virtual world.^{xxii} The Terms explicitly forbid the sale of in-game items and characters for real world currency.^{xxiii} Despite this, and despite the refusal of some sites to list sales for such virtual property,^{xxiv} a market for the sale of accounts, avatars, in-game currency, and items has flourished, as a quick web search on “WoW account sales” can attest. Thus, where users believe they have contributed something of value to the virtual property, such as the time and effort spent to create and enhance the character, they are likely to believe their efforts have earned them an ownership interest in the virtual property regardless of the Terms.

In contrast, Second Life® not only encourages users to freely create items within the virtual world^{xxv}, but explicitly grants the users ownership of their creations.^{xxvi} Second Life® even provides an operator-run currency exchange, called the LindeX™,^{xxv} and an auction site for virtual land and items.^{xxv} By granting ownership of content to the users and authorizing sales within the Terms, the operator, Linden Lab®, has actually managed to maintain a large amount of control – and revenue flow, from associated fees – over the virtual world.

Codes of Conduct

In the real world, the criminal code and the laws of property and torts supplement the law of contracts, offering different mechanisms for handling disputes and providing a baseline expectation for standards of behavior. In the virtual world, however, all “laws” stem from the contract between the user and the operator. Typically, the most serious penalty an operator can impose on a user for violation of the expected conduct is to deny the user future access to the virtual world, known as banning.^{xxix} In addition, other users often have no enforcement mechanism against those who violate the Terms other than reporting the behavior to the operator and hoping something is done.

Although an imperfect solution, the Terms should therefore specify the code of conduct expected out of users of the virtual world and some explanation of how users can report violations of the code of conduct to the operator. Court decisions regarding a company’s ability to enforce these codes of conduct are rare^{xxx}, but appear to side with the company’s right to control interaction within the virtual worlds they provide.^{xxxi} More importantly, from a community relations standpoint, enforcing clearly articulated rules may irk those users looking to push the

boundaries of acceptable conduct, but please others who believe in following the code of conduct and “think most of the people getting caught in the dragnet are guilty as charged.”^{xxxii}

Further, the Communications Decency Act (CDA) provides a safe harbor^{xxxiii} for online service operators from liability for user-generated content, including speech.^{xxxiv} In a case against America Online® (AOL), for example, the Fourth Circuit held that AOL was not liable for publishing posts made by a user, despite AOL’s notice of the defamatory content.^{xxxv} Similarly, MySpace™ was shielded from liability for messages that violated the website’s Terms but were created by and exchanged between users without editorial oversight by the company.^{xxx}

Although these two cases were not concerned with virtual worlds *per se*, the parallels are strong enough to encourage Terms drafters to consider the implications. The operator has the right to control all aspects of behavior within the virtual world. Further, the operator may enforce the Terms against violators, and is not liable for user generated content. The CDA is not an excuse to enforce a code haphazardly, as this would likely annoy users and offer grounds for a discrimination suit.

Conclusion

This article was intended to provide a starting point for an operator when writing their Terms. The operator should take advantage of the lessons learned by other operators and include what courts like to see in such contracts. For example, each clause should be separated, with a clear heading and include links to useful information, such as the rules of a chosen arbitration organization. to the operator should consider their users’ expectations of ownership, and realize that if they try and forbid users from acting on what they see as their rights, users will find a way around them. Operators should explicitly set out a code of conduct for expected behavior and enforce it evenhandedly. Lastly, operators should not copy another virtual world’s Terms, but instead should tailor Terms to their particular virtual world.

About the Author

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ⁱ See, e.g., Joshua Fairfield, “Anti-Social Contracts: The Contractual Governance of Virtual Worlds”, 53 McGill Law Journal 427, 447 (2007).

ⁱⁱ Fairfield at 430. (“The United States relies on private-law contract to govern behaviour in virtual communities. By comparison, South Korea vigorously uses its criminal laws to enforce norms. Chinese courts have used a theory of labour in ruling that a game service operator must return virtual property to the player who has

worked to obtain it.”)

ⁱⁱⁱ Press Release, Linden Lab®, Linden Lab Debuts, Company Dedicated to 3D Entertainment (Feb. 11, 2002) (on file with author).

^{iv} Press Release, Linden Lab®, 1 Billion Hours, 1 Billion Dollars Served: Second Life® Celebrates Major Milestones for Virtual Worlds (Sept. 22, 2009) (on file with author).

^v Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593 (E.D.Penn. 2007).

^{vi} Richard Bartle (1996), “Hearts, Clubs, Diamonds, Spades: Players Who suit MUDs” at <http://www.mud.co.uk/richard/hcds.htm>.

^{vii} See Trujillo v. Apple Computer, Inc., 578 F. Supp. 2d 979, 983 (N.D. Ill. 2008) (denying a motion to compel arbitration where Terms of Service including the arbitration clause were available to a purchaser only after the purchase was completed.)

^{viii} See, e.g., Posting of Daz Productions, Inc. End User License Agreement to http://www.daz3d.com/sections/aboutus/eula/EULA_Content.pdf (December 22, 2009) (granting “a personal non-exclusive, non-transferable License to use the 3-D Model(s)” in exchange for a user’s agreement “to pay DAZ3D prior to or concurrent with delivery of the 3- D Model(s) the full purchase price for the 3-D Model(s)”); Posting of World of Warcraft® Terms of Use Agreement to <http://www.worldofwarcraft.com/legal/termsofuse.html> (July 29, 2008) (granting a limited license to “use the Service solely for your own non-commercial entertainment purposes” in exchange for purchase).

^{ix} See Davis v. O’Melveny & Myers, 485 F.3d 1066; Trujillo, 578 F. Supp. 2d at 992 (“Unconscionability under Illinois law has both procedural and substantive facets”); Weinstein v. AT&T Mobility Corp., 2008 U.S. Dist. LEXIS 35666 (E.D. Pa. Apr. 30, 2008) (“Under Pennsylvania law, there must be both procedural and substantive unconscionability in order to void an arbitration provision or a contract in general.”) *but see* Hauenstein v. Softwrap Ltd., 2007 U.S. Dist. LEXIS 60618 (W.D. Wash. Aug. 16, 2007) (stating that “under Washington law, a contract is unenforceable if it is substantively or procedurally unconscionable” but “the fact that a contract is an adhesion contract does not necessarily make it procedurally unconscionable”).

^x Comb v. PayPal, Inc., 218 F. Supp 2d 1165, 1172 (N.D. Cal. 2002)..

^{xi} Id.

^{xii} Dean Witter Reynolds, Inc. v. Superior Court, 211 Cal. App. 3d 758 (Ct. App. 1989).

^{xiii} Bragg, 487 F. Supp. 2d at 606 (finding that there were no market alternatives to Second Life as it was the first and only virtual world to grant property rights in virtual land).

^{xiv} Id.; see also Hauenstein, 2007 U.S. Dist. LEXIS 60618 at 10 (finding no procedural unconscionability where an arbitration clause was not “hidden in a maze of fine print” but rather clearly stated in regular size font under the heading “Arbitration”).

^{xv} Boghos v. Certain Underwriters at Lloyd’s of London, 36 Cal. 4th 495 (Cal. 2005) (finding bold-font arbitration clause under “Binding Arbitration” heading enforceable.)

^{xvi} Common arbitration organizations include the International Chamber of Commerce (ICC) and the American Arbitration Association (AAA).

^{xvii} Bragg, 487 F.Supp. 2d at 607 (finding Linden Labs' failure to make available the costs and rules of arbitration in the ICC further evidence of procedural unconscionability).

^{xviii} *See Lytle v. Citifinancial Servs.*, 2002 PA Super 327 (Pa. Super. Ct. 2002) (finding reservation of court access to the company but forcing the customer to arbitrate creates a presumption of unconscionability).

^{xix} Post of World of Warcraft® Terms (Section 7 states “NOTWITHSTANDING ANYTHING TO THE CONTRARY HEREIN, YOU ACKNOWLEDGE AND AGREE THAT YOU SHALL HAVE NO OWNERSHIP OR OTHER PROPERTY INTEREST IN THE ACCOUNT, AND YOU FURTHER ACKNOWLEDGE AND AGREE THAT ALL RIGHTS IN AND TO THE ACCOUNT ARE AND SHALL FOREVER BE OWNED BY AND INURE TO THE BENEFIT OF BLIZZARD.”) (emphasis original).

^{xx} *See, e.g.*, Posting of sale-8wkzg-1400910239@craigslist.org to <http://charlottesville.craigslist.org/vgm/1400910239.html> (Oct. 1, 2009, 4:21AM EDT) (describing a World of Warcraft® account sale as “You will be paying for all the time and effort I have put into playing this character. Any financial compensation I receive from the sale of this account is for my time spent playing this character an account. This account remains the property of Blizzard [Entertainment, Inc.]”)

^{xxi} Posting of Battle.net® Terms of Use to <http://us.blizzard.com/en-us/company/about/termsfuse.html> (March 18, 2009). (“Blizzard owns, has licensed, or otherwise has rights to all of the content that appears in the Service or the Games. You agree that you have no right or title in or to any such content, including without limitation the virtual goods or currency appearing or originating in any Game, or any other attributes associated with the Account or stored on the Service. Blizzard does not recognize any purported transfers of virtual property executed outside of a Game, or the purported sale, gift or trade in the “real world” of anything that appears or originates in a Game, unless otherwise expressly authorized by Blizzard in writing. Accordingly, you may not sell in-game items or currency for “real” money, or exchange those items or currency for value outside of a Game, without Blizzard’s written permission.”)

^{xxii} Posting of World of Warcraft® End User License Agreement to <http://www.worldofwarcraft.com/legal/eula.html> (July 29, 2008) (“You may permanently transfer all of your rights and obligations under the License Agreement to another only by physically transferring the original media (e.g., the CD-ROM or DVD you purchased), all original packaging, and all Manuals or other documentation distributed with the Game; provided, however, that you permanently delete all copies and installations of the Game in your possession or control, and that the recipient agrees to the terms of this License Agreement.”).

^{xxiii} Posting of Battle.net Terms.

^{xxiv} Posting of “eBay bans auctions of virtual goods” to http://news.cnet.com/eBay-bans-auctions-of-virtual-goods/2100-1043_3-6154372.html?tag=mncol (January 29, 2007).

^{xxv} Posting of “Second Life®: The Creations” to <http://secondlife.com/whatis/creations.php> (“The Second Life

world is a place dedicated to your creativity. It's about dreaming of something one moment and bringing it to life the next. Everything in Second Life is resident-created, from to the strobe lights in the nightclubs to the car (or spaceship) in your driveway.”) (March 11, 2010).

^{xxvi} Posting of “Second Life®: Frequently Asked Questions” to <http://secondlife.com/whatis/faq.php> (“You also own anything you create—Residents retain intellectual property rights over their in-world creations.”) (March 11, 2010).

^{xxvii} Posting of “LindeX™ Market Data” to <http://secondlife.com/statistics/economy-market.php> (March 11, 2010).

^{xxv} Posting of “Second Life® Auctions” to <http://usd.auctions.secondlife.com/> (March 11, 2010).

^{xx} See Bragg.

^{xx} Posting of Jay Moffitt, “Banning in Games” to <http://gamersrightslawyer.com/2009/10/14/banning-in-games/> (October 14, 2009).

^{xxxi} Estavillo v. Sony Computer Entertainment America, 2009 WL 3072887 (N.D. Cal. Sept. 22, 2009) (holding that Sony® was not a government entity and upholding a ban of a user despite the user’s claim of First Amendment protections.)

^{xxxii} Posting of “World of Warcraft bans raise players’ ire” to http://news.cnet.com/World-of-Warcraft-bans-raise-players-ire---page-2/2100-1043_3-6169517-2.html?tag=mncol (March 22, 2007).

^{xxxiii} 47 U.S.C. § 230.

^{xxxiv} *But see* Fair Housing Council of San Fernando Valley, et al. v. Roomates.com, LLC, 521 F.3d 1157 (9th Cir. 2008) (holding that the CDA’s safe harbor provisions did not immunize the operator from liability for violations of the anti-discrimination portions of the Fair Housing Act, even though the users supplied allegedly discriminatory preferences).

^{xxxv} Zeran v. America Online, Inc., 129 F.3d 327 (4th Cir. 1997).

^{xxxvi} Jane Doe v. MySpace, Inc., 474 F. Supp. 2d 843 (W.D. Tex. 2007).

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