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PERSISTENT AND EMERGING QUESTIONS ABOUT THE USE OF END-USER LICENCE AGREEMENTS IN CHILDREN'S ONLINE GAMES AND VIRTUAL WORLDS

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I. INTRODUCTION

Gaming has become a core part of children's online experiences. As of 2009, 91% of Canadian children aged 6 to 12 years reported that they engaged in digital gaming at least once a month, and 26% said they gamed on a daily basis.[1] In addition to its enormous popularity, the children's digital-gaming landscape has recently undergone a number of significant expansions. According to industry analysts, in addition to innumerable single-player online games, hundreds of new virtual worlds and massively multiplayer online games (MMOGs) targeted specifically to children and teens have emerged over the past few years.[2] As well, a growing number of children's titles now feature user-generated content (UGC) and do-it-yourself (DIY) game making tools. For example, players of *LittleBigPlanet*, an E-rated, web-enabled console-based game series centered around UGC, have made and published over 7 million mini-games since the first game installment was released for the PlayStation 3 in 2008.[3] At its peak, children's virtual world *Club Penguin*

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1 See Entertainment Software Association of Canada, *Essential Facts About the Canadian Computer and Video Game Industry* (Toronto, 2009).

2 Virtual Worlds Management, "Report: 200+ Youth-Oriented Worlds Live or Developing" (26 January 2009), online: <http://www.virtualworldsmanagement.com/ 2009/youth-01-26-2009.html>.

3 The series now includes a PlayStation 3-based sequel, *LittleBigPlanet 2*, *LittleBigPlanet Karting*, and *LittleBigPlanet Vita* for PlayStation handheld devices.

received 30,000 daily submissions to its in-world newspaper, *The Club Penguin Times*, as players sent in articles, poems, and artwork in the hopes of having their work published in a weekly that was reportedly read by approximately two-thirds of the world's then 6.7 million members.[4]

Despite the prevalence and noted significance of these developments, the legal and regulatory implications of increased rates and levels of engagement in social interaction and content creation among minors within online games and other forums remains an under-explored area within both academic and public discourses. Instead, when children's relationship to digital games and other online media *are* considered, it is largely as part of one of the many ongoing debates about the potential impacts (beneficial or detrimental) for children's development, learning, or socialization. Meanwhile, little consideration has thus far been given to the roles children might hold and exceptional examples that children might represent within ongoing debates and development of video-game law and virtual-worlds governance, or to the important legal questions and challenges that minors might introduce into such deliberations. Yet, within digital games, children are frequently enrolled in many of the same legal and economic relationships identified among adult players of mainstream titles.[5] For instance, within popular, corporately owned titles, micro-transactions and in-game advertising abound, raising various regulatory questions[6] and broader ethical concerns about the potential for commercial exploitation, deceptive advertising, and unauthorized forms of market research.

See David Hinkle, "LittleBigPlanet celebrates 7 million user levels with massive, manic infochart" (7 August 2012), online: Joystiq <http://www.joystiq.com>.

4 Dawn C Chmielewski, "News that breaks the ice: Young fans flock to Disney's *Club Penguin* virtual gazette", *Los Angeles Times* (30 August 2008), online: <http://www.latimes.com>.

5 See generally Edward Castronova, *Synthetic Worlds: The Business and Culture of Online Games* (Chicago: University of Chicago Press, 2005).

6 Sara M Grimes, "Kids' Ad Play: Regulating Children's Advergames in the Converging Media Context" (2008) 8:12 Int'l J Comm L & Pol'y 161.

The pixilated villages of *Club Penguin* and virtual cardboard castles of *LittleBigPlanet* may initially seem like odd places to focus an exploration of emerging issues in intellectual-property (IP) or contract law. Just as such issues are rarely discussed within the literature on children and digital games, outside of the occasional finger pointing at children for their participation in copyright infringement and piracy, underage players are rarely included in serious discussions of the highly complex copyright, authorship, and IP ownership regimes and negotiations currently unfolding within digital games and online worlds. Meanwhile, research shows that even younger children often use child-specific virtual spaces to engage in many of the same types of creative, collaborative, and expressive activities found in teen- and adult-targeted games and virtual worlds (herein referred to as "mainstream titles").[7] The above-mentioned *LittleBigPlanet* is just one example of an emerging genre of "UGC games"[8] that not only enable, but to some extent revolve around child-created content. In such titles, additional questions arise about the way in which copyright is described and enforced where minors are involved, and whether fair-dealing exceptions are given adequate consideration.[9] Furthermore, numerous UGC games require that children (and/or their parents) agree to waive ownership rights over

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7 Deborah A Fields & Yasmin B Kafai, "Knowing and Throwing Mudballs, Hearts, Pies, and Flowers: A Connective Ethnography of Gaming Practices" (2010) 5:1 Games and Culture 88; Jackie Marsh, "Young Children's Play in Online Virtual Worlds" (2010) 8:1 Journal of Early Childhood Research 23; Sara M Grimes & Deborah A Fields, *Kids Online: A New Research Agenda for Understanding Social Networking Forums* (7 November 2012), online: The Joan Ganz Cooney Center <http://www.joanganzcooneycenter.org> [Grimes & Fields, "Kids Online"].

8 Herein, the term "UGC games" will refer to games that contain tools and infrastructures that enable players to create a sharable, interactive form of content—from mini-games and game levels, to avatar costumes and environmental features and layouts.

9 Sara M Grimes, "Child-Generated Content: Children's Authorship and Interpretive Practices in Digital Gaming Cultures" in Rosemary J Coombe, Darren Wershler & Martin Zelinger, eds, *Dynamic Fair Dealing: Creating Canadian Culture Online* (Toronto: University of Toronto Press) [forthcoming in November 2013] [Grimes, "Child-Generated Content"].

any content or other forms of IP they might contribute to the game space. These relationships are often addressed—and to some extent defined—in the games' accompanying privacy policies, end-user license agreements (EULAs), terms of use (TOU), and terms of service (TOS) contracts (herein simply referred to as EULAs).

Within the broader academic literature on the legal and ethical dimensions of digital games, the terms and claims made in the EULAs of virtual worlds and MMOGs have featured quite prominently. A particularly significant amount of attention has thus far focused on IP ownership claims, which have also emerged as key issues of debate within the gaming industry and player community. From the players' struggles for IP ownership rights in *Second Life* and *World of Warcraft*,[10] to the modding communities that have emerged around Valve's *Half-Life* and Epic Games' Unreal Development Kit,[11] to the awe-inspiring fan homages to *Star Trek* and *Game of Thrones* that players have produced using the 8-bit, sandbox game *Minecraft*,[12] the evolving and at times contentious relationship between game players and established copyright regimes continues to be discussed at some length. These works build on established traditions within digital-game scholarship, which have long called into question the scope, validity, and ethics of the sweeping IP ownership claims made within EULAs,[13] given the increasingly laborious

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[10] Kim Barker, "MMORPGing—The Legalities of Game Play" (2012) 3:1 European Journal of Law and Technology 1, online: <http://ejlt.org/article/viewFile/119/195>.

[11] Hector Postigo, "Modding to the Big Leagues: Exploring the Space Between Modders and the Game Industry" (2010) 15:5 First Monday, online: <http://firstmonday.org>.

[12] See e.g. halnicholas, "Building Megaobjects in Minecraft", online: YouTube <http://youtu.be/kn2-d5a3r94>; FireRockerzstudios, "Minecraft Game of Thrones Kings Landing City!", online: YouTube <http://youtu.be/jwyqAA_TpKo>; Laura Hudson, "How Fans Recreated Game of Thrones in a Minecraft Map the Size of LA" *Wired* (27 March 2013), online: <http://www.wired.com/underwire/2013/03/westeroscraft-game-thrones-minecraft/all>.

[13] See Edward Castronova, "The Right to Play" (2004) 49:1 NYL Sch L Rev 185 [Castronova, "Right"]; Daniel C Miller, "Determining Ownership in Virtual Worlds: Copyright and License Agreements" (2003) 22:2 Rev Litig 435; F Gregory

and creative nature of some players' contributions to the production and shaping of digital game content,[14] and given the special "magic circle" status that is often accorded to play.[15]

Despite ongoing scholarly debates,[16] in many ways, EULAs currently serve as the legislative backbone of digital play environments. The primary role that EULAs have assumed within the structuring and governance of digital games has in turn contributed to a privileging of copyright and contract laws within subsequent discussions (both public

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Lastowka & Dan Hunter, "The Laws of the Virtual Worlds" (2004) 92:1 Cal L Rev 1; Jack M Balkin, "Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds" (2004) 90:8 Va L Rev 2043; Jack M Balkin & Beth S Noveck, eds, *The State of Play: Law, Games, and Virtual Worlds* (New York: NYU Press, 2006); Sara M Grimes, "Online Multiplayer Gaming: A Virtual Space for Intellectual Property Debates?" (2006) 8:6 New Media & Society 969; TL Taylor, *Play Between Worlds: Exploring Online Game Culture* (Cambridge, Mass: MIT Press, 2006); Debora J Halbert, "Public Lives and Private Communities: The Terms of Service Agreement and Life in Virtual Worlds" (2009) 14:12 First Monday, online: <http://firstmonday.org>; James Grimmelmann, "Virtual World Feudalism" (2009) 118 Yale Law Journal Pocket Part 126.

14 See Postigo, *supra* note 11; Andrew Herman, Rosemary J Coombe & Lewis Kaye, "Your Second Life? Goodwill and the Performativity of Intellectual Property in Online Digital Gaming" (2006) 20:2–3 Cultural Studies 184; Susan P Crawford, "Who's in Charge of Who I Am? Identity and Law Online" (2004) 49:1 NYL Sch L Rev 211; Molly Stephens, "Sales of In-Game Assets: An Illustration of the Continuing Failure of Intellectual Property Law to Protect Digital-Content Creators" (2002) 80:6 Tex L Rev 1513; Dan L Burk, "Authorization and Governance in Virtual Worlds" (2010) 15:5 First Monday, online: <http://firstmonday.org>.

15 Castronova, "Right", *supra* note 13.

16 See e.g. Brendan James Gilbert, "Getting to Conscionable: Negotiating Virtual Worlds' End User License Agreements Without Getting Externally Regulated" (2009) 4:4 Journal of International Commercial Law and Technology 238 at 238:

> Prior works on the regulation of virtual worlds have identified major defects with the two current methods of regulating virtual worlds. The primary method is the developer's End User License Agreement (EULA)—a contract between the developer and the participant that communicates the developer's expectations for the virtual world to the participant, and the participant's agreement communicates their intent to be bound by those expectations. . . . The other method of regulating virtual worlds has not yet been used in the United States, but is waiting in the wings: real world governmental regulation [footnote omitted].

and academic) of video-game/virtual-worlds law, and of players' rights.[17] As Barker describes,

> Copyright serves to protect the expression of ideas and is therefore used to protect software. Contract law governs the licenses and relationships between parties. Specifically in the gaming context, contracts seek to assign and allocate copyright and other intellectual property rights. As such, contract and copyright are relied upon to form a governing mechanism over online gaming.[18]

Although there are various critiques and unresolved questions associated with the standard online-game EULA, and although there are limits to "how far lopsided contracts will be enforced",[19] the fact that so many courts (particularly in the United States) have thus far proven themselves wiling to enforce them means that "businesses that have the opportunity to do so will tend to use form contracts to protect themselves".[20] Extending this tendency to games and virtual worlds specifically targeted to children, on the other hand, introduces a number of additional problems that may ultimately not be so easily ignored. As Gregory Lastowka points out, due to special protections and exceptions bestowed to minors upon entering into contractual agreements, the standard EULA "would be less likely to protect the owner of [a children's] virtual world."[21] Nonetheless, the vast majority of children's games, worlds, and online forums do include them and require child players to agree to them upon entering into the game space.

It is notable that the prevalence of likely non-binding, voidable, yet nonetheless mandatory contracts within children's titles has attracted so little discussion to date. In at least some cases, it would appear that the

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17 See e.g. Lastowka & Hunter, *supra* note 13; Joshua AT Fairfield, "Anti-Social Contracts: The Contractual Governance of Virtual Worlds" (2008) 53:3 McGill LJ 427; Grimmelmann, *supra* note 13.

18 Barker, *supra* note 10 at 2 [footnotes omitted].

19 Gregory F Lastowka, *Virtual Justice: The New Laws of Online Worlds* (New Haven: Yale University Press, 2010) at 91 [Lastowka, *Virtual Justice*].

20 *Ibid.*

21 *Ibid* at 66.

very voidability[22] of EULAs made with minors has served to justify the lack of consideration they have thus far been given. Another possible reason for the lack of critical discussion of the presence of EULAs in children's games is that, until recently, there appeared to be an assumption that children did not engage in the same depth of social interaction and content production that has come to be associated primarily with adult players within the game-studies literature. As such, for many years, the types of conflicts over player-made content and IP ownership associated with mainstream titles such as *Second Life*[23] and *World of Warcraft*[24] did not seem as likely to arise within children's titles.

Indeed, virtual worlds and other online games designed and targeted specifically to younger children (under the age of 12 years) have historically placed significant limitations on the extent to which their players are able to interact with one another and otherwise contribute to the shaping of content.[25] Such restrictions are the combined result of a variety of factors. As operators of online services directed to (or knowingly used by) children under the age of 13 years, children's online games and virtual worlds must comply with relevant, existing regulatory requirements, including those pertaining to children's media and marketing, as well as to personal information and privacy, such as those established in the US-based *Children's Online Privacy Protection Act* (*COPPA*);[26] in the more general guidelines set out in the *Personal*

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22 See Ross A Dannenberg et al, *Computer Games and Virtual Worlds: A New Frontier in Intellectual Property Law* (Chicago: American Bar Association, 2010) at 38: "[A]n agreement entered into by a minor is *voidable*, not *void*. Unless the child seeks to void the contract, the contracting parties are bound by its terms" [emphasis in original].

23 See *Bragg v Linden Research*, 487 F Supp 2d 593 at 605–10 (ED Pa 2007) [*Bragg*].

24 See *MDY Indus, LLC v Blizzard Entertainment, Inc*, 629 F 3d 928 (9th Cir 2010); *Davidson & Associates, Inc v Internet Gateway*, 334 F Supp 2d 1164 (ED Mo 2004) (*sub nom Blizzard v BNet*) [*Blizzard*].

25 Sara M Grimes, *The Digital Child at Play: How Technological, Political, and Commercial Rule Systems Shape Children's Play in Virtual Worlds* (PhD Thesis, Simon Fraser University, 2010) [unpublished] [Grimes, "Digital Child"].

26 15 USC § 6501 (2006).

Information Protection and Electronic Documents Act (*PIPEDA*);[27] and in industry self-regulatory guidelines.[28] They are also subject to growing societal pressures to incorporate mechanisms and strategies designed to protect children from being exposed to inappropriate content and (potentially) dangerous situations.[29] As a result, until quite recently, the prevalent trend within online spaces targeted to children was to significantly limit opportunities for self-expression, or for creating and sharing user-made content.

While comparatively significant restrictions on speech remain a prominent part of many children's online games and virtual worlds, there are now a number of titles that nonetheless concurrently enable children to produce and share forms of creative content and intellectual property, with the common caveat that such content is often monitored for *COPPA* compliance and "appropriateness". Meanwhile, children's titles have continued to include EULAs, many of which continue to claim IP ownership over any and all user submissions. A contradictory relationship is unfolding behind the scenes of these sites—on the one hand, children are being encouraged to create content, share ideas, and produce various types of derivative works, while on the other hand, they

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27 SC 2000, c 5.

28 For instance, games containing advertising originating in the United States would have to comply with the Children's Advertising Review Unit (CARU)'s self-regulatory guidelines for advertising to children, while Canadian sites containing marketing would arguably be held to the Canadian Marketing Association (CMA)'s Code of Ethics and Standards of Practice (which includes special criteria for marketing to children under the age of 13 years). See Children's Advertising Review Unit, *Self-Regulatory Program for Children's Advertising*, 8th ed (Washington, DC: Council of Better Business Bureaus, Inc/National Advertising Review Council, 2006); Canadian Marketing Association, *Code of Ethics and Standards of Practice*, online: <http://www.the-cma.org/regulatory/code-of-ethics>.

29 Sonia Livingstone, "Taking Risky Opportunities in Youthful Content Creation: Teenagers' Use of Social Networking Sites for Intimacy, Privacy and Self-Expression" (2008) 10:3 New Media & Society 393; Valerie Steeves & Cheryl Webster, "Closing the Barn Door: The Effect of Parental Supervision on Canadian Children's Online Privacy" (2008) 28:1 Bulletin of Science, Technology & Society 4.

are asked to agree to highly complex contracts through which they might waive their potential rights as creators of this content.

While the potential "voidability" of the EULAs contained in children's games and virtual worlds may make them seem innocuous from a legal perspective, at a practical level, they nonetheless have a clear impact on the ways in which digital-game and virtual-world spaces are being designed and managed, and help inform rules about what is allowed and what is not within these spaces. They also work to establish a set of cultural norms and expectations, which are explicitly, but more often implicitly, communicated to child players. As Coombe warns, the quotidian practices can be just as important in establishing how certain laws evolve and how norms become routine.[30] Intellectual property in particular, Coombe explains, has a "cultural life" of its own, through which "[p]eople's anticipations of law (however reasonable, ill informed, mythical, or even paranoid) may actually shape law and the property rights it protects."[31]

In a recent study of the EULAs found on 16 popular children's virtual worlds, the author found that many, if not most, of the same terms found in contracts originally intended for adults also appear in contracts presumably intended for children.[32] These findings are supported by previous research the author has conducted on EULAs found in various websites and online games intended for children.[33] In addition, some children's sites feature EULAs that attempt to bypass

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30 Rosemary J Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (Durham: Duke University Press, 1998) at 9.

31 *Ibid.*

32 Sara M Grimes, "Digital Play Structures: Examining the Terms of Use (and Play) Found in Children's Commercial Virtual Worlds" in Anne Burke & Jackie Marsh, eds, *Children's Virtual Play Worlds: Culture, Learning and Participation* (New York: Peter Lang) [Grimes, "Digital Play"].

33 See e.g. the author's previous work in this area, including Grimes, "Child-Generated Content", *supra* note 9 and Sara M Grimes, "Terms of Service and Terms of Play in Children's Online Gaming" in J Patrick Williams & Jonas Heide Smith, eds, *The Players Realm: Studies on the Culture of Video Games and Gaming* (Jefferson, NC: McFarland Press, 2007) 33 [Grimes, "Terms of Service"].

some of the problems associated with trying to form a contractual agreement with a minor by naming the child's parent or guardian as the agreeing party. Conversely, a smaller number of developers have notably endeavored to produce EULA terms that, to some extent, acknowledge children's special legal status. In each case, however, the appearance of EULAs in children's games raises a number of important cultural and ethical questions—about children's autonomy, liability, responsibility, and authorship—that warrant closer attention. For the most part, these documents contain highly complex language and sentence structures, terminology, and concepts. They are oftentimes introduced to new users in ways that facilitate clicking "Agree" without reading the terms in their entirety.[34] Furthermore, a number of studies confirm that the current standards for informing parents and obtaining parental consent are largely inadequate.[35] In addition to all this, many of the EULAs included in children's online games and virtual worlds can be seen as working to preemptively resolve regulatory grey zones that have not yet been subject to public discussion, as well as expand corporately advantageous power relations into new spaces of childhood.

It is in regards to this last dimension that the current paper seeks to initiate discussion. An exploration of current trends, future implications, and possible solutions is provided in five sections. The first part examines some of the common terms and arguments made about EULAs—specifically the terms they commonly contain relating to IP ownership within digital games—and considers some of the ways in which many of the assumptions characteristic of the discussion do not

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[34] Christian Sandvig, "The Internet at Play: Child Users of Public Internet Connections" (2006) 11:4 Journal of Computer-Mediated Communication 932; Valerie Steeves, "Children's Online Privacy Policy Concerns" in Marita Moll & Leslie Regan Shade, eds, *The Internet Tree: The State of Telecom Policy in Canada 3.0.* (Ottawa: Canadian Centre for Policy Alternatives, 2011) 175.

[35] See e.g. Livingstone, *supra* note 29; Steeves & Webster, *supra* note 29; Joseph Turow, *Privacy Policies on Childrens Websites: Do They Play by the Rules?* (Philadelphia: Annenberg Public Policy Centre of the University of Pennsylvania, 2001). Such issues are important when considering whether children and their parents are truly giving "informed consent" when they consent to EULAs and other rules contained within online games and virtual worlds.

necessarily apply to or even address the possibility of minors. The second section revisits some of the literature and main theories that serve to justify the ongoing need for a special legal status and protections for minors, specifically in relation to contractual agreements. The third part explores the notion of parental liability as a provisional solution to enrolling minors in potentially voidable contractual agreements, and how this approach is problematized by recent legal developments relating to the enforceability of infants' waivers. The fourth part examines the ongoing trend of officially "banning" minors in the EULA, and explores some of the implications this has had for children's access to key cultural experiences, as well as legal ramifications of misrepresenting one's age in this context. The final part explores how the criticisms and problems raised in previous sections of the paper can be used to devise an alternative approach, by providing a series of recommendations for drafting a more reciprocal, balanced, and child-centric EULA, which furthermore draws upon existing examples.

II. EVERYTHING, FOREVER, THROUGHOUT THE UNIVERSE

As argued above, EULAs have served as a central focus point for many scholarly works and public commentaries examining issues and questions pertaining to virtual-world governance and video-game law.[36] While their enforceability has been questioned at length, EULAs serve as de facto governing documents that appear in the form of contracts that, in turn, list a number of terms and conditions that players must voluntarily agree to before entering a game. Many of these terms and conditions relate to legal and economic relationships, and describe such things as corporate liability, indemnity, and the respective responsibilities of the agreeing parties, while others reproduce wider industry trends and international trade agreements around intellectual property and patent

[36] Some of the common questions explored in this literature: Who is in charge of these spaces? At what point do "real world" laws supersede in-world rules? Do players have rights? See e.g *supra* note 13; Gilbert, *supra* note 16; Lastowka & Hunter, *supra* note 13; Grimmelmann, *supra* note 13; Lastowka, *Virtual Justice*, *supra* note 19.

protection (as outlined in the *Digital Millennium Copyright Act*,[37] for instance). Many of the standard terms included in these documents are aimed at establishing corporate authority and a certain amount of control over players' in-game interactions and behaviours, and occasionally over their external game-related activities as well. If a player is found breaking the rules outlined in the EULA, they might have their account suspended, see themselves banned from the game altogether, or even face the possibility of having to defend themselves in a real-world court of law.

An important dimension of the terms contained in many of these EULAs, is the way they often mesh and intertwine the rules of play with the rules of business, national, and international law, and thereby work to transform otherwise common instances of "breaking the rules" into (potentially) illegal acts. As Lastowka argues, "[v]irtual worlds are intriguing to both lawyers and games scholars because they blur boundaries that were previously clear between games and other forms of social activity."[38] Indeed, many online games and virtual worlds include terms that are aimed specifically at ensuring that gameplay unfolds in ways that are conducive to both consumer satisfaction and corporate priorities. For instance, they might include rules that forbid players from engaging in hate speech and various forms of discrimination, reflecting "real world" concerns for fundamental human rights and freedoms. In each case, the rules of play outlined in EULAs concurrently serve to reinforce—both discursively and, increasingly, legally—the game or virtual-world owners' veto control over the game environment. A number of the now-standard terms included in these documents emerge out of valid concerns about corporate liability in the event that players are discovered using the game to engage in illegal activities. This control is enforced by the game owners' discretionary power to enact changes to the game's contents and regulatory systems, as well as to the contracts themselves. Additionally, it has become standard practice to use EULAs to attempt to minimize corporate accountability or liability.

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[37] Pub L No 105-304, 112 Stat 2860 (1998).

[38] Greg Lastowka, "Law and Games Studies" (2006) 1:1 Games and Culture 25 at 27.

This is not to say that EULAs are devoid of other forms of regulation. Where applicable, their contents are also deeply shaped by federal, provincial, and state policy and law. They must comply with a myriad of laws, governmental policies, and industry standards concerning their mass-media content, their business practices, their approach to player governance, and various other facets of the daily operation of a quasi-public/quasi-private space. For example, embedded advertisements found within MMOGs should conform to industry and governmental standards about truthfulness and accuracy in advertising. Since many online games and virtual worlds also enable and record users' personal information, as well as their interactions, they must conform to privacy laws regarding the collection and storage of user data. Similarly, the players themselves must abide by multiple real-world laws directed at policing social relations (interpersonal, public, or economic).

Some of the previous work in this area argues that, in addition to extending real-world laws into new digital contexts, EULAs can also work to expand the scope and reach of existing copyright regimes—which increasingly aim to encompass every interaction, expression, or item that is even marginally associated with the game's designed environment and contents.[39] As such, EULAs are arguably being used to reframe dimensions of cultural practice and social interaction, which until now had not (or rarely) been discussed in terms of IP ownership or copyright, as copyrightable "submissions" and as resources amenable to market exchange. This trend is reflective of more pervasive efforts that scholars such as Rifkin and Mosco have observed across various digital media, through which the corporate owners of the tools of media production and content distribution are assuming an increasing amount

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[39] See Fairfield, *supra* note 17 at 429:

> These EULAs supplant much of the default law that real-world communities rely on. For example, the drafters of virtual-world EULAs attempt to create pseudoproperty systems (or to eliminate private property altogether within virtual worlds), pseudotort systems, and even pseudoconstitutional and pseudocriminal systems out of a patchwork quilt of contracts.

For additional examples of this argument, see *supra* note 13.

of control over the terms, contexts, and nature of users' online experiences.[40]

The broad, sweeping claims that are often contained in standard or form EULAs have led a number of scholars and legal experts to explore whether the contracts may be so disproportionately in the corporate owners' favour as to be vulnerable to charges of unconscionability.[41] As Gilbert argues, "EULAs regulatory framework is fraught with problems", primary among which is that "the developers' superior bargaining strength results in a stilted EULA that is susceptible to the unconscionability doctrine",[42] which commonly involves two tests, procedural and substantive unconscionability. For instance, EULAs are commonly devised in ways that impose markedly unequal bargaining power, thereby passing the first test of procedural unconscionability: "Participants have zero bargaining power in EULAs; they are designed to be contracts for millions of participants to accept, typically without reading."[43] Randall argues that the standard EULA found in digital games and virtual worlds would also meet the criteria for substantive unconscionability, by containing "harsh, one-sided or oppressive terms."[44] Kunze supports this argument, pointing out that these EULAs are

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40 See Jeremy Rifkin, *The Age of Access: The New Culture of Hypercapitalism Where All of Life is a Paid-For Experience* (New York: Jeremy P Tarcher/Putnam, 2000); Vincent Mosco, *The Digital Sublime: Myth, Power, and Cyberspace* (Cambridge, Mass: MIT Press, 2004).

41 See Gilbert, *supra* note 16; Lastowka, *Virtual Justice, supra* note 19; Barker, *supra* note 10; Balkin, *supra* note 13; Susan Randall, "Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability" (2004) 52:1 Buff L Rev 185; Cheryl B Preston & Eli W McCann, "Unwrapping Shrinkwraps, Clickwraps, and Browseraps: How the Law Went Wrong from Horse Traders to the Law of the Horse" (2011) 26:1 BYU J Pub L 1.

42 See Gilbert, *supra* note 16 at 241.

43 *Ibid* at 242 [footnote omitted]. See also Alfred Fritzsche V, "Trespass to (Virtual) Chattels: Assessing Online Gamers' Authority to Sell In-Game Assets Where Adhesive Contracts Prohibit Such Activity" (2007) 8 UC Davis Bus LJ 235.

44 Randall, *supra* note 41 at 191, cited in Gilbert, *supra* note 16 at 242.

frequently used to grant the game's corporate owner "unilateral, unchecked godlike power, while the customer has few or no rights."[45]

Despite such critiques, the fact remains that the unconscionability defence has not generally been successful,[46] a trend that extends to cases involving online user agreements. As Zacks writes, "the limited circumstances of . . . unconscionability have extremely high thresholds to overcome in order to rebut the presumption of enforceability of a contract where a manifestation of assent has been provided."[47] Notably, while the laws also vary from one province to the next, Canadian contract law is generally quite different from the law in the United States.[48] Substantive unconscionability has not (yet) been accepted in Canadian law as grounds for voiding a contract.

There are furthermore numerous challenges associated with contesting the terms of an EULA after the fact, for instance after the software has been purchased, downloaded, and used.[49] While numerous

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[45] Jason T Kunze, "Regulating Virtual Worlds Optimally: The Model End User License Agreement" (2008) 7:1 Northwestern Journal of Technology and Intellectual Property 102 at 107, cited in Gilbert, *supra* note 16 at 242.

[46] Blake D Morant, "The Salience of Power in the Regulation of Bargains: Procedural Unconscionability and the Importance of Context" (2006) 2006:4 Mich St L Rev 925.

[47] Eric A Zacks, "Contracting Blame" (2012) 15 U Pa J Bus L 169 at 211 [footnote omitted]. See also Jon Hanson & David Yosifon, "The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture" (2003) 152:1 U Pa L Rev 129.

[48] For a review of relevant Canadian laws see British Columbia Law Reform Commission, *Report on Minors' Contracts* (1 February 1976), online: <http://www.bcli.org/sites/default/files/LRC26-Minors_Contracts.pdf>. See also *Age of Majority Act*, RSBC 1996, c 7, s 1(1).

[49] See Daniel C Miller, "Shrinkwrapped and Clickwrapped: Exploring Intersections of Contract and Intellectual Property Law" (2005) 9:3 Journal of Internet Law 1. See also Ian R Kerr, "Spirits in the Material World: Intelligent Agents as Intermediaries in Electronic Commerce" (1999) 22:2 Dal LJ 190; Francis M Buono & Jonathan A Friedman, "Maximizing the Enforceability of Click-Wrap Agreements" (1999), 4:3 J Tech L & Pol'y, online: <http://jtlp.org/vol4/issue3/friedman.html>; Thomas J Smedinghoff, "Electronic Contracts & Digital Signatures: An Overview of Law and Legislation" (1999) 564 PLI/Pat 125; Andrew S Patrick, "Just-In-Time Click-

cases have questioned the enforceability of shrinkwrap and clickwrap licenses found in software and online applications,[50] in the United States, Miller argues, "[u]ltimately, the trend has been to uphold the validity of shrinkwrap licenses".[51] There are, however, some important exceptions. For instance, Miller points out that in some cases "federal pre-emption may be invoked to nullify the contract."[52] Indeed, there are similarly cases in which "federal courts have found unconscionability in EULAs",[53] despite the overall low success rate of this argument. In other cases, such as *Blizzard v BNet*,[54] unconscionability was dismissed in part because the defendants had specialized, professional knowledge of EULAs and the software industry—characteristics that are certainly not shared by the majority of the millions of players who click "Agree" daily to such contracts without reading them, let alone by young children.

The notion that a user's knowledge and capacities may play a role in determining the validity of an unconscionability challenge is highly

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through Agreements: Interface Widgets for Confirming Informed, Unambiguous Consent" (2005) 9:3 Journal of Internet Law 17.

50 For a relevant, recent Canadian example, see *Century 21 Canada Ltd Partnership v Rogers Communications Inc*, 2011 BCSC 1196, 26 BCLR (5th) 300. For discussion of this case, see Matthew Nied, "I Browse Therefore I Accept: Recent Developments in the Enforceability of Website Terms of Use Agreements" (2012) 1:1 Commercial Litigation and Arbitration Review 11.

51 Miller, *supra* note 49 at 11.

52 *Ibid.* Miller points to three "seminal" cases in which federal preemptions have been used to nullify a condition set forth in a shrinkwrap or clickwrap agreement, which furthermore "demonstrate apparent inconsistencies in the courts' preemption jurisprudence in relation to intellectual property law" (*ibid*): *Vault Corp v Quaid Software Ltd*, 847 F (2d) 255 (5th Cir 1988); *ProCD, Inc v Zeidenberg*, 86 F (3d) 1447 (7th Cir 1996); and *Bowers v Baystate Technologies, Inc*, 320 F (3d) 1317 (Fed Cir 2003).

53 Gilbert, *supra* note 16 at 242. See also Lastowka, *Virtual Justice*, *supra* note 19 at 16–19 for a detailed, critical overview of *Bragg v Linden Research*, which was settled out of court after Philadelphia Judge Eduardo Robreno issued an opinion in support of Bragg's claims that terms contained in the EULA for *Second Life* were unconscionable.

54 See *Blizzard*, *supra* note 24.

relevant when considering the presence of EULAs in sites and online games for children. As discussed below, minors are generally considered to have a more limited capacity to comprehend the nature and repercussions of commercial processes and contractual agreements. Nonetheless, numerous children's online-game and virtual-world developers have opted to proceed with what has become the de facto norm of using a slightly modified version of the standard-form EULA. For instance, a recent study of the EULAs found in 16 highly popular virtual worlds designed and targeted specifically to children under the age of 13 years found that all 16 contained many if not all of the same terms and specialized language found in contracts written for adults.[55] Furthermore, there appears to be lingering confusion among children's website and game developers about how exactly to address minors within EULAs, and who exactly should be named as the agreeing party. The above-mentioned study found that while some contracts addressed the child directly, others addressed the parent, while a few addressed the parent and child interchangeably.[56]

The lack of best practices or a shared standard when it comes to crafting a child-appropriate EULA is by no means insignificant. As mentioned, not only do the vast majority of North American children and teens currently play some form of games online, but minors have

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[55] See Grimes, "Digital Play", *supra* note 32. This study builds on the author's previous work on EULAs and TOS contracts in children's online games, including Grimes, *Digital Child*, *supra* note 25; Grimes, "Terms of Service", *supra* note 33; Sara M Grimes & Leslie Regan Shade, "Neopian Economics of Play: Children's Cyberpets and Online Communities As Immersive Advertising in Neopets.com" (2005) 1:2 International Journal of Media & Cultural Politics 181. For an overview of the list of common EULA terms used in these studies, see Jack Russo, "How To Read "Terms of Use" Agreements" (Lecture delivered at the Computer Systems Laboratory Colloquium, 11 April 2001), online <http://www.stanford.edu/class/ee380/Abstracts/010411.html>.

[56] While the academic literature in this area is sparse, other researchers have found similar problems within EULAs contained in online games, virtual worlds, and websites directed to children. See e.g. Steeves & Webster, *supra* note 29; Fairfield, *supra* note 17; Lastowka, *Virtual Justice*, *supra* note 19; Seth Grossman, "Grand Theft Oreo: The Constitutionality of Advergame Regulation" (2005) 115 Yale LJ 227.

been known to be among the most active players of online games and participants in virtual worlds for well over a decade.[57] In addition to engaging in a wide range of commercial transactions online,[58] many minors are now assuming increasingly active roles in creating the contents of their virtual play spaces. Digital content creation represents a growing trend among both children and adolescents—one that is currently being facilitated by a steady increase in child-specific tools, school curriculum, and after-school programs aimed at enabling children of increasingly younger ages to produce, remix, and publish their own creations in public online forums.[59] Such practices raise important questions about the ways in which children's authorship rights, IP ownership, and rights of transfer are dealt with within EULAs, particularly since so many of these contracts claim sweeping IP rights over any and all user submissions.[60] While comparative examples might be drawn upon from the history and legal struggles of child actors and

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57 Entertainment Software Association of Canada, *supra* note 1; Virtual Worlds Management, *supra* note 2; Kathryn C Montgomery, *Generation Digital: Politics, Commerce, and Childhood in the Age of the Internet* (Cambridge: MIT Press, 2007); NPD Group, "The Video Game Industry Is Adding 2–17 Year-Old Gamers At a Rate Higher Than That Age Group's Population Growth" (2011), online: NDP Group <https://www.npd.com>.

58 Piper Jaffray, "Taking Stock with Teens: Results Presentation" (2012), online: <http://www.whiteboardadvisors.com/files/Taking_Stock_Teach-in_Spring_2013_MV_2.pdf>; "Study finds children spending more money on digital media", *Electronista* (4 October 2011) online: <http://www.electronista.com>. See also David Buckingham, *The Material Child* (Cambridge: Polity Press, 2011).

59 Henry Jenkins et al, *Confronting the Challenges of Participatory Culture: Media Education for the 21st Century* (Cambridge: MIT Press, 2009); Jackie Marsh, *Childhood, Culture and Creativity: A Literature Review* (Newcastle: Creativity, Culture and Education, 2010) [Marsh, *Childhood*]; Rebecca W Black, *Adolescents and Online Fan Fiction* (New York: Peter Lang, 2008); Grimes & Fields, *supra* note 7.

60 Grimes, *Digital Child*, *supra* note 25; Grimes, "Digital Play", *supra* note 32; Grimes, "Terms of Service", *supra* note 33.

athletes,[61] the prevalence and quotidian nature of children's UGC production nonetheless presents a unique problem for existing industry norms and regulatory systems, which are largely based on the assumption of a traditional adult-producer/child-consumer relationship. While the finding that children's roles as producers of content are not adequately addressed within the standard EULA is perhaps unsurprising, it nonetheless further problematizes the presence of standard form, non-child-specific EULAs within sites designed for children, particularly in terms of the potential impacts on children's burgeoning cultural rights and agency.[62]

III. "E" IS FOR ECONOMIC SOCIALIZATION

Minors are accorded a special status within US and Canadian contract law, which include a variety of exceptions and special considerations. As Dannenberg and associates describe, because children are believed to be "less likely to understand what they are agreeing to" and "more likely to make impulsive and unwise decisions", "common law has firmly established—and state statutes have reaffirmed—that a minor may disaffirm a contract at any point up to and within a reasonable time after

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[61] See Cal Fam Code § 6710 (West 2004); *Sparks v Sparks*, 101 Cal App 2d 129 (1950); *Burnand v Irigoyen*, 30 Cal 2d 861 (1947); *Scollan v Gov't Employees Ins*, 222 Cal App 2d 181 (1963); *Mitchell v Mitchell*, 963 SW 2d 222 (Ky Ct App 1998), cited in Heather Hruby, "That's Show Business Kid: An Overview of Contract Law in the Entertainment Industry" (2006) 27 J Juvenile L 47 at 47. See also Mark Rosenthal & Brian Yates, "Sign Up The Next Lebron James Before He Leaves High School? Not So Fast!" (2006) 24:1 Ent & Sports Law 9. For further discussion of Coogan's Law and relevant state regulation relating to child performers and athletes, see Jessica Krieg, "There's No Business Like Show Business: Child Entertainers And the Law" (2004) 6:2 U Pa J Lab & Employment L 429.

[62] See Grimes, "Child-Generated Content", *supra* note 9; Cees J Hamelink, "Children's Communication Rights: Beyond Intentions" in Kirsten Drotner & Sonia Livingstone, eds, *The International Handbook of Children, Media and Culture* (London: Sage, 2008) 508.

reaching the age of majority, thereby rendering the contract a nullity."[63] There are important variations in how this special status—often articulated as infant laws, infant waiver laws, and infancy doctrines[64]—is accorded in different parts of the United States and Canada,[65] particularly around the specific conditions under which a minor may contest a contract and issues of restitution.[66] Generally, however, contracts made with minors have traditionally been understood as frequently voidable,[67] and something that is not entered into without a certain amount of risk attached.[68] Moreover, the mere act of presenting

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63 Dannenberg et al, *supra* note 22 at 38. See also Juanda Lowder Daniel, "Virtually Mature: Examining the Policy of Minors' Incapacity to Contract through the Cyberscope" (2008) 43 Gonz L Rev 239.

64 Cheryl B Preston & Brandon T Crowther, "Infancy Doctrine Inquiries" (2012) 52:1 Santa Clara L Rev 47. In the United States, a number of works have explored the implications for minors of the recent Restatement (Third) of Restitution and Unjust Enrichment (2011), which has important implications for the infancy doctrine defence, including Cheryl B Preston & Brandon T Crowther, "Minor Restrictions: Adolescence Across Legal Disciplines, the Infancy Doctrine, and the Restatement (Third) of Restitution and Unjust Enrichment" (2012) 61:2 Kan L Rev 343; and Joseph M Perillo, "Restitution in a Contractual Context and the Restatement (Third) of Restitution and Unjust Enrichment" (2011) 68:3 Was & Lee L Rev 1007 at 1016.

65 Key Canadian examples include the *Infants Act*, RSBC 1996, c 223, and the *Minors' Property Act*, RSA 2000, c M-18. See also *Children's Law Reform Act*, RSO 1990, c C-12; *Children's Law Act*, SS 1990-91, c C-8.1; *Minors' Property Act*, SA 2004, c M-18.1; and *Age of Majority Act*, RSBC 1996, c 7, s 1(1).

66 See Cheryl B Preston, "CyberInfants" (2013) 39:2 Pepp L Rev 225.

67 As Preston, *ibid* at 227, describes: "Even if generally enforced against adults, minors can frequently void TOS under the traditional infancy doctrine. The infancy doctrine, although subject to some narrow defences, permits avoidance of any contract entered into by a minor." See also *Berg v Traylor*, 148 Cal App 4th 809 at 818 (2007); *Goldberg v Superior Court*, 23 Cal App 4th 1378 at 1382–83 (1994). While these cases pertain specifically to US law, similar arguments may be made in Canada, specifically within provinces where infants laws permit avoidance of contracts entered into by minors under certain conditions.

68 See *ibid* at 1382–83: "Simply stated, one who provides a minor with goods and services does so at her own risk."

an EULA to a minor as a mandatory contractual agreement is ethically questionable, particularly in cases where the online site or service is specifically targeted to, and is known to be predominantly used by, children under the age of 13 years.

In the United States, Preston argues, the infancy doctrine is currently underused, particularly in relation to online contracts and transactions.[69] As Preston and Crowther suggest, "[p]erhaps because the doctrine is sufficiently clear to permit most cases to be resolved on summary judgment, not many recent reported cases exist."[70] On the other hand, in at least two of the existing US cases that *have* addressed the applicability of the infancy doctrine to online contracts, *AV v iParadigms, LLC*[71] and *EKD v Facebook*,[72] the Courts deemed that minors who benefit from (and/or continue to use) the services outlined in a contract cannot subsequently evoke the infancy doctrine to disaffirm specific clauses of that contract.[73] However, both cases have raised their share of discussion and criticism.[74] Referring specifically to *AV v iParadigms*, for instance, Preston provides a strong dismissal of the Court's conclusions, stating,

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69 Preston & Crowther, "Infancy Doctrine Inquiries", *supra* note 64.

70 *Ibid* at 48.

71 544 F Supp (2d) 473 (ED Va 2008) [*AV*]. See also *AV v iParadigms, LLC*, 562 F (3d) 630 (4th Cir 2009).

72 No 11-461(SD Ill 8 March 2012), online: <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1022&context=historical> [*EKD*].

73 The Court concluded in *EKD*, *ibid* at 8, that "[p]laintiffs cannot disaffirm the forum-selection clause in Facebook's TOS, although Plaintiffs were minors when they entered the agreement containing the clause." In *AV*, *supra* note 71 at 481, the Court determined that "[p]laintiffs received benefits from entering into the Agreement with iParadigms. . . . Plaintiffs cannot use the infancy defense to void their contractual obligations while retaining the benefits of the contract. Thus, Plaintiffs' infancy defense fails." In both cases, direct reference was made to *MacGreal v Taylor*, 167 US 688 (1897) [*MacGreal*], which established that the infancy defence cannot function as "a sword to be used to the injury of others, although the law intends it simply as a shield to protect the infant from injustice and wrong" (*ibid* at 701).

74 Julie Cromer Young, "From the Mouths of Babes: Protecting Child Authors from Themselves" (2010) 112:2 W Va L Rev 431. See also Eric Goldman, "Facebook's

> The district court's comments on the infancy doctrine, in this context, may be interpreted as dicta. But even if taken literally, the district court's conclusion misapprehends the retained benefit exception to the infancy doctrine. Reliance on this case as a basis to deny minors a right to avoid a TOS is unfounded.[75]

Indeed, in a more recent case involving Facebook and minors, *IB v Facebook*,[76] the Court referred specifically to *EKD v Facebook* when it highlighted that under California law, a minor may "disaffirm all obligations under a contract, *even for services previously rendered*, without restoring consideration or the value of services rendered to the other party."[77] Accordingly, Preston maintains that, "[o]nce minors, and their parents, catch on to the fact that the legislatures of almost every [US] state and the vast majority of courts still strictly affirm the doctrine, the impact on businesses targeted largely at minors may be severe."[78]

There are various, longstanding justifications for granting minors special protections when it comes to legally binding contracts.[79] As articulated in *Niemann v Deverich*,[80]

> The law shields minors from their lack of judgment and experience and under certain conditions vests in them the right to disaffirm their

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'Browsewrap' Enforced Against Kids—*EKD v. Facebook*" (2012), online: Technology & Marketing Law Blog <http://blog.ericgoldman.org/archives/2012/03/ facebooks_brows.htm>.

75 Preston, *supra* note 66 at 239.

76 905 F Supp 2d 989 (2012) [*IB*].

77 *Ibid* at 1001, citing *Deck v Spartz, Inc*, 2011 WL 7775067 (ED Cal), citing *Berg v Traylor*, 148 Cal App 4th 809 (2007) [emphasis added in *IB*].

78 Preston, *supra* note 66 at 228.

79 See Dannenberg, *supra* note 22. See also Preston, "CyberInfants", *supra* note 66; Preston & Crowther, "Infancy Doctrine Inquiries", *supra* note 64; Daniel, *supra* note 63; Larry Cunningham, "A Question of Capacity: Towards a Comprehensive and Consistent Vision of Children and Their Status under Law" (2006) 10:2 UC Davis J Juv L & Pol'y 275.

80 98 Cal App 2d 787 (1950) [*Niemann*] [footnote omitted]. See also *Berg v Traylor*, *supra* note 77 at 818.

> contracts. Although in many instances such disaffirmance may be a hardship upon those who deal with an infant, the right to avoid his contracts is conferred by law upon a minor "for his protection against his own improvidence and the designs of others." It is the policy of the law to protect a minor against himself and his indiscretions and immaturity as well as against the machinations of other people and to discourage adults from contracting with an infant.[81]

It should be noted, however, that any attempt to discuss the capacities of "minors" in general terms is immediately problematic and subject to critique. Scholars associated with the "new sociology of childhood" movement highlight that age-based categorizations of children and their abilities are not only ideologically aligned with other problematic forms of biological determinism, but are also potentially quite harmful to children who do not fit normative expectations. Dominant notions of childhood, such as those found in traditional disciplines such as psychology, law, and medicine, can also be disempowering to children who have historically been viewed by these disciplines "as incompetent, dependent beings who were merely on the way to 'becoming' adults."[82] As Marsh points out, there is a "need to embrace the biological and temporal aspects of childhood at the same time as recognizing the way in which childhood is socially constructed."[83] This, of course, presents its own set of challenges—particularly when attempting to make generalizations about young people's capacities or learning trajectories. It becomes an even greater challenge within discussions of law and policy, which overwhelmingly group infants, children, and adolescents together under the same category of minors.[84]

While it may be problematic to simply say that minors have cognitive or emotional "limitations",[85] there is nonetheless a significant body of

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81 *Niemann, supra* note 80 at 793.

82 Marsh, *Childhood, supra* note 59 at 10.

83 *Ibid* [footnote omitted].

84 An important exception being the *COPPA, supra* note 26, which differentiates between minors over and under the age of 13 years.

85 The term is used to describe such a clearly and widely divergent assortment of ages, literacy levels, developmental stages, and experiences,that any sweeping claim is

research supporting the "common belief" that many minors, especially younger minors, do not have the abilities, knowledge, experience, or resources required to fully grasp the scope and repercussions of the terms contained in standard EULAs. For one, studies of children's Internet use suggest that very few actually read EULAs or privacy policies.[86] While this trend is not unique to children, as comparable rates are often reported among adults and the "general population",[87] it is nonetheless an important consideration, as it indicates limited exposure and familiarity with the documents and their contents.[88] Previous work in this area furthermore suggests that the length, language, and terminology used in standard EULAs make them challenging texts for many adults to get through, never mind young children.[89] Perhaps most importantly, however, is that the very processes EULAs often seek to describe involve concepts, relationships, and transactions that a significant proportion of younger minors—children under the age of 12 years—are not able to fully understand.

The literature examining children's economic socialization can be useful in providing some much needed theoretical and empirical support for these claims.[90] For instance, although the primary purpose of

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bound to essentialize and disempower the infants, children, and adolescents that it seeks to describe.

86 Sandvig, *supra* note 34; Steeves & Webster, *supra* note 29; Steeves, *supra* note 34.

87 Yannis Bakos, Florencia Marotta-Wurgler & David R Trossen, "Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts" (Paper delivered at the 4th Annual Conference on Empirical Legal Studies, November 2009), online: <http://ssrn.com/abstract=1443256>.

88 For instance, a study by Bakos, Marotta-Wurgler & Trossen, *ibid* at 1, indicates that "only one or two out of every thousand retail software shoppers chooses to access the license agreement, and those few that do spend too little time, on average, to have read more than a small portion of the license text."

89 Previous research has discovered similar trends within children's privacy policies as well. See Anca Micheti, Jacquelyn Burkell & Valerie Steeves, "Fixing Broken Doors: Strategies for Drafting Privacy Policies Young People Can Understand" (2010) 30:2 Bulletin of Science, Technology & Society 130; Turow, *supra* note 35.

90 Key works examining children's comprehension of economic concepts such as profit and property include Anselm L Strauss, "The Development and Transformation of

commercial online games and virtual worlds is to generate revenues (either directly or by building brand awareness), studies indicate that younger children (aged 4 to 11 years) are unlikely to fully grasp the commercial facets of their favourite games and websites.[91] Instead, children tend to construct "their own understanding[s] of the economic world".[92] These findings are particularly compelling given that so many of the terms listed in standard-form EULAs seek to delineate commercial relationships and interactions between the game's owners, its contents, its users, and various third-parties (e.g., third-party advertisers). Similarly, research on children's emergent understandings of the general concept of ownership provides additional insight into the ethics and

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Monetary Meaning in the Child" (1952) 17:3 American Sociological Review 275; Anna Emilia Berti & Anna Silvia Bombi, *The Child's Construction of Economics* (Cambridge, UK: Cambridge University Press, 1988); Peter K Lunt & Adrian Furnham, eds, *Economic Socialization: The Economic Beliefs and Behaviours of Young People* (Cheltenham, UK: Edward Elgar Publishing, 1996). More recent works in this area focus on children's understanding of copyright and the provenance of ideas: Marjorie Taylor, Bonnie M Esbensen & Robert T Bennett, "Children's Understanding of Knowledge Acquisition: The Tendency for Children to Report that They Have Always Known What They Have Just Learned" (1994) 65:6 Child Development 1581; Kristina R Olson & Alex Shaw, "'No Fair, Copycat!': What Children's Response to Plagiarism Tells Us About Their Understanding of Ideas" (2011) 14:2 Development Science 431.

91 Based on a series of interviews with children aged 4 to 11 years, Strauss, *supra* note 90, concluded that children have difficulty with the very notion of "profit", while subsequent studies have found that children under the age of 10 or 11 tend to view the very idea of profit as unfair. See also David Leiser "Children's Conceptions of Economics—The Constitution of the Cognitive Domain" (1983) 4:4 Journal of Economic Psychology 297; Gustav Jahoda & Anatole France, "The Construction of Economic Reality by Some Glaswegian Children" (1979) 9:2 European Journal of Social Psychology 115.

92 Berti & Bombi, *supra* note 90 at 14. For example, the children and young people interviewed by Livingstone and associates described that developers made websites and online games for largely benevolent reasons, such as wanting to entertain children. See Sonia Livingstone, "Internet Literacy: Young People's Negotiation of New Online Opportunities" in Tara McPherson, ed, *Digital Youth, Innovation, and the Unexpected* (Cambridge, MA: MIT Press, 2008) 101 at 109 [Livingstone, "Internet Literacy"].

applicability of EULA terms that ask players to grant full or partial ownership rights over their non-personally identifiable information, UGC, and other intellectual property to commercial entities. On the one hand, children develop an understanding of the ownership of physical objects quite early,[93] and generally tend to have a relatively sophisticated grasp of different forms of property and ownership by the time they reach pre-adolescence.[94] On the other hand, most children find the concept of the right of transfer much more challenging to master.[95] Researchers suggest that this is not all that surprising, given that children's daily experience is one in which adults (usually parents) retain right of transfer over the majority of their possessions—from clothing to toys, objects are given to them to use for a time, but can often be taken away again (for instance, handed down to a younger sibling, or confiscated as punishment).[96] It is not until later that children begin to

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93 Furnham concludes that only very young children mistake "liking" an object for ownership, and that by the time they reach kindergarten most children (89%) are "aware of the distinction between personal desires and ownership": Adrian Furnham, "The Economic Socialization of Children" in Lunt & Furnham, *supra* note 90 at 21. See also Dale F Hay, "Yours and Mine: Toddlers' Talk About Possession with Familiar Peers" (2006) 24:1 British Journal of Developmental Psychology 39; Lauren G Fasig, "Toddlers' Understanding of Ownership: Implications for Self-Concept Development," (2000) 9:3 Social Development 370; Ori Friedman & Karen R Neary, "Determining Who Owns What: Do Children Infer Ownership from First Possession?" (2008) 107:3 Cognition 829.

94 For instance, Berti and associates identify five levels of understanding in children's knowledge about the concept of "ownership", as children progress through changing beliefs about ownership and property: from the simplistic belief that the person who uses the object most is the person who owns the object, to an awareness of the role of the "boss" and the role of the "worker", to an understanding of organizational hierarchy and structure, as well as an ability to differentiate between ownership and labour. See Anna Emilia Berti, Anna Silvia Bombi & Adriana Lis, "The Child's Conceptions About Means of Productions and Their Owner" (1982) 12:3 European Journal of Social Psychology 221.

95 Fiona Cram, Sik Hung Ng & Nileena Jhaveri, "Young People's Understanding of Private and Public Ownership" in Peter Lunt & Adrian Furnham, eds, *Economic Socialization: the Economic Beliefs and Behaviours of Young People* (Cheltenham, UK: Edward Elgar, 1996) 110 at 110-29.

96 *Ibid* at 114.

understand that ownership of intangible things like ideas, labour, and future profits can be permanently and abstractly transferred to another.

In addition to developmental considerations, the capacity of minors to enter into contractual agreements is also hampered by their lack of experience and familiarity with the terms and processes involved. While there are a wide variety of programs and initiatives in both Canada and the United States aimed at teaching young people about the legal ramifications of their Internet use, these tend to focus on corporate copyrights rather than on users' IP ownership, authorship, or fair-dealing/fair-use rights.[97] In a recent analysis of "antipiracy and copyright education campaigns designed as K–12 curricular materials that have been made available in the United States and Canada",[98] Gillespie discovered that UGC and amateur production (and the various associated issues these might entail) were rarely addressed, and that copyright was reduced to an equating of legal usage with paid-for usage, with little to no mention made of fair dealing, Creative Commons, or the various forms of content that are (legally) offered for free. Additionally, Olson and Shaw note that negative reactions toward plagiarism tend to increase at around the age that children begin attending elementary school, leading the researchers to posit that the children in their study "may have been explicitly taught that copyright is bad. . . . [I]t is possible that exposure to older peers and teachers via formal schooling is creating the tendency to care about plagiarism."[99]

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97 Tarleton Gillespie, "Characterizing Copyright in the Classroom: The Cultural Work of Antipiracy Campaigns" (2009) 2:3 Communication, Culture & Critique 274 at 278 [Gillespie, "Characterizing Copyright"].

98 *Ibid.* Notably, Gillespie's research indicates that some of the organizations most heavily involved in promoting and sponsoring these copyright curriculum materials also represent the very same industry players who have contributed to the normalization of using standard form EULAs in websites and games designed for children.

99 *Supra* note 90 at 438. As Olson and Shaw, *ibid*, observe however, "[w]hether children's negative evaluations of plagiarizers are being driven by violations of ownership or by a lack of creativity on the part of the plagiarizer is an open question." [citation omitted]. See also Olivier R Goodenough & Gregory Decker,

With the aforementioned rise in opportunities for children to contribute content and share their creations in online forums, questions about how their emerging roles as producers are delineated within commercial sites, and who is involved in determining and teaching children about how those roles are defined, becomes increasingly urgent.

The key question that has not yet been adequately addressed within the academic literature in this area is how children themselves understand EULAs and their relationships to them. Just as children create their own ideas about economic and technological processes,[100] it is likely that they also construct their own folklore about EULA contracts and some of the terms they commonly encompass. At the same time, since so many adults similarly click "Agree" to EULAs without reading them, it is easy to see how clicking "I Agree" upon entering a new game or virtual world may also become little more than a ritualized part of children's online experience.[101] This represents an important gap in the literature, and future research in the area should endeavor to uncover both how children develop formal and informal (their own) understandings of EULAs contracts, as well as how these understandings change and deepen as they age and become more experienced with online contracts and their contents.

In the meantime, drawing together the various studies and theories of children's economic socialization and literacy trajectories reviewed above can be used to provide a more nuanced, empirical support to the oft-cited claim, such as that made by Dannenberg and associates, that children are "less likely to understand what they are agreeing to" and

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"Why do good people steal intellectual property?" in Michael DA Freeman & Olivier R Goodenough, eds, *Law, Mind and Brain* (Farnham: Ashgate, 2009) 345.

[100] See Leslie R Shade, Nikki Porter & Wendy Sanchez, "'You Can See Anything On the Internet, You Can Do Anything On the Internet!': Young Canadians Talk About the Internet" (2005) 30:4 Canadian Journal of Communication 503. See also Yasmin B Kafai, "Understanding Virtual Epidemics: Children's Folk Conceptions of a Computer Virus" (2008) 17:6 Journal of Science Education and Technology 523.

[101] Indeed, as Furnham, *supra* note 93 at 31, argues, for very young children at least, "[m]ost economic events are still simply observed and accepted as a mere ritual".

"more likely to make impulsive and unwise decisions."[102] Although minors of different ages and experience levels differ significantly, the legal and economic nuances of EULAs are likely beyond the capacities and literacy levels of most. A deeper consideration of such claims is important, because the user's ability to both understand and appreciate the terms outlined in EULAs has previously served as a key factor in determining their alleged unconscionability. In *Blizzard v BNet*, for instance, the Court ruled against the defendants' claims of contract unconscionability[103] in part because the defendants had demonstrated specialized knowledge of computer software and EULA provisions. In this case, the Court concluded, "the defendants are not unwitting members of the general public as they claim. They are computer programmers and administrators familiar with the language used in the contract".[104] Arguably, this is not the case with children, particularly not the pre-adolescent aged demographic that is targeted by many child-specific digital games and virtual worlds.

IV. PARENTAL DISCRETION ADVISED

As a provisional solution to some of the issues raised above, a growing number of children's titles include terms in their EULAs that attempt to bypass the child and the problem of minors' contracts altogether, by instead naming the child's parent or guardian as the agreeing party. For instance, the E-rated *LittleBigPlanet*, a series of games that revolve around user-created levels and content, states at the outset that its EULA can only be accepted by an adult (aged 18 years or older), who can either accept the terms on their "own behalf" or "on behalf of your minor child".[105] A similar strategy was identified in the author's aforementioned

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[102] Dannenberg et al, *supra* note 22 at 38.

[103] *Blizzard*, *supra* note 24.

[104] *Ibid* at 41–42.

[105] *LittleBigPlanet 2*, "End User License Agreement" (2012). The full paragraph reads: "This Agreement can be accepted only by an adult 18 years or older. By clicking the "Accept" button, you affirm that you are over 18 years old and you are accepting this Agreement on your own behalf or on behalf of your minor child (under 18)."

study of virtual worlds designed and targeted to elementary-school-aged children, wherein a number of the EULAs described that parents would be considered to have automatically agreed to the terms upon granting their child permission to use the site.[106] In a number of cases, some confusion about how the agreeing party was identified and addressed in the EULAs was noted, for instance, using the pronoun "You" to ambiguously and interchangeably refer to the child, to the parent, or to both parent *and* child. The approach is perhaps partially justified by the accompanying assumption that parental consent is one of the requirements outlined in the *COPPA*[107] for sites frequented by and engaged in collecting personal information from children under the age of 13 years. As studies by Livingstone,[108] Shade and associates,[109] Steeves,[110] and Turow[111] each demonstrate, however, the parental-consent requirement is rarely strictly enforced by site operators, and can often be easily bypassed by child users.

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[106] Grimes, "Digital Play", *supra* note 32. For example, the *Club Penguin*, "Terms of Service" (2008–09) reads: "If you are a parent or guardian and you provide your consent to your child's registration with the site, you agree to be bound by these terms of use in respect of their use of the site": (*ibid* at 158). Similarly, the *MoshiMonsters*, "Terms & Conditions" (2008) reads: "If you use moshimonsters.com, or let your kids use moshimonsters.com, you agree to be bound by these Terms. Parents, you agree that your kids will follow the Terms too": (*ibid* at 159). And *Fusion Fall*, "End User Access and License Agreement" (2009), for Sony's child-oriented MMORPG, contains the following:

> "You are responsible and liable for all activities conducted through your Account, regardless of who conducts those activities. If you are a parent or guardian, you may permit your child to use the Account instead of you, provided that parents and guardians are liable for the activities of their child"[:]

(*ibid* at 159).

[107] *Supra* note 26.

[108] See *supra* note 29.

[109] See *supra* note 55 and 100.

[110] See *supra* note 34.

[111] See *supra* note 35.

The strategy of naming the parent as the accountable, agreeing party—who is not only made responsible for ensuring that their minor child abides by the remaining terms delineated in the EULA, but is also asked to waive a number of their child's rights on their behalf—raises some important questions, particularly within Canadian contexts.[112] Although parents are often held responsible and believed to be liable for their children's actions, parents and children are not interchangeable, and are in fact treated as separate entities by the courts and regulatory entities. There are various laws in place aimed at mediating the unique relationship and sharing of responsibilities that occurs between parents and their children, many of which are extremely important in providing legal protections to minors whose parents fail to act in their best interests, as well as formal recognition that children are autonomous people who often act autonomously and against their parents' wishes.

More importantly, laws in several Canadian provinces and US states are aimed specifically at regulating parents' ability to legally enter into contracts on their child's behalf or bind their child to a contractual agreement.[113] In British Columbia, for instance, a number of such limitations can be found in the BC *Infants Act*[114] under section 40, which specifically relate to cases where an agreement itself gives an unfair advantage to another adult.[115] This was most recently confirmed at the

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[112] For a recent Californian example that addresses parental liability and the infancy doctrine in cases involving micro-transactions enacted by a minor child using a parent's credit card on Facebook, see *IB*, *supra* note 76.

[113] See *Anson v Anson* (1987), 10 BCLR (2d) 357, 3 ACWS (3d) 196 (Co Ct); *Young v Young* (1990), 75 DLR (4th) 46, 50 BCLR (2d) 1 (CA).

[114] *Supra* note 65.

[115] For example, section 40 includes the following stipulations (among others) regarding the power of a parent or guardian to enter into agreements: "A guardian may make a binding agreement for an infant, (a) if the agreement involves a consideration not greater than $10 000, with the consent of the Public Guardian and Trustee, or (b) in a case other than one referred to in paragraph (a), with the approval of the court by order made on the petition of a party to the agreement": *ibid*, s 40(1.1)(a)–40(1.1)(b). Furthermore, the Act describes that: "Subsection (1.1) does not apply to an agreement to settle a claim by an infant for unliquidated damages": (*ibid*, s 40(2)); and "An agreement to indemnify a person as a result of the person making an

British Columbia Supreme Court in *Wong (litigation guardian of) v Lok's Martial Arts Centre Inc*,[116] when Justice Peter Willcock ruled that under BC's *Infant Act*, a parent cannot sign away a child's right to later sue for negligence.[117] In this case, the contract under dispute was an infant waiver associated with a minor's participation in martial-arts instruction, through which corporate liability for any physical or legal risk was waived by a minor's parent, who had accepted these responsibilities on their child's behalf.[118] The minor was reportedly injured by an instructor during a sparring match, and the *Wong* case was used to determine whether the infant waiver signed by the parent "would be legally effective in British Columbia to bar the infant's status to subsequently sue."[119]

Without any directly applicable Canadian cases to draw upon,[120] the parties turned to law reviews, including a recent review of liability

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agreement with another person for an infant is void unless consented to or approved under subsection (1.1)": (*ibid*, s 40(3)).

116 *Wong (Litigation guardian of) v Lok's Martial Arts Centre Inc*, 2009 BCSC 1385, [2010] 2 WWR 729 [*Wong*].

117 *Ibid* at para 61.

118 *Ibid* at para 4. For a detailed overview and case comment on the *Wong* case, see Peter Bowal, Thomas D Brierton & John Rollett, "The Law of Infant Waivers: *Wong v Lok's Martial Arts Centre Inc*" (2011) 44:2 UBC L Rev 407.

119 Bowal, Brierton & Rollett, *ibid* at 410, citing *Wong*, *supra* note 116 at para 18.

120 Numerous related cases were consulted, including *Re Wong and Yeung*, 2000 BCSC 1536, 81 BCLR (3d) 362; *Anson v Anson* (1987), 10 BCLR (2d) 357, 3 ACWS (3d) 196 (Co Ct); *Young v Young* (1988), 29 BCLR (2d) 359, 29 RFL (3d) 113 (CA); *Macdonald Estate v British Columbia (Public Guardian and Trustee)*, 2003 BCCA 428, 229 DLR (4th) 653; *Toews (Guardian ad litem of) v Weisner*, 2001 BCSC 15, 102 ACWS (3d) 630; *Butterfield v Sibbitt and Nipissing Electrical Supply Co Ltd*, [1950] 4 DLR 302, [1950] OR 504 (HCJ); *Swanson Estate v Hanneson* (1972), 26 DLR (3d) 201, [1972] 3 WWR 241 (Man QB), aff'd 42 DLR (3d) 688, [1973] 6 WWR 179 (Man CA); *Stevens v Howitt* (1969), 4 DLR (3d) 50, [1969] 1 OR 761 (HCJ); *Carey v Freeman*, [1938] 4 DLR 678, [1938] OR 713 (CA); *Carter v Junkin* (1984), 11 DLR (4th) 545, 47 OR (2d) 427 (HCJ), as identified by Bowal, Brierton & Rollet, *supra* note 118.

waivers for sporting and recreational injuries by the Manitoba Law Reform Commission,[121] which called into question the validity of parental waivers. For instance, the nature of the exchange itself is important: "The general rule is that a contract with a minor for necessary goods and services is enforceable by and against the minor. Contracts for services which are not necessaries are enforceable by the minor but not against the minor."[122] Ultimately, Justice Willcock concluded:

> I have considered the defendant's submissions that the Court should not limit the full range of parental authority. I am also cognizant of the policy reasons for permitting parents to sign limited releases . . . .[123]

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[121] See Manitoba Law Reform Commission, *Waivers of Liability for Sporting and Recreational Injuries* (Winnipeg: Law Reform Commission, 2009). See also Law Reform Commission of British Columbia, *Report on Recreational Injuries: Liability and Waivers in Commercial Leisure Activities* (Vancouver: Law Reform Commission, 1994).

[122] Manitoba Law Reform Commission, *supra* note 121 at 14. See also *Wong*, *supra* note 116 at paras 38, 47 which furthermore describe that "[t]he sole case referred to in relation to the validity of waivers, *M. v. Sinclair* is the judgment of Lerner J., cited above, in which an argument in support of the parental right to waive an infant's claim is described as 'tenuous'", and that "[s]uch agreements, subject only to certain specific exceptions, require either the approval of the Public Trustee or the Court". See also *Miller (Next friend of) v Sinclair* (1980), 15 CCLT 57, 5 ACWS (2d) 442 (Ont HCJ). Although beyond the purview of the current article, this aspect of the *Wong* case is of additional relevance to the discussion, since playing digital games would also not likely fall under the category of a necessary good or service.

[123] See *Wong*, *supra* note 116 at para 59, which makes reference to *Scott v Pacific West Mountain Resort*, 834 P 2d 6 (Wash 1992) and *Wagenblast v Odessa School District*, 758 P 2d 968 (Wash 1988), both of which contain arguments that such releases are permissible in the common law. Willcock J also cited Richard B Malamud & John E Karyan, "Contractual Waivers for Minors In Sports-Related Activities" (1991–92) 2:2 Marq Sports LJ 151; Doyice J Cotten & Sarah J Young, "Effectiveness of Parental Waivers, Parental Indemnification Agreements, and Parental Arbitration Agreements as Risk Management Tools" (2007) 17:1 Journal of Legal Aspects of Sport 53; Robert S Nelson, "The Theory of the Waiver Scale: An Argument Why Parents Should Be Able to Waive their Children's Tort Liability Claims" (2001–02) 36:2 USF L Rev 535.

> I am of the opinion, however, reading the Infants Act as a whole that the legislature intended the Act to establish the sole means of creating contractual obligations that bind minors. In coming to this conclusion I place some weight upon the fact that the rationale for prohibiting parents and guardians from releasing infants' claims after a cause of action has arisen applies with some force to pre-tort releases as well.[124]
>
> The Act does not permit a parent or guardian to bind an infant to an agreement waiving the infant's right to bring an action in damages in tort.[125]

Through this decision, the Court established that parents are not able to legally waive their minor child's right, or future right, to litigate.[126] While it is unclear to what extent this ruling might in turn apply to the wide range of terms contained in the typical children's digital game or virtual-world EULA, it nonetheless raises a compelling argument against the validity and reach of the above-mentioned strategy of naming a parent as the agreeing party.[127] Since this strategy may be understood to

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[124] *Wong*, *supra* note 116 at para 60.

[125] *Ibid* at para 61.

[126] As Bowal, Brierton & Rollet, *supra* note 118 at 420, n 68 point out, citing the Law Reform Commission of British Columbia, *supra* note 121 at 6, the Law Reform Commission of British Columbia has furthermore argued that

> the practice of extracting agreements from parents to indemnify operators in respect of legal actions on behalf of their children contravenes the public policy of protecting minors' interests, as these indemnities clearly discourage a parent from vindicating a child's rights.

The authors thus conclude that "Any doubt about the unenforceability of these indemnities should be removed": Bowal, Brierton & Rollet, *supra* note 118 at 420, n 68. However, they also point out that the *Wong* decision "is not a common law decision about parental powers to bind their children in contracts, including waivers. Ultimately parents and their children enjoy the best of both worlds—to enforce the contract when in their interests and to abandon it when it is not, including after loss or injury": (*ibid* at 418).

[127] According to Bowal, Brierton & Rollet, *supra* note 118 at 421:

> The *Wong* decision strikes down the legal efficacy of parent-signed infant waivers in British Columbia so that, while ubiquitous in the marketplace, at most they carry some practical force to persuade infants and their parents to exercise care and refrain from bring suit. *Wong* hastens the need for the provincial legislatures to address and

function in a similar way as waivers, in that they also ask parents to waive their child's right to claim unliquidated damages while absolving the site or game developer of any liability. For example, the Terms and Conditions contract found on the children's virtual world *BarbieGirls.com* during the time of the author's study, listed the child's parent or legal guardian as an agreeing party, and contained the following liability-waiving clause:

> We will not be liable, and we disclaim all liability, in connection with any direct, indirect, incidental, special, consequential, or exemplary damages, including, without limitation, damages for loss of profits, goodwill, use, data, or other intangible losses (even if we've been advised of the possibility of such damages).[128]

Another possible challenge to the "implied" parental-consent strategy that is sometimes found in children's website and online-game EULAs, is in the way these contracts often attempt to assign legal responsibility for the minor child's actions onto the allegedly, implicitly agreeing parent. For instance, the EULA included in popular role-playing game *Maple Story* contains the following term:

> You agree that you are entirely liable for all activities conducted through the Account, and are responsible for ensuring that you are and/or your child is aware of, understands, and complies with the terms of this Agreement and any and all other Company rules, policies, notices and/or agreements.[129]

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resolve this issue definitively, as they have already done with other child protection legislation, including legislation of the laws of contract in other related contexts.

[128] Grimes, "Digital Play", *supra* note 32 at 163–64, originally cited in BarbieGirls "Terms and Conditions" 2010 at para 16.

[129] The *Maple Story/Nexon* contract also reads:

> By signing up for an Account and using the Service, you represent and warrant that you are 18 years of age or over and have the right, authority and capacity to enter into this Agreement, or you are the legal age required to form a binding contract in your jurisdiction if that age is greater than 18.... Your Account may be used only by you, except that if you are a parent or guardian, you may permit one (1) of your minor children who is 13 years of age or older to use the Account instead of you[:]

Nexon America Inc, "Nexon Terms of Use" (2011), online: <http://nxcache.nexon.net/nx/global/legal_info/terms.html>.

While the extent to which parents could indeed be found liable for their children's online activities is still being determined,[130] and may vary between and within countries, the recent example of the Apple "bait-apps" settlement provides some preliminary insight into how this relationship could ultimately be delineated. In 2011, a California judge consolidated several class-action lawsuits that had been filed against Apple by parents aimed at recovering costs for unauthorized purchases made by their minor children through third-party apps downloaded through and mediated by Apple's iTunes/App Store.[131] At the centre of the suit were iOS games marketed and rated as appropriate to children (including games rated 4+, which translates to 4 years of age and over, 9+, and 12+) which, while initially free to download and play, contain "game currencies" that can charge real-world money for in-game purchases of virtual items (such as supplies, berries, or upgrades) to the account holder's credit card.[132]

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[130] See e.g. *IB*, *supra* note 76, in which the extent of parental liability (for financial loss incurred by their children through Facebook games without their knowledge) was under debate.

[131] Mike Williams, "Apple in legal trouble over free-to-play apps aimed kids", *Gamesindustry International* (14 April 2012), online: <http://www.gamesindustry.biz>.

[132] For a specific example of the intermingling of for-purchase and free methods players can use to earn the in-game currency required to acquire items in *Smurfs' Village*, see SmurfyFan, "Different Ways to Get Smurfberries" (31 July 2013), online: My Smurfs' Village <http://www.mysmurfsvillage.com/smurfs-village-intro/different-ways-to-get-smurfberries>. See also Cecilia Kang, "FTC to review Apple iPhone in-app purchases", *Washington Post* (22 February 2011), online: <http://voices.washingtonpost.com/posttech/2011/02/ftc_chairman_to_probe_apple_ip.html>; Chris Pereira, "Free-to-play game controversy sparks FTC investigation", *1UpGames* (23 February 2011), online: <http://www.1up.com/news/free-to-play-game-controversy-sparks-ftc-investigation>; CBC News, "Apple lawsuit over kids' app bills nears settlement" (26 February 2013), online: *CBC News - Business* <http://www.cbc.ca/news/business/story/2013/02/26/technology-apple-lawsuit-in-app-purchases.html>.

The games have been called "bait-apps" for their "bait-and-switch" approach—players are enticed by the free game and have usually invested a certain amount of time and energy into the game before encountering the items or areas that require a real-money purchase to obtain. In the case of games targeted to children, the model can quickly veer into unethical territories. In addition to the varying degrees of knowledge and economic socialization children bring to these interactions, the real-world implications of such purchases are not always explained in ways that a child would or could understand. Furthermore, games containing in-app purchases often concurrently feature an in-game method of acquiring and spending "pretend" currency as well, which can arguably add to the confusion. In any case, the Apple bait-apps lawsuit did not hinge upon children's limited ability to understand these types of transactions, but rather upon Apple's failure to inform parents that such features were present within games advertised as "free" to play. Although most of the plaintiffs claimed small dollar amounts (under $5), it was reported that in some cases children's in-app purchases had totalled over $100.[133]

The plaintiffs claimed that "Apple failed to adequately disclose that third-party Game Apps, largely available for free and rated as containing content suitable for children, contained the ability to make In-App Purchases"[134] without explicit parental consent and participation.[135] The

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[133] See "Case No. 5:11-CV-01758-EJD" *In re Apple In-App Purchase Litigation*, online: <https://www.itunesinapppurchasesettlement.com/CAClaimForms/AIL/Home.aspx>, confirming that the lawsuit focused on the fact that minors made purchases "without the account holder's knowledge or permission". For additional details about dollar amounts, see Williams, *supra* note 131; CBC News, *supra* note 132; Sakthi Prasad, "Apple to settle lawsuit on inadvertent app purchases by kids", *Reuters Canada* (26 February 2013), online: Reuters <http://ca.reuters.com>. A "significant majority of in-app purchases in qualified apps [included in the Apple settlement] are under $5": Unopposed Motion for Preliminary Approval of Class Action Settlement; Certification of Settlement Class; And Approval of Form and Consent of Proposed Noticed at IV.A.2 17, *In Re Apple In-App Purchase Litigation*, 855 F Supp 2d 1030 at 1038, n 4 [*Re Apple*] (No 11-CV-1758-EJD) [Unopposed Motion, *Re Apple*].

[134] Prasad, *supra* note 133.

second part of the claim had to do with the voidability of contracts made with minors, described in the filing:

> Secondly, under basic contract law, Plaintiffs alleged that each In-App Purchase charged by a minor constitutes a separate sales contract that may be disaffirmed (i.e., rendered voidable) by the minor (through the minor's legal guardians), and if the minor's guardians elect to disaffirm purchase contracts, the class members will be entitled to restitution.[136]

Apple initially responded by filing for dismissal, but in March 2012, US District Judge Edward Davila upheld the claims, stating:

> Contrary to Apple's argument, Plaintiffs have alleged with specificity which misrepresentations they were exposed to, their reliance on those misrepresentations, and the resulting harm. Plaintiffs pled specific facts that Apple "actively advertis[ed], market[ed] and promot[ed] its bait Apps as 'free' or nominal. . . ."[137]

A court filing outlining the proposed settlement appeared a year later. The settlement was described as beneficial to both parties, but particularly to the plaintiffs, as the Court was skeptical of the plaintiff's claims of "ability to recover" (the costs incurred), and outlined that "any potential benefits to the class would likely be delayed for years if the case proceeds in litigation."[138] As such, the proposed settlement was noted as providing "exceptional relief to the class—namely, it provides full refunds for Game Currency purchases made within a single forty-five (45) day period without the knowledge or permission of the account

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[135] As cited in the order granting in part and denying in part Apple's motion to dismiss, the additional details are provided:

> Plaintiffs allege that Apple violated three provisions of the CLRA: (1) representing that goods have uses or characteristics they do not have, Cal. Civ.Code § 1770(a)(5); (2) representing that goods are of a particular standard or quality when they are of another, Cal. Civ.Code § 1770(a)(7); and (3) representing that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law, Cal. Civ.Code § 1770(a)(14)[:]

Re Apple, supra note 133.

[136] Unopposed Motion, *Re Apple*, supra note 133.

[137] *Re Apple, supra* note 133 at 1039.

[138] Unopposed Motion, *Re Apple, supra* note 133 at 11.

holders",[139] as well as iTunes Store credit in the amount of five dollars or aggregate relief, or cash refund in lieu of Store credit if their claim totals $30 or more.[140]

It was also noted that the notice of settlement would also provide

> instructions concerning the use of Apple's parental controls, which may be set to disable In-App Purchases on an iOS device or to require a password before every In-App Purchase transaction. This information will assist members of the Settlement Class in preventing minors from purchasing Game Currency without their knowledge and permission in the future.[141]

In the filing, it was also noted that Apple had since supplemented its mechanisms for ensuring parental consent, by including additional password prompts and parental controls (available as of iOS 4.3, released in March 2011).[142] As Wingfield describes,

> At one time, youngsters with Apple devices had 15-minute windows after their parents bought them apps in which they could freely buy add-on content for those apps, without having to enter a password.
>
> With a software update to its mobile devices in 2011, Apple began requiring users to re-enter passwords when making in-app purchases. They can then buy in-app items for 15 minutes before they're forced to enter their password again. There are also controls in iOS, Apple's mobile operating system, that give parents more finely tuned controls over in-app purchases and the ability to shut them off completely.[143]

This marked an important change in Apple's user-interface design, as the time delay was widely reported upon when the controversy preceding the lawsuit first erupting around child-targeted bait-apps in late 2010. An early target of this controversy and subsequent news coverage was the

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139 *Ibid* at 4.

140 *Ibid* at 5.

141 *Ibid* at 8.

142 *Ibid.*

143 Nick Wingfield, "Apple Agrees to Settle Lawsuit Over App Purchases by Children", *New York Times: Bits* (26 February 2013), online: <http://bits.blogs.nytimes.com>.

"free-to-play" iOS game *Smurfs' Village*, a title advertised as suitable for children ages 4 and up, which was also mentioned in some of the more recent press coverage of the Apple bait-app settlement.[144] As with the bait-app games described above, *Smurfs' Village* featured an embedded in-app purchasing system, wherein certain items cost real-world money to purchase, while others could be acquired using just the in-game (pretend) currency.[145] In late 2010, purchases could be made by simply clicking on an "Agree" button (no password required), which in at least some cases enabled children to place substantial charges on their parents' credit cards.[146]

Soon after the story broke, the Federal Trade Commission (FTC) began investigating mobile applications targeted to children. The game's developer, Beeline Interactive, Inc., has since added a detailed warning about in-app purchases in its iTunes App Store description, which now warns: "PLEASE NOTE: Smurfs' Village is free to play, but charges real money for additional in-app content. You may lock out the ability to purchase in-app content by adjusting your device's settings."[147]

Although the game remains rated 4+, the game's EULA states: "You may not use the Game if you are under the age of 13."[148] In a separate section of the EULA titled "Minor Users", the following terms are outlined:

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[144] See e.g. Cecilia Kang, "In-app purchases in iPad, iPhone, iPod kids' games touch off parental firestorm", *The Washington Post: Technology* (8 February 2011), online: Post Business <http://www.washingtonpost.com>.

[145] At the time of the controversy, the real-world cost of such items reportedly varied from 99 cents to 99 dollars. For additional discussion of the Smurfs' Village app and surrounding controversy, see Sara M Grimes, "From Advergames to Branded Worlds: The Commercialization of Digital Gaming" in Matthew P McAllister & Emily West, eds, *Routledge Companion to Advertising and Promotional Culture* (London: Routledge Press, 2013) 386.

[146] According to Kang, *supra* note 144, one of the parents interviewed claimed their child had racked up over $1400 in *Smurfs' Village* in-app purchases.

[147] *Smurfs' Village*, online: iTunes Preview <https://itunes.apple.com/ca/app/smurfs-village/id399648212?mt=8> [*Smurfs' Village*, iTunes].

[148] *Smurfs' Village*, "End User License Agreement" (2012).

> We do not intend the Game to be viewed or used by children under the age of 13. By using the Game, you represent and warrant that you are age 13 or older. You agree to monitor use of your account by persons between the ages of 13 and 18, and you will deny access to children under the age of 13. You agree to accept full responsibility for any unauthorized use of your account by persons under the age of 18, including responsibility for any use of your credit card or other payment instrument.[149]

Given how few child or adult users read EULAs, this discrepancy between the game's rating (which appears prominently in the App Store description) and an age restriction that surfaces only in the EULA terms is concerning. Furthermore, the mention of credit-card use appears to serve as a direct response to the recent controversies surrounding the game itself, as well as those aimed at the broader practice of using bait-app business models in children's games. Yet, despite the developments surrounding the Apple bait-app lawsuits, the EULA persists in listing the parent as the one with "full responsibility" for the app and how it is used.[150] While this section has highlighted some of the problems and potential limitations of this strategy, it is important to note that it remains in common use and as such exerts a quotidian form of authority—one that is only enhanced by the fact that so few children and parents are sufficiently informed or aware of the underlying processes involved, or of the potential legal recourses available, to even begin to question it, let alone challenge it.

V. NO KIDS ALLOWED

A final trend that bears mentioning is the occasional use of age restrictions as a strategy for addressing, or perhaps more accurately as an *attempt* at bypassing, the complexities and legal grey areas associated with entering into contracts with minors. As posited elsewhere, the relatively stringent regulatory requirements, problematic legal status, and enhanced public scrutiny that are associated with operating a site

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149 *Ibid.*

150 *Ibid.*

frequented by young children in particular, can deter virtual-world and online-game developers from actively including this demographic in their target marketing—or at the very least from addressing them in EULAs and privacy policies.[151] For instance, game developers may elect to formally "forbid" children under the age of 13 years in the hopes of avoiding having to deal with *COPPA* requirements, which necessitate fairly involved levels of player moderation and, at least in theory, require sites to secure parental consent.[152] In two of the examples discussed so far, *Smurfs' Village* and *Maple Story*, players are informed in the EULAs that they must be at least 13 years of age to play. As discussed, this age "restriction" is particularly questionable in the case of *Smurfs' Village*, which is otherwise rated as appropriate for children aged 4 years and older,[153] and features characters drawn from a popular children's media brand.[154]

Indeed, the vast majority of the mainstream titles examined in the broader video-game and virtual-worlds legal-studies literature, contain similar formal age restrictions through EULAs that explicitly forbid young users (either under the age of 13 years or under the age of 18 years). Whether these age restrictions are actually enforced or adhered to, however, is another issue altogether. There are currently a number of studies indicating that a sizable number of children manage to become regular players of certain popular titles despite the presence of formal age bans. For instance, Yee's research on players of *EverQuest 2*, an MMOG that formally banned players under the age of 18 years in its EULA at the time of this study, found that approximately 6.5% of the player-base was

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[151] See Grimes, "Digital Play", *supra* note 32; Grimes & Fields, "Kids Online", *supra* note 7; Montgomery, *supra* note 57; Jill Joline Myers & Gayle Tronvig Carper, "Cyber Bullying: The Legal Challenge for Educators" (2008) 238:1 W Ed Law Rep 6; Preston, *supra* note 66.

[152] Although, as explored above, these requirements are clearly not uniformly enforced across the children's digital landscape.

[153] *Smurfs' Village*, iTunes, *supra* note 147.

[154] Wendy Goldman Getzler, "FAO Schwarz goes blue with new Smurfs promotion", *iKids: Inside the Business of Children's Digital Media* (21 July 2011), online: *KidScreen* <http://kidscreen.com>.

nonetheless between the ages of 12 and 17 years.[155] This is reflective of broader trends that see children joining various social networks and websites that they are officially banned from, including Facebook.[156]

Using a formal age ban to avoid dealing with regulatory requirements and legal uncertainties is in no way sustainable. If a significant component of a game's actual player base is not addressed in the EULA or accounted for in the way a game is run and how its players are managed, it can lead to problems down the road. Furthermore, government regulations, such as the US-based *COPPA*, cannot be mooted through EULA terms alone. In cases where the title is targeted to children and rated as child-appropriate, yet contains a contradictory age restriction in the frequently unread EULA, complaints could potentially be raised about misleading advertising. Indeed, such a complaint was among those filed by the plaintiffs in the Apple bait-apps class action lawsuit.[157] For games and virtual worlds that continue to attract, and fail to systematically eject, players under the age of 13 years, *COPPA* requirements apply whether the EULA "officially" forbids them or not. As the FTC clarified during its recent revision of *COPPA*, "child-directed sites or services that knowingly target children under 13 as their primary audience or whose overall content is likely to attract children

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[155] Nick Yee, "Real Life Demographics", *Nick Yee* (2006), online: The Norrathian Scrolls: A Study of EverQuest <http://www.nickyee.com/eqt/demographics.html>.

[156] See Grimes & Fields "Kids Online", *supra* note 7; Valerie Steeves, "Young Canadians in a Wired World, Phase III: Talking to Youth and Parents About Life Online" *Media Smarts* (29 May 2012), online: <http://mediasmarts.ca/research-policy> [Steeves, "Young Canadians"]; "Children and Parents: Media Use and Attitudes Report" *Ofcom* (23 October 2012), online: <http://stakeholders.ofcom.org.uk/binaries/research/media-literacy/oct2012/main.pdf>; Victoria J Rideout, Ulla G Foehr & Donald F Roberts, "Generation M^2: Media in the Lives of 8- to 18-Year-Olds" *Henry J. Kaiser Family Foundation* (January 2010), online: <http://kff.org/other/poll-finding/report-generation-m2-media-in-the-lives>. See also "That Facebook friend might be 10 years old, and other troubling news" *Consumer Reports* (June 2011), online: <http://www.consumerreports.org/cro/magazine-archive/2011/june/electronics-computers/state-of-the-net/facebook-concerns/index.htm>.

[157] See *Re Apple*, *supra* note 133 at 1040.

under age 13 as their primary audience must still treat all users as children."[158] It should be noted that some online games, such as *RuneScape*, have already changed or removed their age restrictions in response to the fact that their player base included a significant number of younger users.[159]

There could also be repercussions for young players who provide false information about their age upon registration, or who knowingly engage in a misrepresentation of their real age and status as minors. As Dannenberg and associates warn, "some (but not all) courts hold that a child who 'intentionally' misrepresents his or her age may not void his or her contracts."[160] They describe:

> The enforceability of a EULA against a minor has not been extensively tested in the courts, particularly against minors who affirmatively misrepresent their age to gain access to virtual worlds, so its validity remains uncertain. However, existing case law suggests that although contracts signed by minors are generally voidable at the minor's discretion, courts will not allow a minor to take the benefits of a contract without the burdens of conditions or stipulations in the contract.[161]

However, Preston clarifies that even in jurisdictions that do allow this defence, it has been largely "limited to instances of bad faith or active misrepresentation on the part of the minor."[162] In order for an adult to

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[158] Federal Trade Commission, News Release, "FTC Seeks Comments on Additional Proposed Revisions to Children's Online Privacy Protection Rule" (1 August 2012), online: <http://www.ftc.gov>.

[159] See Grimes, "Digital Child", *supra* note 25.

[160] Dannenberg et al, *supra* note 22 at 38. See also 43 CJS Infants §151 (2008); *Nichols v English*, 154 S E 2d 239 at 240 (Ga 1967). In some cases, the adult may also have the option to bring an action in tort for fraud against the minor who misrepresented his or her age, if resulting injuries were incurred. See Richard A Lord & Samuel Williston *Williston on Contracts (A Treatise on the Law of Contracts)*, vol 5, 4th ed, (Rochester, NY: Lawyers Cooperative, 2009) at § 9:2; *Royal Finance Company v Schaefer*, 330 S W 2d 129 at 130 (Mo Ct App 1959).

[161] Dannenberg et al, *supra* note 22 at 38.

[162] Preston, *supra* note 66 at 233, citing 43 CJS *Infants* § 151 (2004).

use this defence, they must furthermore demonstrate that they conducted a sufficient investigation of the user's age to be able to reasonably "rely in good faith" that the user was indeed over the age of majority.[163]

Lastly, the presence of such age restrictions can contribute to a systematic exclusion of younger users—both from participating in the valuable learning and cultural experiences associated with online gaming and virtual-world play, as well as from public and academic discussions that are currently unfolding about the state and future of video-game law and virtual-worlds governance. As the following section will explore, since these discussions will clearly have profound implications for children and the types of spaces and activities that are ultimately made available to them online, preemptively excluding them from these deliberations and processes merely serves to postpone, and possibly compound, properly dealing with the various problems and questions associated with minors contracts, informed consent, and child-generated UGC within online-gaming contexts.

VI. EULAS . . . FOR KIDS!

A fundamental problem with the standard EULAs found in MMOGs and other digital games is that they do not adequately address the special status and various ethical considerations associated with entering into formal, commercial, and legal relationships with players who are minors. As argued above and elsewhere, for many years, the most common approach appeared to be that of simply attempting to avoid these issues altogether by officially banning minors (under 18 years of age) or younger minors (under 13 years of age) from participating. Following the massive boom in the number of online games and virtual worlds made and targeted to children that occurred in 2009,[164] new strategies for dealing with minors have now begun to emerge. Many of these new strategies, while partial and at times disjunctive, can be read as attempts to resolve some of the regulatory ambiguities and legal grey areas

[163] Kan Stat Ann § 38–103 (West 2010).

[164] Virtual Worlds Management, *supra* note 2.

surrounding child players—from minors' contracts and child-generated content, to notions of informed and parental consent.

While not so long ago, it may have seemed unlikely that a child player would become embroiled in a legal conflict involving a virtual-world or online-game EULA, today, children use these forums for a wide variety of activities—from purchasing, creating, and socializing to sharing increasingly sophisticated forms of content (intellectual property). Acknowledging this shift through the incorporation of EULAs that address child users and/or their parents, and that recognize children's contributions of intellectual property and other forms of content represents an important starting point.[165] On the other hand, attempting to resolve complex, lingering questions (e.g., about children's authorship or ownership rights, parental responsibility, and the extent to which children may enter into legal relationships in online games) through EULA terms alone is insufficient. Particularly since these documents are largely written without any involvement or input from key stakeholders, such as children and their parents, and without the benefit of concerted public debate.

In highlighting some of the main problems and issues associated with the use of standard-form EULAs in children's titles, however, a unique opportunity for establishing a child-centric alternative presents itself. Addressing these problems and issues would be an important first step toward creating a more inclusive, fair, and legally valid standard of practice when it comes to devising EULAs for children's titles. Furthermore, the practices that the EULAs examined above seek to describe have a number of larger ethical, economic, and legal implications, which, for the most part, have not yet been adequately addressed or discussed. This in turn highlights the need for a more systematic engagement with the public on these issues and implications, which would optimally include targeted consultations with key stakeholders. Collaborating with these stakeholders in the articulation of

[165] For a different perspective on the need to revisit some of the norms and exceptions that have emerged around minors' contracts, see James Chang & Farnaz Alemi, "Gaming the System: A Critique of Minors' Privilege to Disaffirm Online Contracts" (2012) 2:2 UC Irvine Law Review 627.

a "best practices" document, for instance, and identifying exceptional, innovative, or otherwise responsive examples that might serve as templates, are both additional steps that developers of children's titles might take in constructing a less problematic and more child-centric version of the standard-form EULA. Active participants in such initiatives would contribute significantly to resolving, at least provisionally, some of the grey areas and ambiguities involved, in a way that also acknowledges children's needs and emerging rights as "digital citizens".

There are numerous justifications for endeavouring to produce a more equitable, child-centric version of the standard EULA.[166] Although children have a special legal status and the benefit of certain protections when it comes to contracts and commercial interactions more generally, these documents nonetheless have a significant impact on their online experiences, their economic socialization, their access to tools and spaces, and their ability to participate in digital cultural production. As such, the way in which these documents are articulated and mobilized is important. Furthermore, as Coombe reminds us, the everyday applications of EULAs and other documents designed to define and delineate legal relationships can take on a life of their own—establishing norms and setting expectations that might eventually reshape legislation. Perhaps the most important justification for this proposed venture, however, is found in Dannenberg and associates' argument that although a contract made with a child can be deemed void if challenged by the

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[166] Preston argues that the infancy doctrine itself may need to be revisited in order to better reflect the growing participation of minors in online and market transactions. She warns, however, that

> [a]ny reassessment must be thoughtful and limited unless and until we have current evidence establishing that minors no longer need some or all of the doctrine's protections or that the doctrine is being regularly abused. Such a reassessment must be sensitive to context and consider whether changes in the infancy doctrine should be undertaken first with brick-and-mortar transactions or TOS, and whether changes should be experimental and incremental or encompassing. At this point, the infancy doctrine is the law, and it is one mechanism for encouraging online businesses to reign in their greed both in targeting children and in catching all users with hidden, overreaching contract terms[:]

Preston, *supra* note 66 at 228.

child,[167] particularly if the contract is not beneficial to the child,[168] "EULAs are not *per se* unenforceable against minors."[169] As Dannenberg and associates argue, although "an agreement entered into by a minor is *voidable*" it is not automatically *void*—in fact, if the child does not seek to void the contract, "the contracting parties are bound by its terms."[170] They cite, for instance, that "a minor cannot avoid obligations under a click-wrap agreement for educational software while still maintaining the benefits of a passing grade in the class from use of the software."[171]

Speaking from a US (primarily Californian) context, Dannenberg and associates suggest that there are numerous factors that would likely to be involved in determining the ultimate "voidability" of an online-game or virtual-world EULA made with a minor, if challenged. These include the nature of the affirmative act (and whether there is misrepresentation of age on behalf of the minor), the type of notice that is given to the minor about the EULA and its terms, the language used in the EULA, how it is presented and what it claims to do, as well as the "type of harm" involved.[172] As Dannenberg and associates describe,

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[167] For US examples, see *supra* note 61.

[168] The only exception being in instances where the child enters into a contract to obtain the "necessities of life" (food, clothing, shelter, etc., as established in *Miller v Smith & Co*, [1925] 3 DLR 251, [1925] 2 WWR 360 at 377. See also *Wong*, *supra* note 116.

[169] Dannenberg et al, *supra* note 22 at 38–39. See also *EKD*, *supra* note 72. Indeed, there are various other examples of cases where the infancy doctrine was unsuccessfully evoked in an attempt to void certain clauses contained in a contract made with a minor. See *Morrow v Norwegian Cruise Line Ltd*, 262 F Supp 2d 474 (MD Pa 2002); *Paster v Putney Student Travel, Inc*, 1999 WL 1074120 (CD Cal 9 June 1999); *Harden v American Airlines*, 178 FRD 583 at 587 (MD Ala 1998) (quoting *American Jurisprudence*, vol 42, 2d ed (Rochester, NY: Lawyer's Cooperative, 1991) "Infants", §§ 58, 61. *C.f. Doyle v Giuliucci*, 401 P 2d 1 at 3 (Cal 1965), as cited in *EKD v Facebook*, *supra* note 71 at 7–8.

[170] Dannenberg et al, *supra* note 22 at 38. See also *MacGreal*, *supra* note 73 at 696.

[171] Dannenberg et al, *supra* note 22 at 38.

[172] *Ibid* at 40.

> For example, the exception may hold for a teenager who affirmatively clicks on a box that falsely claims he is 18 years or older to gain access to gain access to a virtual world intended for adults only. However, a 12-year-old girl who gains access to a virtual world intended for children by simply clicking on a box that states she agrees to the EULA may not satisfy the requisite intentional and affirmative act if there is language buried in the agreement that requires a minor to seek parental consent before accessing the virtual world. Accordingly, a virtual world operator may not be able to enforce a EULA against a child or the parent when the child successfully bypasses minimum parental control measure to gain access to its virtual world.[173]

While the position advanced above is clearly not unanimously shared by video-game-law experts and scholars, it nonetheless represents a particular and compelling interpretation of the legal status of minors' contracts within online-gaming contexts. It also illustrates that questions about how EULAs are designed, presented, worded, and managed matter greatly, as do the particular contents and terms included in the contracts themselves.

This discussion in turn leads the way toward several feasible, child-centric solutions to some of the main problems associated with EULAs in children's games and virtual worlds. For instance, children are rarely encouraged to read EULAs, which are oftentimes inaccessible anyway in terms of the language and terminology used. Including mechanisms for ensuring that children and actual parents read the EULAs, even if this means significantly changing the format (from long, text-based document to interactive narrative, for instance), would contribute significantly to satisfying the intentional- and affirmative-act criteria described by Dannenberg and associates.[174] Similar arguments can be made for using child-friendly language in EULAs meant to dictate terms in sites targeted to young children. An illustrative example of this approach can be found in the EULA for children's virtual world *Moshi Monsters*, as per the following excerpt:

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[173] *Ibid* at 40.

[174] See *ibid.*

> Back on Earth, we at Mind candy would like to thank you in advance for your interest in adopting a Moshi Monster. We want to make sure that they are looked after as well as possible, and are treated in accordance with the rules for monster care. In order to qualify for monster adoption, you must accept the following terms and conditions. If you don't understand these terms, you should review them with your parents.[175]

In addition to using child-friendly language, developers should consider incorporating a better balance between the rights and responsibilities accorded to users in the current standard form EULA. The author's aforementioned study of children's virtual-world EULAs found that the contracts included very little (if any) delineation of the rights that users have.[176] Concurrently, a substantial amount of responsibility was delegated onto the users of the sites and/or their parents. In many cases, for instance, the EULAs made children responsible for securing their own parent's consent and for monitoring their own and other players' in-game behaviours, in addition to assuming various legal responsibilities and liabilities. In contrast, EULAs are often used to not only claim sweeping rights (for instance, over user-submitted content and intellectual property) for the game's developers, but also require users to absolve the developers of a breadth of responsibilities, including some that might otherwise be quite commonly expected of and assumed by an online service provider.[177] A more equitable, child-

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[175] MoshiMonsters, "Terms and Conditions", online: <http://www.moshimonsters.com/tc>, as cited in Grimes, "Digital Play", *supra* note 32. It is important to note, however, that not all of the actual terms included in this EULA diverge from the problematic trends identified above. This example is merely included as an illustration of how child-friendly language might be used in this context.

[176] See Grimes, "Digital Play", *supra* note 32; Grimes, "Digital Child", *supra* note 25.

[177] For example, as Andrew E Jankowich describes, "Contracts, like EULAs or TOSs, are insufficient to regulate the various and complex long-term relationships between participants and proprietors. As a form of click-wrap agreement, EULAs and TOSs provide little consideration of participants' needs, and ad hoc rulemaking by proprietors outside of these agreements will likely be unsatisfyingly arbitrary": "Property and Democracy in Virtual Worlds" (2005) 11:2 BUJ Sci & Tech L 173 at 178.

centric approach to EULAs would involve striving for reciprocity and balance, in which players' potential rights are acknowledged alongside their responsibilities, and a more reciprocal relationship is established between the users of these sites and their developers. Gilbert provides a similar recommendation in his examination of the potential unconscionability and subsequent (as well as, in his opinion, avoidable) need for government regulation of mainstream virtual-world EULAs, saying that "[i]f developers of virtual worlds prove capable to protect participants' rights and ensure competition between worlds" government oversight "may not be necessary."[178]

As many online games and virtual worlds now contain tools and infrastructures for players to create and share UGC and other forms of intellectual property, a more consistent approach for describing and managing child-made content is also recommended. As Jenkins argues, participating in the creation of digital content is fast becoming a crucial part of childhood, and has been associated with everything from "creative expression, civic engagement, political empowerment", to opportunities for informal learning, the development of crucial information and computer-technology skills, and "economic advancement."[179] Although children's participation in such activities is not currently very well defined or accounted for within existing regulation and copyright law,[180] according to Young, significant protections could be afforded through a better extension and application of the infancy doctrine. Speaking specifically to the US context, Young writes:

> Online contracts, however, may present an instance where the doctrine of infancy should not be abolished or even limited, but perhaps should be expanded so that minor authors who post materials on a web site can protect the rights in those works from unwitting dilution. Online click-through agreements often contain licenses to the young authors' copyrighted works, but authors who could be protected by the doctrine

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178 Gilbert, *supra* note 16 at 251.

179 Jenkins et al, *supra* note 59 at 9.

180 Julie Cromer Young, "From the Mouths of Babes: Protecting Child Authors From Themselves" (2010) 112:2 W Va L Rev 431 at 433.

> of infancy habitually are aware neither of the rights they have obtained in the work nor of the license granted merely by the child's navigation through a colorful site.[181]

Young suggests that Congress address current questions surrounding contracts involving minors, and incorporate portions of it into the *Copyright Act* in order to accommodate and provide protections for child authors (and, presumably, minors who create other forms of copyrighted works as well). Her proposed solution has, she argues, the "potential to further the objectives not only of copyright law but also of the doctrine of infancy, without tampering with the defensive mechanism as it exists in most states."[182]

Although developers should not attempt to resolve the lingering questions about minors' contracts on their own (e.g., through EULAs), they nonetheless have an important role to play in determining how children's newfound roles, rights, and responsibilities as content producers will ultimately unfold within digital contexts. In the meantime, moreover, serious questions remain as to what children's role, status, and rights as authors might look like; what happens when minors engage in collaborative online content creation; whether and under what contexts a child can own and transfer IP rights; at what age is a child ready to engage in more complex author and copyright transactions; and what responsibilities and authorities should be accorded to parents. Notably, some preliminary attempts to address these questions can already be found. Within a number of online games and virtual worlds specifically centered on player-submitted UGC, for instance, there is an emerging trend toward acknowledging the player's status as author or creator. For instance, UGC-based online game *Minecraft* clarifies in its EULA that players retain ownership rights over their creations, including any patches and "mods" (software modifications) they might design, as well as any screenshots or videos they might take:

> Any tools you write for the game from scratch belongs to you. Other than commercial use (unless specifically authorized by us in our brand

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[181] *Ibid.*

[182] *Ibid* at 460.

> and assets usage guidelines—for instance you are allowed to put ads on your YouTube videos containing Minecraft footage), you're free to do whatever you want with screenshots and videos of the game, but don't just rip art resources and pass them around, that's no fun."[183]

Devising terms that acknowledge children's roles and rights as content creators (and/or co-creators) within EULAs will be challenging, but there are prior examples to draw on. In 2007, *Zimmer Twins* (created by Lost the Plot Online Inc., now Zinc Roe) and *Edgar & Ellen* (created by Star Farm) became two of the first children's media properties to both incorporate child-made UGC and give children full credit for their story ideas, designs, and other creative UGC submissions. For instance, the EULA and text descriptions available on the *Edgar & Ellen* UGC submission website referred to children as "independent contractors", while their submissions were described as "works for hire".[184] In both cases, the EULAs were used to explain the content-submission process and the transfer of IP ownership that this entailed. The EULA was largely written in child-friendly language and advised children to talk to their parents about the larger implications of granting the company permission to use the content as they pleased.[185] While the specific transaction described in these examples raises some red flags about the conscionability and (potential) voidability of a contract that claims full or partial-yet-exclusive ownership over children's creations, these EULAs nonetheless provide an appropriate framework for recognizing the work, effort, authority, and authorship of children engaged in creating and sharing content within a commercial online forum.

In a similar vein, EULAs aimed at children need to provide a more comprehensive and equitable account of copyright, including acknowledgement of fair-dealing/fair-use exceptions. As Gillespie describes, media-literacy curricula aimed at children rarely tackle the nuances of copyright and use.[186] The previous research in this area

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[183] *Minecraft*, "Terms of Use", online: <https://minecraft.net/terms>.

[184] This website no longer exists.

[185] *Ibid.*

[186] See Gillespie, "Characterizing Copyright", *supra* note 97 at 295-98.

indicates that it cannot be assumed that children are adequately informed about such exceptions or of the rationale behind them.[187] At the same time, derivative and fan works not only represent a core facet of children's culture and how children learn *about* culture,[188] but remixing, fan homages, and co-authored content feature prominently within many popular children's games and virtual worlds. Various children's virtual worlds authorize and encourage players to use copyrighted content in specific contexts, such as when using branded items or purchasable and downloadable content. For instance, *LittleBigPlanet* features design kits based on popular Disney characters or films that players can purchase and download for use in their own UGC game creations. A failure to address these exceptions by providing a fuller picture of the range of rights and responsibilities users have when it comes to copyrighted content can lead to unnecessary confusion about why and where the use of copyrighted content is acceptable. It also creates "hierarchies of access",[189] in which use of copyrighted content becomes redefined specifically and solely as a "paid-for experience".[190]

Another important justification for creating a more appropriate, balanced, and child-centric EULA is the positive impact this could have on the advancement of children's communication rights, including those

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[187] See e.g. Steeves, "Young Canadians", *supra* note 156 (for an overview of a recent study of young people's understandings of copyright and use). For other works examining children's digital literacy more generally, see Livingstone, "Internet Literacy", *supra* note 92; Leslie R Shade, Nikki Porter & Wendy Sanchez, "'You Can See Anything On the Internet, You Can Do Anything On the Internet!': Young Canadians Talk About the Internet" (2005) 30:4 Canadian Journal of Communication 503; Grimes & Shade, *supra* note 55; Kafai, *supra* note 100.

[188] See generally Maya Götz et al, *Media and the Make-Believe Worlds of Children: When Harry Potter Meets Pokémon in Disneyland* (Mahwah, NJ: Lawrence Erlbaum, 2005); Rebecca W Black, "Access and Affiliation: The Literacy and Composition Practices of English-Language Learners in an Online Fanfiction Community" (2005) 29:2 Journal of Adolescent & Adult Literacy 118; Henry Jenkins, *Convergence Culture: Where Old and New Media Collide* (New York: NYU Press, 2006).

[189] Grimes & Fields, "Kids Online", *supra* note 7 at 44.

[190] Rifkin, *supra* note 40 (referring to the title of the source).

articulated in the *UN Convention on the Rights of the Child.*[191] For instance, children's rights to express their own opinions (Article 12), the right to freedom of expression (Article 13), and the right to participate in cultural and artistic activities (Article 31), can each find support in online forums aimed at fostering children's authorship and UGC, as well as in documents (such as EULAs) that acknowledge children as active, empowered agents. The complication, as Hamelink describes, is that articulating a more clearly delineated space for children's communication rights can include "rights that may in certain circumstances conflict with each other or that collide with other pressing interests, such as parental care and responsibility in the case of children's rights."[192] Thus, a reworking of the EULAs found in children's online games and virtual worlds to better reflect children's communication rights would involve a fairly complex negotiation of different stakeholder needs and interests.[193] While this may well prove challenging, an EULA that contributed more directly to the advancement of children's rights would also begin to provide children with more, and more clearly identifiable, benefits than found in the current standard-form EULA. As the question of whether a contract is beneficial to the minor is considered by Dannenberg and associates to be one of the key factors likely to determine the voidability

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191 20 November 1989, Can TS 1992 No 3, 1577 UNTS 3.

192 Hamelink, *supra* note 62 at 510.

193 As previous cases have shown, however, the rights and interests of adults do not necessarily always take precedence over those of children. When it comes to freedom of speech, as Festinger points out, contemporary US courts are inclined to rule on the side of the constitution. For example, in both *Interactive Digital Software Association v St Louis County* and *American Amusement Machines Association v Kendrick*, one of the leading arguments against legislation aimed at enforcing age-based regulation of games was that such regulation infringed upon minors', as well as parents', rights to select their own media. In these cases, freedom-of-speech considerations were extended to the very children and adolescents that the bills were originally intended to "protect": Jon Festinger, *Video Game Law* (Markham: LexisNexis Canada, 2005) 123-26, citing *Interactive Digital Software Association v St Louis County*, 329 F 3d 954 (8th Cir 2003); *American Amusement Machines Association v Kendrick*, 244 F 3d 572 (7th Cir 2001).

of a contract made with a minor,[194] a stronger alignment with children's rights could also have broader implications for the sustainability and future of EULAs within children's titles.

VII. CONCLUSION

This paper has argued that current trends in how EULAs are articulated and mobilized within children's online-game and virtual-world documents are inadequate and imbalanced. Many of the EULAs examined in the author's own research, as well as those described in the previous literature, fail to address the special status, needs, and vulnerabilities of child users, particularly of younger children (under the age of 13 years). They are written in complex language, can easily be bypassed or "Agreed" to without being read, burden their users with numerous responsibilities and very few rights, and are rarely reciprocal. These findings are not limited to minors and to children's titles, but rather mirror those found in the research focused on mainstream, adult-oriented video-game and virtual-world EULAs as well.[195] In the decade or so that has passed since the first critiques of online-game and virtual-world EULAs first appeared, however, very little power has been shifted into the hands of the players. Despite years of debate and a few high-profile cases, such as the widely cited *Bragg*,[196] and a few notable exceptions,[197] EULAs found in online games and virtual worlds continue reproduce the same tendencies of emphasizing copyright and corporate authority, while suppressing issues of governance, players' rights, and corporate responsibility. As this paper has demonstrated, these same tendencies are now being carried over to children's titles, albeit with some important variations. As described above, this shift is significant for a number of reasons. Although potentially voidable and unconscionable, before (or until) they are challenged in a court of law,

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[194] See *supra* note 22.

[195] See e.g. Castronova, "Right", *supra* note 13; Balkin, *supra* note 13.

[196] *Supra* note 23.

[197] As discussed above, including, possibly, *Minecraft*. See *supra* note 183 and accompanying text.

EULAs fulfill a powerful quotidian function. They describe and enact rules, establish parameters, regulate user behavior, and establish expectations about the relationships and processes delineated within. Arguably, EULAs gain at least some of this power from the fact that the vast majority of the time, the vast majority of players—especially young players—are isolated from the full implications of the legal contracts they have unanimously agreed to. As the author has argued elsewhere, "[i]t is often only when a rule has been breached, and a player has been reprimanded" that the restrictions and relationships established in an EULA are experienced as such.[198]

As Gilbert has argued, increased governmental regulation of online games and virtual worlds remains a viable possibility given the lack of reciprocity and scope of the claims contained in the standard EULA.[199] This may be particularly true of children's titles. Yet, as Hamelink reminds us, within regulatory regimes, "there tends to be more concern for the protection of children against harmful materials than the more constructive project of creating specially suited materials for children."[200] There are certainly a number of issues, processes, and relationships unfolding within children's online games and virtual worlds that warrant concerted public attention, as well as better accommodation within both industry standards of practice and relevant regulatory frameworks. As suggested herein, the rise of UGC within game contexts presents a particularly new and under-explored aspect of children's online gaming, with its associated questions about children's authorship and their ability to consent to granting IP ownership rights over their creations to corporate entities. However, this is just one among many challenges ahead when it comes to addressing, accommodating, supporting, and managing child players within dynamic, multiplayer, online environments. While this paper has attempted to provide some recommendations as to how to develop a more balanced, reciprocal, and child-friendly version of the standard EULA, these are only intended as

198 Grimes, "Digital Child", *supra* note 25 at 101.

199 See generally Gilbert, *supra* note 16.

200 Hamelink, *supra* note 62 at 516.

first steps. In order to begin the more significant task of dispelling some of the deeper questions and grey areas surrounding children's cultural participation in online forums, a broader conversation with a range of stakeholders must be initiated, as it is through debate and informed deliberation that a more inclusive and adaptive set of strategies might be devised.