Do End User License Agreements Bind Normal People?

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Do End User License Agreements Bind Normal People?

Michael Terasaki*

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I. INTRO

The installation of every computer program requires the computer user to click on a series of buttons that appear on the screen, most of which are labeled with the word “Next.” Invariably, one of these buttons will not contain the word “Next” but will read “I Agree.” Agree to what? Generally speaking, individual computer users have no idea what they agree to in the End User License Agreement (“EULA”) by clicking “I Agree.” Individual software users from the general public are likely to assume the software publisher did not place objectionable terms in the agreement. These users are also likely to think that the agreement would never actually be

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enforceable, and to neglect to notice that the text of the box has changed from "Next" to "I Agree." What the user is not likely to do is thoroughly read the terms of the agreement with a legal dictionary, carefully weigh the pros and cons of the agreement, and then reject the agreement and cancel the installation process.

What exactly do these agreements contain? Are they enforceable? Should they be enforceable? Who should they be enforceable against? This Article examines these questions from the perspective of individual users of the general public, in the course of normal use of the software. This Article does not focus on institutions making agreements for the use of software, or on bad faith software users that are using the software in a manner that suggests liability in the flavor of traditional copyright infringement or unjust enrichment. Rather, this Article evaluates typical "clickwrap" EULAs as they apply to the general public.

Part II of this Article explains the EULA generally, including the clickwrap delivery method and the reasoning behind the EULA. Part III discusses the enforceability of EULA contracts from a contract standpoint, including potential contract defenses. Part IV examines several court approaches that use alternatives to contract formation to interpret the effect of EULAs. Part V proposes two possible solutions. The first is simply to bypass the EULA entirely and give consumers a copy of a copyrighted work instead of a license. The second is to draft EULAs in a way that consumers understand the agreements they are entering into.

II. THE END USER LICENSE AGREEMENT

Generally speaking, the EULA is a "legal agreement between the manufacturer and purchaser of software that stipulates the terms of usage." The terms of these agreements usually cover a wide variety of topics typically included in adhesion contracts, such as arbitration provisions, limitation of liability, and choice of law or forum clauses, as well as a surprising assortment of other topics, like weapons development and rights to the consumer's name and likeness. However, the most pernicious term, and the term around which this Article centers, is the license provision.

1. See explanation on Clickwrap infra Parts II, III.
3. An adhesion contract is "[a] standard-form contract prepared by one party, to be signed by another party in a weaker position, usu. a consumer, who adheres to the contract with little choice about the terms." BLACK'S LAW DICTIONARY 366 (9th ed. 2009).
4. See Software License Agreement for iTunes for Windows, Apple, http://www.apple.com/legal/sla/docs/iTunesForWindows.pdf (last updated Sept. 10, 2013) ("You also agree that you will not use the Apple Software for any purposes prohibited by United States law, including, without limitation, the development, design, manufacture or production of missiles, or nuclear, chemical or biological weapons."); see also Statement of Rights and Responsibilities, Facebook, https://www.facebook.com/legal/terms (last updated Nov. 15, 2013) ("[Y]ou permit a business or other entity to pay us to display your name and/or profile picture with your content or information, without any compensation to you."). While Facebook is not installed software in the traditional sense, Facebook provides the functional equivalent of a computer program in spite of the lack of a required software install.
The EULA is established generally by the use of a “clickwrap” format. The clickwrap agreement is entered into simply by clicking on a pop-up box labeled “I Agree” when prompted, often during an installation process. Anyone reading this Article has likely seen, and entered into a clickwrap agreement, which is typically displayed during the installation process.

License provisions purport to give consumers “licenses” to use software rather than ownership of a copy of the software. Originally, license agreements were employed to fill a perceived gap in copyright protection. The computer software industry was ahead of the law, and licensing instead of selling software provided developers with a form of contract-based copyright protection. However, even though copyright protections have become clearly defined in providing software developers with equal protections as those received by the developers of other works, courts continue to interpret EULAs as establishing license arrangements instead of ownership interests in order to provide an even higher level of protection to software developers than that which would be provided by copyright protections alone.

A. Circumventing the First Sale Doctrine

Now codified in Title 17 of the United States Code, and originally established by the United States Supreme Court in 1908, the first sale doctrine provides a publisher with a complete monopoly for all sales of a copyrighted work that the publisher makes to a buyer. However, subsequent sales of copyrighted works from the buyer to a subsequent buyer are not entitled to copyright protection. By restricting a consumer’s ability to subsequently sell software, EULAs afford software

6. See Specht v. Netscape Commc’ns Corp., 306 F.3d 17, 22 (2d Cir. 2002) (“If a user attempted to install . . . without clicking ‘Yes,’ the installation would be aborted.”); see also Moore v. Microsoft Corp., 741 N.Y.S.2d 91, 92 (App. Div. 2002) (stating that a user was required to click on the “I Agree” button during installation).
7. See Lively, supra note 5, at 358.
8. See SoftMan Prods. Co. v. Adobe Sys., Inc., 171 F. Supp. 2d 1075, 1083 (C.D. Cal. 2001) (“Historically, the purpose of ‘licensing’ computer program copy use was to employ contract terms to augment trade secret protection in order to protect against unauthorized copying at a time when, first, the existence of a copyright in computer programs was doubtful, and, later, when the extent to which copyright provided protection was uncertain.”).
9. See id. at 1083 n.10.
10. See id. at 1083 (“[F]ederal courts interpreted the Copyright Act to provide substantial protection for computer programs . . . .”).
11. By analogizing Software EULAs to the book licenses in Bobbs-Merrill Co. v. Straus, we can see how software developers can control the secondary market for software via EULAs, effectively giving the developer or publisher a monopoly over every sale of the developer’s software in the country. See infra note 13.
12. 17 U.S.C. § 109(a) (2012) (“[T]he owner of a particular copy . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy . . . .”).
13. See Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 350 (1908) (explaining that the Supreme Court rejected a book publisher’s attempt to control the secondary market by printing a notice on the cover of the book purporting to restrict the resale of the book for less than one dollar).
14. Id.
publishers much greater protections, and much greater profits, relating to software sales than for sales of copyrighted works in other industries.

B. EULAs Allow Software Companies to Generate Higher Profits. What Is the Problem?

The fundamental problem with licensing software is that the transaction results in a disconnect between the legal rights that the EULA grants to the consumer and the rights consumers believe they are entitled to as a result of physical and economic characteristics of the transaction.

Consider the purchase of a book. A consumer walks into a store, selects a book, carries the book over to the cashier, pays for the book, and walks out with the book. Even if the purchase is made online, the consumer generally follows the same steps, exchanging money for a book which will be shipped to the consumer. Of course, this applies to nearly all purchase/sale transactions in American life. Consumers select an item they want, provide payment, and receive a product which they now own. This process frames the way consumers view every exchange of money for products, and consumers expect that the process will be either the same or substantially similar when purchasing software.

EULAs allow publishers to frame software licensing transactions as ordinary buy-sell transactions, with which consumers are exceedingly familiar, while withholding the ownership interest in the product for themselves. Whether or not a transaction gives ownership or a mere license matters to consumers because consumers should arguably be granted the rights that consumers believe they are getting at the time the transaction occurs. Alternatively, effective notice at the time of the transaction could adequately inform consumers of their rights, and achieve the same ends without full ownership in the consumer.

III. Do EULAs Result in License or Ownership?

EULAs uniformly purport to withhold ownership from the consumer. In order for a consumer to hold an ownership interest in a copy of software, instead of a license, the EULA must either be unenforceable in whole, or the language establishing a license must be found unenforceable. Many courts have approached the question from a contract enforcement standpoint, using basic principles of contract formation and unconscionability to decide whether or not a EULA is enforceable. Many other courts have followed a different approach, determining that an ownership or license exists without addressing basic contract enforceability issues. Courts following this

16. See infra Parts III.A, C.
17. See infra Part IV.
approach sidestep the questions of contract enforceability by either assuming that the contract is enforceable, or ignoring the issue altogether.\textsuperscript{18}

A. Enforceability – Contract Formation

The typical contract formation defense is that a consumer cannot possibly agree to a term nestled in a several-thousand-word-long EULA merely by a clickwrap “I Agree” button. Generally, terms of clickwrap and shrinkwrap licenses were found unenforceable until the decision in \textit{ProCD, Inc. v. Zeidenberg} in 1996.\textsuperscript{19}

Starting with \textit{ProCD}, EULAs have often been held enforceable, in spite of contract formation and mutual assent defenses, under the shrinkwrap or clickwrap delivery method.\textsuperscript{20} In \textit{ProCD}, the plaintiff stamped the license onto the CD on which the product was encoded, provided a printed copy of the license in the box, and displayed the terms of the license agreement on the screen every time the software was loaded.\textsuperscript{21} The court held that under the Uniform Commercial Code (“UCC”), a software user could accept the terms of the license agreement “by performing the acts the vendor proposes to treat as acceptance” and that “\textit{ProCD} proposed a contract that a buyer would accept by using the software after having an opportunity to read the license at leisure.”\textsuperscript{22} Zeidenberg’s mere act of using the software was considered acceptance of the terms of the license agreement.\textsuperscript{23}

The \textit{ProCD} court drew heavily from other sales agreements that involved immediate payment followed by terms that must be later agreed to, specifically pointing out insurance, airline ticket, and concert ticket sales.\textsuperscript{24} The \textit{ProCD} decision also bought into the idea that the software industry is somehow different and therefore deserves special treatment because of the peculiar nature of software.\textsuperscript{25} Since \textit{ProCD}, shrinkwrap agreements have fairly consistently been held enforceable.\textsuperscript{26}

While \textit{ProCD} involved a shrinkwrap agreement, as opposed to a clickwrap agreement, this makes no difference in the present analysis. The \textit{ProCD} court’s reasoning that a consumer should take the EULA and read it over at a time after the purchase\textsuperscript{27} applies equally well to shrinkwrap and clickwrap agreements alike, and courts have treated clickwrap and shrinkwrap agreements as equivalents.\textsuperscript{28}

\begin{enumerate}
\item \textsuperscript{18} \textit{Id.}
\item \textsuperscript{19} \textit{See generally} \textit{ProCD, Inc. v. Zeidenberg}, 86 F.3d 1447 (7th Cir. 1996).
\item \textsuperscript{20} \textit{See} Lively, \textit{supra} note 5, at 350 (“Over ten years later, \textit{ProCD} has been widely followed and its principles have been extended to apply to clickwrap agreements as well.”).
\item \textsuperscript{21} \textit{ProCD}, 86 F.3d at 1450.
\item \textsuperscript{22} \textit{Id.} at 1452.
\item \textsuperscript{23} \textit{Id.}
\item \textsuperscript{24} \textit{See id.} at 1451.
\item \textsuperscript{25} \textit{See id.}
\item \textsuperscript{26} Mark A. Lemley, \textit{Terms of Use}, 91 MINN L. REV. 459, 469 (2006).
\item \textsuperscript{27} \textit{See ProCD}, 86 F.3d at 1452 (explaining that a software user can accept to the EULA “after having an opportunity to read the license at leisure”).
\item \textsuperscript{28} \textit{See MDY Indus. v. Blizzard Entm’t, Inc.}, 629 F.3d 928, 957 (9th Cir. 2011) (citing \textit{ProCD} for the proposition that clickwrap EULAs can establish a contract between the software company and the software user).
\end{enumerate}
Analysis of contract formation through clickwrap agreements should acknowledge that the major cases holding that clickwrap EULAs are binding involve an “end user” that is actively seeking to gain financially from exploiting the software in some way.\textsuperscript{29} Courts likely are less receptive to defendant/consumers who knowingly breach EULA terms in the pursuit of profit than to defendant/consumers who simply fail to read the terms of the EULA. In the former situation, the defendant’s conduct appears similar to unjust enrichment,\textsuperscript{30} where the defendant would reasonably be expected to pay for the chosen use of the publisher’s software. In the latter situation, the consumer has merely failed to read a long and complicated set of terms displayed during an already inconvenient installation process.

B. Criticism of ProCD and Alternative Approaches

The Ninth Circuit, which happens to be the home of many software giants, has regularly applied at least some of ProCD.\textsuperscript{31} Ninth Circuit courts follow the ProCD approach even if it is not cited.\textsuperscript{32} However, ProCD has been poorly received in other courts, which have followed alternative approaches like that of Step-Saver Data Systems v. Wyse Technology.\textsuperscript{33} In Step-Saver, the court relied on UCC section 2-207 in holding that a “box-top” license agreement on the outside of the packaging did not create a contract between the parties.\textsuperscript{34} Because the software had already been shipped to the buyer after other purchase terms had been assented to, the box-top license, which contained additional terms, was not enforceable with its additional contract terms.\textsuperscript{35} The Step-Savor decision is also notable because the court refused to buy into the notion that a lack of special treatment would “inevitably destroy the software industry.”\textsuperscript{36}

Some courts, like Klocek v. Gateway, Inc., have expressly rejected the decisions of ProCD and the courts that follow it.\textsuperscript{37} The court in Klocek criticized the ProCD court’s reasoning, and instead promoted Step-Saver, holding that a five day

\begin{itemize}
  \item \textsuperscript{29} See ProCD, 86 F.3d at 1450 (explaining that Defendant Zeidenberg was reselling the ProCD database product in order to make a profit by selling it online for a cheaper price than the ProCD software was selling for at retail); MDY, 629 F.3d at 936 (indicating that the defendant’s gross revenue from producing a software program that breached the EULA and Terms of Use for the game World of Warcraft was a projected $3.5 million).
  \item \textsuperscript{30} Unjust enrichment is defined as: “The retention of a benefit conferred by another, without offering compensation, in circumstances where compensation is reasonably expected.” BLACK’S LAW DICTIONARY 1678 (9th ed. 2009).
  \item \textsuperscript{31} See, e.g., MDY, 629 F.3d at 957-58 (affirming the enforceability of the World of Warcraft Terms of Use and EULAs, both of which are entered into by the user in clickwrap form).
  \item \textsuperscript{32} See, e.g., Vernor v. Autodesk, Inc., 621 F.3d 1102, 1112, 1116 (9th Cir. 2010) (holding that a software license agreement in clickwrap form with notices on the packaging was sufficient to provide software users with only a license to use the software).
  \item \textsuperscript{33} Step-Saver Data Systems v. Wyse Technology, 939 F.2d 91 (3d Cir. 1991).
  \item \textsuperscript{34} Id. at 105.
  \item \textsuperscript{35} See id. at 102-03.
  \item \textsuperscript{36} Id. at 104.
\end{itemize}
"review-and-return" policy on a license agreement was not sufficient to create a binding contract.\textsuperscript{38}

These decisions stand in stark contrast to many courts that espouse a view of “software exceptionalism” around which this Article focuses.\textsuperscript{39}

C. Enforceability – Unconscionability

Under the unconscionability doctrine,\textsuperscript{40} courts may refuse to enforce contracts, in whole or part, if “the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.”\textsuperscript{41} The general test, articulated in Armendariz v. Foundation Health Psychcare Services,\textsuperscript{42} shows that “unconscionability has both a ‘procedural’ and a ‘substantive’ element, the former focusing on ‘oppression’ or ‘surprise’ due to unequal bargaining power, the latter on ‘overly harsh’ or ‘one-sided’ results.”\textsuperscript{43} Furthermore, “The prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.”\textsuperscript{44} Both procedural and substantive elements of unconscionability need not be present in equal amounts, however, because a sliding scale is used, providing for an excess of one element to compensate for a deficiency in the other.\textsuperscript{45} “In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.”\textsuperscript{46}

Decisions expressly ruling on the issue of unconscionability in regards to shrinkwrap or clickwrap license are surprisingly few and far between.\textsuperscript{47} As with cases that have considered defenses involving contract formation, courts have generally not dealt with members of the general public, but with companies or organizations who are

\textsuperscript{38.} Id. at 1341.
\textsuperscript{39.} See Carver, supra note 15, at 1929.
\textsuperscript{40.} See Lively, supra note 5, at 358 (explaining that “[f]or the purposes of determining unconscionability, whether or not the UCC is applicable is largely academic” because there is “no substantive difference” between the Restatement and the UCC on unconscionability, which results in basically the same analysis).
\textsuperscript{41.} U.C.C. § 2-302 cmt. 1 (2003). (This comment is explaining the text of the statute that says, “If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.”) Id. § 2-302(1).
\textsuperscript{42.} Armendariz v. Foundation Health Psychcare Services, 6 P.3d 669 (Cal. 2000).
\textsuperscript{43.} Id. at 690 (internal quotation marks omitted).
\textsuperscript{44.} Id. (emphasis original) (quoting Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 145 (Ct. App. 1997)).
\textsuperscript{45.} Id.
\textsuperscript{46.} Id.
\textsuperscript{47.} Bradley E. Abruzzi, Copyright, Free Expression, and the Enforceability of “Personal Use-Only” and Other Use-Restrictive Online Terms of Use, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 85, 126 (2010).
well aware of the contract terms. Many of these decisions have held agreements to be conscionable and enforceable.

The prime example of bad-faith users pleading the unconscionability defense is *Davidson & Associates v. Internet Gateway, Inc.* The defendants in *Davidson* had reverse engineered video game software in order to create a similar system for themselves and others to use. This reverse engineered system allowed use of the software without displaying banner advertisements that the publisher's system included. In holding against the defendants, the court focused on the fact that the defendants were "not unwitting members of the general public" but were "computer programmers and administrators familiar with the language used in the contract, and [had] the expertise to reverse engineer and understand source code." The *Davidson* court additionally focused on the defendant's ability to return the software to the store within thirty days if the defendant found the terms of the license agreement unacceptable.

In *Bragg v. Linden Research, Inc.*, the court considered an online Terms of Service Agreement and expressly found in favor of the user on the issue of unconscionability. *Bragg* included an in depth discussion and analysis of unconscionability in the clickwrap paradigm, and is important in light of the scarcity of other decisions on point. The parties were Bragg, an individual who played the online game "Second Life," and Linden Research, the company that created and maintained the game. The Second Life terms of service agreement was presented in clickwrap form, and included provisions for California choice of law, arbitration, and forum selection. Linden Research suspended Bragg's online account based on a suspicion of activity that violated the terms of service. When Bragg sued, Linden Research moved to compel arbitration pursuant to the terms of service.

First analyzing, and finding, procedural unconscionability, the *Bragg* court relied on the fact that the contract was one of adhesion, the superior bargaining strength of Linden Research, the lack of "reasonably available market alternatives,"

50. *Id.* at 1172.
51. *Id.* at 1173.
52. *Id.* at 1179.
53. *Id.* at 1180.
55. EULAs and Terms of Service/Use Agreements are both common adhesion contracts that are generally presented in clickwrap format, and often include very similar terms. For the purposes of unconscionability analysis, they are roughly equivalent. *See* Jared S. Livingston, Comment, *Invasion Contracts: The Privacy Implications of Terms of Use Agreements in the Online Social Media Setting*, 21 ALB L.J. SCI. & TECH. 591, 601 (2011).
56. *See id.* at 605-11.
57. *Id.* at 595.
58. *Id.* at 603.
59. *Id.* at 597.
60. *Id.*
and the extent to which supposedly agreed upon terms were hidden within the contract.61

The court also found substantive unconscionability based on several of the terms of the agreement.62 First, the terms allowed Linden to terminate the agreement at any time, to refuse any future service, to determine "in Linden's sole discretion" whether or not a customer had breached the terms, to return no money based on Linden's mere suspicions, and to amend the agreement at any time.63 Second, the court found unconscionable the arbitration provisions requiring any user that wished to bring a suit against Linden Research to share the costs of arbitration, which in Bragg's case would have been greater than the cost of bringing the suit in court.64 Third, the court found unconscionable the term requiring that the arbitration take place in San Francisco, California.65 Finally, while not expressly written into the agreement, the arbitration scheme included an aspect of confidentiality that would place Linden Research in "a far superior legal posture by ensuring that none of its potential opponents have access to precedent while, at the same time, the company accumulates a wealth of knowledge on how to negotiate the terms of its own unilaterally crafted contract."

Ultimately finding both procedural and substantive unconscionability, the court refused to enforce the arbitration provision.67

1. Unconscionability of Clickwrap EULAs Following the Bragg Approach

The programs used by typical individual software users include EULAs that are delivered through the same clickwrap packaging used by the Second Life Terms of Service in Bragg. Also, the Second Life terms contain many of the same terms as typical EULAs. The application of the Bragg court's approach is therefore well suited to an analysis of whether EULAs are unconscionable when enforced against individual software users who are members of the general public. Furthermore, unlike Davidson & Associates v. Internet Gateway,68 where the user was reverse engineering the software in a way that directly affected the software publisher's bottom line, the conflict between the parties in Bragg arose in the course of normal user and publisher activity. This makes Bragg more representative of the circumstances that an individual software user would experience when involving the unconscionability defense.

62. Id. at 611.
63. Id. at 608.
64. Id. at 608-10.
65. Id. at 610.
66. Id.
a. Procedural Unconscionability

Following the Bragg court's approach, procedural unconscionability can be evaluated by determining, for example, whether EULA contracts are contracts of adhesion, whether software publishers wield superior bargaining strength when constructing EULAs, whether any market alternatives exist, and whether terms were hidden within the contract. The fact that EULAs are contracts of adhesion and the software publishers have clear, superior bargaining power in relation to individuals both point towards procedural unconscionability.

The potential of an available market alternative is more of a gray area. In Bragg, the court found that there were no reasonable market alternatives, and stated that “[a]lthough [Second Life] is not the only virtual world on the Internet, Second Life was the first and only virtual world to specifically grant its participants property rights in virtual land.” But clearly, there are many potential alternatives to various software programs. Second Life, as an online game, is one of the many choices available. By identifying the distinctive nuance Second Life provides - a property interest in virtual real estate - the court recognized that consumers often choose one piece of software over other very similar software based on functional nuances. However, this recognition by the court should not be interpreted as allowing all computer programs to be found sufficiently unique that there is no market alternative. By examining a case where the court “f[ound] no procedural unconscionability because there were other financial institutions that offered competing IRA’s which lacked the challenged provision,” the Bragg court concluded that procedural unconscionability could be properly found in the Second Life contract, because other online games lacked that distinguishing property interest feature of Second Life.

Many common software products that individual users install do not have distinguishing features that rise to the same level of importance as an actual property interest that the Bragg court focused on. Mere differences in user interface, video game graphics, or programming may not be sufficient to make a piece of software one that is without an available market alternative. However, the general uniformity of EULA terms should lead courts to the conclusion that market alternatives are not reasonably available. The following example illustrates the lack of real choice in EULAs. “Borderlands 2” and “League of Legends” were two popular computer games in 2013, and both games contain restrictive choice of law and venue clauses that effectively insulate the publishers from litigation. The Borderlands 2 EULA specifies that “the sole and exclusive jurisdiction and venue for actions related to the subject matter hereof shall be the state and federal courts located in Licensor's principal

69. Bragg, 487 F. Supp. 2d at 605-08.
70. Id. at 606.
71. Id. at 606 (“Although it is not the only virtual world on the Internet, Second Life was the first and only virtual world to specifically grant its participants property rights in virtual land.”).
72. Id. (referring to Dean Witter Reynolds, Inc. v. Superior Court, 259 Cal. Rptr. 789, 795 (Ct. App. 1989)).
corporate place of business (New York County, New York, U.S.A.).” The League of Legends EULA imposes a similar term, requiring that a court action “shall be decided exclusively by a court of competent jurisdiction in Los Angeles, California, United States of America . . .” Even assuming there is a primarily American customer base for each of these games, most individual software users would clearly be hard pressed to pursue, or defend, any litigation related to the EULA simply based on geography. Nearly all EULAs include a choice of law and venue term, so at least as far as software that uses a standard EULA is concerned, individual software users cannot be viewed as having reasonable market alternatives, even if a significant variety of similarly functioning software is available.

The final procedural unconscionability consideration that Bragg focused on was the extent to which terms were hidden from the reader. The fact that EULAs are often displayed only once in a tiny text box that shows less than one hundred words at a time, and then are hidden within “readme” files buried within the computer’s file system should give any court reason to find procedural unconscionability. For instance, the size of the EULA review box during an install of Google Picasa 3.9 on a 1600x900 resolution screen using Windows 7 is roughly four inches wide by two inches tall. Considering that the Google Picasa 3.9 EULA contains 4,220 words, any term within the agreement should be considered “buried” within the text of the agreement.

Picasa appears to be on the lower end of the EULA word count spectrum. An Apple iTunes installation requires agreement to 4,320 words of EULA before the installation will complete. The game League of Legends includes a EULA of 4,751. Windows 8 requires the acceptance of a 5,507 word agreement. The game World of Warcraft requires the user to agree to a EULA of 3,956 words as well as a Terms of Use agreement of 5,187 words, for a total of 9,143 words. For perspective, this Article is around 10,500 words, so imagine reading it all in a four inch by two inch text box before agreeing to make it legally binding.

Procedural unconscionability should be relatively easy for courts to find when individual users from the general public are involved. Unfortunately for consumers,
procedural unconscionability alone will not result in the wholesale invalidation of EULA agreements, because the “prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.”

b. Substantive Unconscionability

The Bragg court emphasized four features of the Second Life agreement to find substantive unconscionability: 1) Linden Research’s unilateral ability to terminate the agreements based on mere suspicions, 2) the up-front arbitration fees requirement, 3) the choice of venue provision, and 4) the arbitration confidentiality requirement.

Termination provisions in EULAs often provide for termination of the agreement by either party. However, a general feature of EULAs that remains is the software publisher’s ability to terminate the agreement, often without notice, like in the World of Warcraft EULA which provides that “Blizzard may terminate this Agreement at any time for any reason or no reason.” Similarly, Apple iTunes “reserve[s] the right to change, suspend, remove, or disable access to any Services at any time without notice.” This common language, allowing termination or alteration of the agreement “for any reason or no reason” goes far beyond the Second Life agreement’s term allowing for termination of services based on a suspicion of wrongdoing. This ability of software publishers to alter or terminate agreements for any reason, or without reason, points toward a finding of substantive unconscionability.

While most EULAs include arbitration requirements, the costs of arbitration to the consumer have been softened significantly compared to the arbitration provision from Second Life. Blizzard agrees to cover arbitration expenses in the World of Warcraft “[i]f such costs are determined by the arbitrator to be excessive,” and Microsoft volunteers arbitration costs and fees if the dispute is less than $75,000. The Second Life agreement involved up-front costs, which still would need to be put

84. Id. at 608-10.
85. Id. at 610.
86. Id.
87. See World of Warcraft End User License Agreement, supra note 81.
88. Id.
89. Software License Agreement for iTunes for Windows, supra note 4, at 3.
90. World of Warcraft End User License Agreement, supra note 81.
91. Bragg, 487 F. Supp. 2d at 608-09 (initiation cost of arbitration would have cost somewhere around $10,000).
92. Id. (“If such costs are determined by the arbitrator to be excessive, Blizzard will pay all arbitration fees and expenses.”).
93. Microsoft Software License Agreement Windows 8, supra note 80, at 4 (“In a dispute involving $75,000 or less, Microsoft will promptly reimburse your filing fees and pay the AAA’s and arbitrator’s fees.”).
forth by the consumer in both the World of Warcraft and Windows 8 EULAs. However, a high likelihood of reimbursement by a publisher significantly lowers the protection that a EULA arbitration clause gives a publisher. Compared to the high cost to the consumer of the Second Life arbitration provision, the arbitration provisions that Microsoft and Blizzard included are likely to cover most of the arbitration expenses for typical consumers.

Choice of law and venue provisions are a staple of EULAs, and as mentioned above vary from New York to Los Angeles. However, the hardline approach taken in the arbitration provision of the Second Life agreement, which required all arbitration and litigation be conducted in San Francisco, California, appears to be softening. The Windows 8 EULA allows for dispute resolution to be conducted “in your county of residence,” and applies “[t]he laws of the state or country where you live . . . .” Microsoft, as a model for the entire industry, likely will force a trend by offering such comparably favorable terms. A move away from strict geographic requirements should result in an overall decrease in substantively unconscionable provisions. However until other major software companies follow suit, choice of venue provisions will continue to be an important and common feature in EULAs.

The final substantively unconscionable requirement that the Bragg court found in the Second Life agreement was the requirement for confidentiality regarding arbitration. Individual software users can expect EULAs to require arbitration based on American Arbitration Association (“AAA”) rules, which do not provide for the level of confidentiality that was found unconscionable in the Second Life agreement. The parties must contract on their own for confidentiality, and EULAs do not typically do so. Most EULAs do not include arbitration confidentiality

94. See Limited Software Warranty and License Agreement, supra note 73.
95. See End User License Agreement (EULA), supra note 74.
96. Microsoft Software License Agreement Windows 8, supra note 80, at 4 (“You agree to commence arbitration only in your county of residence or in King County, Washington. Microsoft agrees to commence arbitration only in your county of residence.”).
97. Id. (“The laws of the state or country where you live govern all claims and disputes under this agreement, including breach of contract claims and claims under state consumer protection laws, unfair competition laws, implied warranty laws, for unjust enrichment, and in tort.”).
98. See Lively, supra note 5, at 369-70 (“[l]t is hard to avoid the conclusion that if the Windows Vista EULA is upheld in its entirety, other software developers will follow suit.”).
99. Some EULAs have already adopted a more consumer friendly posture on arbitration location. See World of Warcraft End User License Agreement, supra note 81 (“If you are a resident of the United States, any arbitration will take place at any reasonable location convenient for you.”).
101. See World of Warcraft End User License Agreement, supra note 81 (“The arbitration shall be commenced and conducted under the American Arbitration Association (“AAA”) and, where appropriate, the AAAs Supplementary Procedures for Consumer Related Disputes . . . .”); Microsoft Software License Agreement Windows 8, supra note 80, at 4 (“Any arbitration will be conducted by the American Arbitration Association (the ‘AAA’) under its Commercial Arbitration Rules and in many cases its Supplementary Procedures for Consumer-Related Disputes.”); End User License Agreement (EULA), supra note 74 (“The arbitration will be conducted under the Commercial Arbitration Rules of the American Arbitration Association . . . . and, where appropriate, the AAA’s Supplementary Procedures for Consumer Related Disputes . . . .”).
provisions, diminishing the problem that was present in Bragg: the software publisher’s ability to keep software users at a disadvantage by allowing publishers access to precedent while preventing software users from accessing the same information. The mere fact that arbitration is mandated by most EULAs serves this same purpose, and similarly disadvantages software users; however, unlike confidential arbitration – generally found substantively unconscionable in California – EULAs that lack such confidentiality provisions are upheld.

With respect to common software EULAs, unconscionability following an approach similar to the approach used in Bragg must demonstrate the presence of both procedural and substantive unconscionability. The superior bargaining power that software publishers wield, and the fact that text is hidden within small boxes during the installation process easily fulfill the procedural prong. EULAs inherently favor the software publisher, who drafts the entirety of the terms, and there appears to be no limits on what many publishers can include in EULAs. While many courts tend to follow the “click accept now, read the terms later” approach of ProCD, Inc. v. Zeidenberg, a procedural unconscionability prong should be easily found in the facts that terms are hidden within the contract via the clickwrap acceptance text box, and that there is no opportunity for consumers to negotiate their own terms or to choose a competitor’s product with more favorable terms.

Substantive unconscionability, in most cases, should also be easy to find if courts give EULAs the treatment that normal contracts receive, as the Bragg court did. Particularly, the ability for many software companies to unilaterally terminate the EULA without notice and for any or no reason provides courts with a solid basis for finding the substantive unconscionability prong.

Decisions involving an individual software user who has come to a conflict with a software publisher involving a EULA during the normal course of software use are scarce. The Bragg decision stands alone in laying out an unconscionability analysis that could apply to a typical individual user. While other courts have touched on the unconscionability defense, these decisions all involve some level of wrongdoing that would not apply to typical users.

Unconscionability, when properly applied, should be a viable defense against EULA enforcement. However, many courts appear to avoid the issue of EULA enforcement entirely, and instead choose to look to other evidence in determining the rights of each party.

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103. See Bragg, 487 F. Supp. 2d at 610.
104. See, e.g., id.
105. See Carver, supra note 15, at 1899 (identifying a common approach courts have taken that upholds clickwrap EULAs so long as certain “Magic Words” are used in the EULA).
106. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452 (7th Cir. 1996).
IV. LOOKING BEYOND THE EULA LANGUAGE: WHAT REALLY HAPPENS WHEN CONSUMERS ACQUIRE SOFTWARE?

The ability to circumvent the first sale doctrine, thus providing extra protections for publishers far beyond those provided by copyright statutes, is the primary purpose for software publishers to use EULAs instead of relying on typical copyright law.\textsuperscript{108} By relying on a EULA contract, publishers essentially get to write their own law to be applied between the user and the publisher. Statutory preemption has long failed as a defense when it comes to EULA agreements,\textsuperscript{109} leaving publishers with essentially a blank check to include terms that are as one-sided as possible.\textsuperscript{110} Recognizing that license agreements do not accurately describe the characteristics of the transaction, several courts have turned to non-contract based theories when determining if a software user is in fact an owner or merely a licensee.\textsuperscript{111} The following three cases highlight these alternative approaches to determining whether a transaction results in a license or ownership.

A. Krause v. TitleServ – Incidents of Ownership so One can be Sensibly Considered an Owner

In Krause v. TitleServ, Inc., the plaintiff’s case hinged upon whether or not the software user was an owner, or a licensee.\textsuperscript{112} Specifically, the defendant, TitleServ, asserted that it was an owner of a copy of the computer program,\textsuperscript{113} and thus, TitleServ was not liable to Krause, because “it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program . . . .”\textsuperscript{114}

To decide on the question of ownership, the Krause court did not focus on whether the parties had come to an express agreement on whether or not the purported licensee had obtained ownership of a copy of the program, but instead focused on

\textsuperscript{108} See Carver, supra note 15, at 1891-95.
\textsuperscript{109} See generally Abruzzi, supra note 47, at 115-22 (discussing statutory preemption in the clickwrap paradigm).
\textsuperscript{110} See Livingston, supra note 55, at 610-16 (discussing how competition between software publishers and reputational checks may in theory limit the abuse of power that contract drafters exert, but the actual competition is for the products, and not for the contract terms).
\textsuperscript{111} See generally Carver, supra note 15 (explaining the history of software copyright and licensing cases and statutes that determine, or should determine, ownership of software based on traditional intellectual property principles).
\textsuperscript{112} Krause v. TitleServ, Inc., 402 F.3d 119, 122 (2d Cir. 2005). While Krause v. TitleServ does not involve a EULA, but an agreement that purported to create a license, the court lays out principles that should be used in determining whether or not ownership of a copy of a program exists in the possessor in relation to statutory defenses to copyright infringement liability, such as 17 U.S.C. § 109 first sale and 17 U.S.C. § 117(a)(1) essential step defenses. See id. at 122-25. These same principles should be seen as guiding when determining if EULA reservation of title provisions allow for copyright infringement liability in the possessor of a copy of software. The mere fact that EULAs purport to reserve formal title in the publisher would not be dispositive under an analysis that take into account the “incidents of ownership.”
\textsuperscript{113} Id. at 122.
\textsuperscript{114} Id. at 121.
"whether the party exercises sufficient incidents of ownership over a copy of the program . . . ." The court then looked to the following factors in determining that Titleserv was indeed an owner: First, Titleserv paid substantial consideration for the program. Second, Krause customized the program specifically for Titleserv. Third, Titleserv stored the copies of the programs on servers owned by Titleserv. Fourth, Krause did not reserve the right to possession of the copies, and regardless of any developments in the relationship between Krause and Titleserv, the parties had agreed that Titleserv could possess and utilize the software indefinitely. Finally, Titleserv had the right to destroy the software if it wished.

The court did not discount the weight of a formal transfer of title, stating that "the presence or absence of formal title may of course be a factor in this inquiry, but the absence of formal title may be outweighed by evidence that the possessor of the copy enjoys sufficiently broad rights over it to be sensibly considered its owner." In other words, the formal transfer of title, or in the case of a EULA, the formal reservation of title, may be taken into account when determining ownership. However, formal title alone is not dispositive in making an ownership determination.

B. Incidents of Ownership Applied to Individual Users

After analyzing the incidents of ownership, individual users of the general public should be able to utilize the statutory protection found in copyright statutes, even if they require "ownership" of a copy of the copyrighted material. While the factors listed in Krause are certainly non-exclusive, those factors provide a good starting point for an analysis of the incidents of ownership showing evidence that the possessor of a copy should be considered an owner.

First, the Krause court considered whether substantial consideration was paid for the program. Individual users routinely pay between $59.99 and $139.99 for a standard piece of software, certainly a substantial amount for an individual consumer, who may be earning minimum wage, in which case the purchase would be the

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115. Id. at 124.
116. Id.
117. Id.
118. Krause, 402 F.3d at 124.
119. Id.
120. Id.
121. Id. (emphasis added).
122. See id. at 125 (concluding that Titleserv was an "owner" in the absence of any other information on which to base its decision, suggesting that other factors would have been considered had any been presented).
123. Id. at 124.
equivalent of 8.27 hours of work for a $59.99 software purchase.\footnote{125} The substantial consideration paid for the software favors ownership status for the individual user.

Second, the \textit{Krause} court took into account that the software was customized for Titleserv.\footnote{126} Individuals rarely purchase customized software for themselves, and common productivity software and computer games are mass marketed to the public at large. The lack of customization in the software demonstrates the publisher's intent to retain control over it for its own purposes.

Third, the court considered who owned the computers on which the software was stored.\footnote{127} While the advent of cloud computing presents alternative situations that allow for computer storage and processing to be outsourced to computers not necessarily owned locally by users, individuals generally still install the software they purchase on their own machines. An individual user's high degree of control suggests that the rights that stem from storing the software should be as great as possible.

Fourth, the court focused on whether the software creator had reserved the right to regain possession of the software.\footnote{128} Most EULAs include terms that purport not only to retain ownership in the copyrighted computer program, but also to reserve ownership of \textit{any copy of the copyrighted computer program} in the software publisher.\footnote{129} However, attempts to prevent ownership from passing without accompanying language that specifies the return or destruction of the physical media is largely symbolic. This is so, because as in \textit{Krause}, "Titleserv had the right to continue to possess and use the programs forever,"\footnote{130} and most common EULAs allow for the same.\footnote{131} While software publishers' intent to retain ownership certainly should be taken into account, individual users often retain possession of copies of software indefinitely.

Fifth, the \textit{Krause} court noted that another incident of ownership was Titleserv's right to destroy its copy of the software at any time.\footnote{132} EULAs often include terms requiring the uninstallation and destruction of all copies of the software following some event.\footnote{133} Typically, publisher-initiated termination of the license agreement can be for "any reason" or "no reason" and requires destruction or

\begin{footnotes}
\item[126] \textit{Krause}, 402 F.3d at 124.
\item[127] \textit{Id}.
\item[128] \textit{Id}.
\item[129] \textit{World of Warcraft End User License Agreement}, supra note 81 ("All title, ownership rights and intellectual property rights in and to the Game and all copies thereof. . . are owned or licensed by Blizzard.").
\item[130] \textit{Krause}, 402 F.3d at 124.
\item[131] Practically speaking, including a EULA term requiring individual software users to return CDs and DVDs to the publisher through the mail or some other shipment method would be fairly useless, because most users would simply not bother to ship the software. The result of not shipping software would lead nearly every software purchase to a breach of contract case, which would be too small for software publishers to bother litigating.
\item[132] \textit{Krause}, 402 F.3d at 124.
\item[133] See, e.g., \textit{Software License Agreement for iTunes for Windows}, supra note 4, at 4; see also \textit{World of Warcraft End User License Agreement}, supra note 81.
\end{footnotes}
uninstallation of software.\textsuperscript{134} However, the user may also still destroy the copies of the software at any time he or she wishes. The right to destroy remains in the individual user, at least until the publisher requires all those who have accepted clickwrap EULAs to destroy their copies of software.\textsuperscript{135} This right to destroy indicates ownership rather than a mere license.

The \textit{Krause} court also touched on the importance of the formal transfer of title when determining ownership.\textsuperscript{136} The primary motivation for software publishers to use EULAs is to reserve title for the software publisher.\textsuperscript{137} At least for the purposes of analyzing whether an individual user exercises "sufficient incidents of ownership,"\textsuperscript{138} publishers should be presumed to withhold formal title from the individual via EULA.\textsuperscript{139} Reservation of formal title in the software publisher of course implicates the presumption that individual users are only licensees. However, \textit{Krause} makes clear that "the absence of formal title may be outweighed by evidence that the possessor of the copy enjoys sufficiently broad rights over it to be sensibly considered its owner."\textsuperscript{140}

Several of the factors discussed above, particularly the right of an individual user to possess the copy of software indefinitely in the user’s physical possession, point strongly towards the conclusion that individual users have sufficient incidents of ownership to be considered owners. Individual users are de facto owners, regardless of the EULA terms, and can make nearly any use of a copy of software they wish. Aside from the notorious money making\textsuperscript{141} and reverse engineering situations found within the few cases concerning EULAs that have been actually heard by courts,\textsuperscript{142} individual software users are largely free to do whatever they wish with their software, including intentionally or inadvertently installing the software on multiple machines, giving away the copy of software, reselling the copy of software, and even modifying or reverse engineering the software. This high degree of practical control over a copy of software leads users, and should lead courts, to conclude that in spite of EULA

\begin{thebibliography}{99}
\item \textsuperscript{134} See, e.g., \textit{Software License Agreement for iTunes for Windows}, supra note 4, at 4; see also \textit{World of Warcraft End User License Agreement}, supra note 81.
\item \textsuperscript{135} As with requiring the return of software, requiring destruction of all copies of software in the possession of individuals would be practically impossible, particularly for software titles that are widely distributed, such as \textit{World of Warcraft: Mists of Pandaria}, which sold more than 2.7 million copies during the first week of sales. \textit{World of Warcraft}, \textit{Twitter} (Oct. 4, 2012, 3:03 PM), https://twitter.com/Warcraft/status/253978557376774144.
\item \textsuperscript{136} See \textit{Krause}, 402 F.3d at 124.
\item \textsuperscript{137} See \textit{Carver}, supra note 15, at 1891-95 (discussing the first sale doctrine as applied to software EULAs).
\item \textsuperscript{138} See \textit{Krause}, 402 F.3d at 124.
\item \textsuperscript{139} Presuming otherwise argues issues that are more fitting to the “economic realities” or pure “perpetual possession” —approaches that focus less on a purported contractual agreement between software users and software publishers. See, e.g., \textit{In re DAK Indus.}, 66 F.3d 1091, 1095-96 (9th Cir. 1995); UMG Recordings, Inc. v. Augusto, 558 F. Supp. 2d 1055, 1060-62 (C.D. Cal. 2008).
\item \textsuperscript{140} \textit{Krause}, 402 F.3d at 124.
\item \textsuperscript{141} See \textit{ProCD, Inc. v. Zeidenberg}, 86 F.3d 1447, 1450 (7th Cir. 1996) (explaining that defendant was reselling the product to others for profit at a discounted rate); MDY Indus. v. Blizzard Entm’t, Inc., 629 F.3d 928, 935-36 (9th Cir. 2011) (explaining that a party breached the EULA terms in order to continue a business, with millions of dollars in revenue, specializing in providing a product that violated the EULA terms).
\item \textsuperscript{142} See, e.g., Davidson & Assocs. v. Internet Gateway, 334 F. Supp. 2d 1164 (E.D. Mo. 2004).
\end{thebibliography}
provisions to the contrary, individuals users are owners at least for the purposes of the affirmative defenses found in 17 U.S.C. Section 117 and other copyright statutes.

C. The Characteristics of Licenses Analysis

The district court in UMG Recordings v. Augusto also addresses the issue of ownership despite the presence of language intended to create a license, and it is a prime example of a court looking past the terms of a license agreement in order to determine ownership. The Ninth Circuit Court of Appeals affirmed the district court’s ruling but emphasized different and additional aspects, leaving the district court’s opinion more instructive for a discussion of software as it applies to individual users.

UMG Recordings (“UMG”) produced promotional CDs that were distributed for advertising purposes. These promotional CDs were marked with the words:

This CD is the property of the record company and is licensed to the intended recipient for personal use only. Acceptance of this CD shall constitute an agreement to comply with the terms of the license. Resale or transfer of possession is not allowed and may be punishable under federal and state laws.

Augusto acquired many of these CDs and sold them on eBay, eventually attracting the attention of UMG. When UMG filed suit, Augusto argued he was protected by the “first sale doctrine” which framed the issue of ownership – required for protection under the first sale doctrine – as the pivotal issue. The district court found that the language stamped onto the CD did not create a license. Instead, it determined that ownership had passed to Augusto by focusing on three characteristics of licenses that were lacking in the situation.

First, the district court pointed out that the owner’s intent to regain possession is a “hallmark” of a license. UMG’s lack of records on who had received CDs and the fact that “[n]othing on the packaging of the Promo CDs or in the licensing label requires that the recipient return the Promo CDs” indicated that this hallmark of a

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144. UMG Recordings, Inc. v. Augusto, 628 F.3d 1175, 1180-83 (9th Cir. 2011) (explaining that Judge Canby of the Ninth Circuit recognized “that the mere labeling of an arrangement as a license rather than a sale, although it was a factor to be considered, was not by itself dispositive of the issue” and affirmed the district court’s decision in favor of Augusto on the basis that the licensing language could not possibly establish a license relationship, because UMG’s distribution of the CDs did not allow UMG to know whether or not the recipient had accepted the disk).
145. UMG Recordings, 558 F. Supp. 2d at 1058.
146. Id.
147. Id.
148. Id. at 1059.
149. Id. at 1059-60.
150. Id. at 1060-62.
151. UMG Recordings, 558 F. Supp. 2d at 1060-62.
152. Id. at 1060.
license was missing.\textsuperscript{153} Second, the district court identified a recurring benefit for the copyright owner as an important characteristic of a license.\textsuperscript{154} UMG was guaranteed no benefit, one time or recurring, from the distribution of the promotional CDs, and thus the recurring benefit that is a common trait of a license was missing.\textsuperscript{155} Third, the district court examined the apparent benefit of the license, which must be more than simply to restrain trade.\textsuperscript{156} As evidenced by the lack of any terms for any other purpose, the district court concluded that UMG’s sole purpose in printing the license was to prevent the sale or transfer of the disks.\textsuperscript{157} Citing to the origin of the first sale doctrine in \textit{Bobbs-Merrill}, the district court concluded that licensing for the sole purpose of restricting trade “was rejected 100 years ago by the Supreme Court.”\textsuperscript{158}

Given the brevity of the UMG license language and the clear intent on the part of UMG to restrict trade, the district court held, and the Ninth Circuit Court of Appeals affirmed, that UMG’s attempt to create a license was ineffective, and thus, Augusto was an owner, at least for the purposes of the first sale doctrine.\textsuperscript{159}

Notwithstanding the district court’s mischaracterization of the issues on software ownership,\textsuperscript{160} applicability of the \textit{UMG Recordings} analysis to common EULA circumstances is logical, because of the extraordinary similarity between the UMG license terms and the most common and most important EULA terms. UMG’s license language begins with a sentence intended to retain title to the actual CD itself.\textsuperscript{161} EULAs also usually start out with a reservation of title.\textsuperscript{162} EULAs then include language that is intended to show that continued use or possession of the software by the user qualifies as acceptance of the terms, usually by reference to the clickwrap delivery method that the software utilizes.\textsuperscript{163} UMG’s license states that the action of accepting the CD is binding on the new possessor of the disk.\textsuperscript{164} The primary purpose of EULAs is to limit the transferability by retaining title in the publisher, and such terms are always included in EULAs.\textsuperscript{165} UMG’s license includes a blanket prohibition on resale or transfer of the CD.\textsuperscript{166} Simply reading out the language of

\begin{itemize}
\item \textsuperscript{153} \textit{Id.} at 1061.
\item \textsuperscript{154} \textit{Id.}
\item \textsuperscript{155} \textit{Id.}
\item \textsuperscript{156} \textit{Id.}
\item \textsuperscript{157} \textit{UMG Recordings}, 558 F. Supp. 2d at 1061-62.
\item \textsuperscript{158} \textit{Id.} at 1061.
\item \textsuperscript{159} \textit{Id.} at 1062.
\item \textsuperscript{160} The district court opinion fails to take into account 17 U.S.C. Section 117 when it states that software “necessitates a license because software must be copied onto a computer to function.” \textit{Id.} There is no such necessity, because statutory protections allow for such a copy to be made “as an essential step in the utilization of the computer program . . . .” 17 U.S.C. § 117(a)(1) (2012).
\item \textsuperscript{161} See \textit{UMG Recordings}, 558 F. Supp. 2d at 1058.
\item \textsuperscript{162} See, e.g., \textit{End User License Agreement (EULA), supra note 74 (“All rights and title in and to the Software and the Game, and all content included therein . . . are owned by Riot Games . . . . ”)}.
\item \textsuperscript{163} See, e.g., \textit{id.} (“By clicking the ‘accept’ button below or using the game or installing the game client software . . . you agree that this license agreement is enforceable like any written contract signed by you.”) (alteration in original).
\item \textsuperscript{164} \textit{UMG Recordings}, 558 F. Supp. 2d at 1058.
\item \textsuperscript{165} See \textit{Carver, supra note 15, at 1891-95.}
\item \textsuperscript{166} \textit{UMG Recordings}, 558 F. Supp. 2d at 1058.
\end{itemize}
UMG's license clearly articulates the basic terms of a typical EULA agreement. The similarity deserves serious consideration by courts.

D. Do EULAs Have the Characteristics of Licenses?

The district court's approach in *UMG* requires more than the mere labeling of the language as a license by only allowing the establishment of a license if the agreement actually contains the characteristics of a license. In this way, the *UMG* court's "characteristics of licenses" approach is the mirror image, examining an identical flipside, of the *Krause* court's "incidents of ownership" approach. The former examines whether enough evidence of a license exists for the copyright owner to have created a license. The latter examines whether enough evidence of ownership exists for the individual software user to be considered an owner.

V. PROPOSAL

The overarching problem with EULAs in relation to individual software users is the disconnect between the restrictive language in EULAs that purports to bind the individual users, and the physical reality that individual users can, and often do, take any action the user wants with a copy of the software, regardless of the terms in the EULA limiting the user's right to take such action. Consumers neither understand the rights they have nor understand the consequences of breaching EULA terms.

The realities of the transaction are important to an individual consumer because the transaction carries all the traits that a consumer would expect from a transaction involving a transfer of ownership instead of a license. The realities of indefinite possession after the transaction are important to an individual consumer because any proposed legal framework should not penalize the individual good faith consumer who can, and often does, breach EULA terms with impunity. This Article articulates two possible solutions to best achieve the goal of providing individual software consumers with software purchases that more closely reflect the realities they experience, both during and after the software purchase transaction: ownership of a copy of a copyrighted work, and reasonable EULA terms that consumers understand.

A. Ownership of a Copy of a Copyrighted Work

The first possible solution is to simply convey to consumers the ownership of a copy of the software instead of attempting to create hundreds of millions of licenses that are, for the most part, unenforceable and untraceable. Conveying to consumers ownership of a copy of software gives consumers all the protections and rights that consumers generally associate with the purchase of a copyrighted work that individual software users already assert. Selling a used copy of software, lending software disks

167. See id. at 1060-62.
to friends, and keeping a box of software disks on a home-office bookshelf are already common actions taken by individual software consumers. Any solution must enable at least simple, common actions like these to continue and receive legal protection, and the simplest solution would be to just grant ownership.

Ownership would clearly establish the rights a consumer has, because it mirrors the experience that consumers receive when making any other purchase at a store or online, and it mirrors the rights that consumers have with most other items in their permanent possession, including the rights that consumers have with respect to copies of copyrighted works.

However, because of the potential negative implications on their profits, software companies will fight any suggestion of this solution. This solution is therefore unlikely to be enacted, even though it is by far the simplest solution.

B. Reasonable EULA Terms

The second possible solution, and the more likely solution, is for courts to enforce EULAs only when they are fair, or at least comprehensible for the target audience of the software. This would require some modest changes in the common clickwrap delivery method. EULAs that place consumers in a position where consumers understand the rights they have and what they can do with those rights achieves the same goal as outright selling a copy of software to consumers. This also allows the software industry to exert the additional control that the industry desires over the software once it is in the consumer's possession.

The current lack of clarity in EULAs is highlighted in the Blizzard World of Warcraft EULA, which clearly states that a used box containing software can be given to another person after all software has been uninstalled and removed from the previous computer and a letter has been sent to Blizzard stating that the previous holder renounces all right to the software.168 However, according to the “Terms of Use,” the associated online account cannot be given to another person.169 These contradictory terms are buried within nearly 10,000 words of text across two separate agreements.

A standard of length and readability for EULA agreements that consumers would be likely to understand would be no longer than several pages, with no terms buried in a maze of fine print. Luckily, courts already have a tool for determining the reasonability of contracts. Courts must apply the standard unconscionability doctrines to EULAs, as the court did in Bragg.170 Typically, conscionable contracts would be one half page171 or one page172 with no hidden terms or mazes of fine print.173

168. See World of Warcraft End User License Agreement, supra note 81.
169. See World of Warcraft Terms of Use, supra note 81.
171. See, e.g., Adler v. Fred Lind Manor, 103 P.3d 773, 784 (Wash. 2004) (indicating that half a page with no "maze of fine print" weighs against procedural unconscionability).
The software industry's continued use of the EULA is evidence of the industry's reluctance to let licensing die out as a method of copyright protection. If courts begin striking down EULAs, in whole or in part, the inevitable response of the software industry will be to slowly reduce the complexity of EULAs until an agreement is upheld by the courts. Newly upheld EULAs would become the industry standard unless publishers find that it is less beneficial than standard sale of ownership of a copy to the user.

VI. CONCLUSION

This paper has examined the End User License Agreement as it applies, or should apply, to the typical individual software user. While many courts have abandoned fundamental contract principles in favor of wide-angle approaches that examine the circumstances of transactions, traditional defenses of contract formation and unconscionability may be the solution. In the absence of much needed legislative action, courts must stop providing software companies special treatment, and begin judging EULAs as contracts.

172. See, e.g., Zuver v. Airtouch Commc'ns, Inc., 103 P.3d 753, 760-61 (Wash. 2004) (upholding one page long with no "maze of fine print").
173. See generally Lively, supra note 5, at 357-69 (discussing the unconscionability doctrine when applied to the Windows Vista EULA under Washington law).
174. Software publishers, as advantaged sellers, will always adjust the terms of the EULA so as to receive the maximum benefit possible. See Livingston, supra note 55, at 601 ("[O]pportunism is a basic assumption of human behavior in the calculation of contracting transactions costs.").