

# Forcing Players to Walk the Plank: Why End User License Agreements Improperly Control Players' Rights Regarding Microtransactions in Video Games

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# NOTES

## FORCING PLAYERS TO WALK THE PLANK: WHY END USER LICENSE AGREEMENTS IMPROPERLY CONTROL PLAYERS' RIGHTS REGARDING MICROTRANSACTIONS IN VIDEO GAMES

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## INTRODUCTION

As of January 2014, around sixty-seven million people played the popular online game League of Legends on a monthly basis.<sup>1</sup> League of Legends is a free-to-play online game that falls into the genre of “Multiplayer Online Battle Arena” (MOBA).<sup>2</sup> MOBAs generally consist of two teams of players where each player controls a character and various computer-controlled units that fight alongside the players to destroy the opposing team’s base or main structure.<sup>3</sup> A team wins once the opposing side’s base has been destroyed.<sup>4</sup> In League of Legends, players control characters called “champions” in two opposing teams consisting of five players each.<sup>5</sup> Players can pick from a variety of different champions to play in a League of Legends match.<sup>6</sup> Players can also customize these champions’ appearances with purchasable vanity items called “skins.”<sup>7</sup> Following the common MOBA layout,<sup>8</sup> the two opposing teams battle in a match where

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1. See Paul Tassi, *Riot’s ‘League of Legends’ Reveals Astonishing 27 Million Daily Players, 67 Million Monthly*, FORBES (Jan. 27, 2014, 4:24 PM), <http://www.forbes.com/sites/insert-coin/2014/01/27/riots-league-of-legends-reveals-astonishing-27-million-daily-players-67-million-monthly/> [<https://perma.cc/Y4GB-QGSP>].

2. See *Play for Free*, LEAGUE OF LEGENDS, <https://signup.leagueoflegends.com/en/overview> [<https://perma.cc/SYQ9-9626>]. There is no formal definition for MOBA, but the term is understood as referring to a type of game “in which a player controls a single character in one of two teams [and] [t]he objective is to destroy the opposing team’s main structure with the assistance of periodically spawned computer-controlled units that march forward along set paths.” See *Multiplayer Online Battle Arena*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Multiplayer\\_online\\_battle\\_arena](https://en.wikipedia.org/wiki/Multiplayer_online_battle_arena) [<https://perma.cc/YC2W-573H>] (last modified Jan. 16, 2017); see also DrFish, Comment to *What Does MOBA Really Mean and What Characterizes Games That Belong to That Genre?*, ARCADE (May 30, 2011, 4:16 PM), <http://gaming.stackexchange.com/questions/23572/what-does-moba-really-mean-and-what-characterizes-games-that-belong-to-that-genr> [<https://perma.cc/9TGM-39AQ>].

3. See *supra* note 2.

4. See *supra* note 2.

5. See *Game Info*, LEAGUE OF LEGENDS, <http://gameinfo.na.leagueoflegends.com/en/game-info/> [<https://perma.cc/7LRW-EEMQ>]; *Welcome to League of Legends*, LEAGUE OF LEGENDS, <http://na.leagueoflegends.com/en/featured/new-player-guide#/> [<https://perma.cc/VD2Y-34YD>] [hereinafter *Welcome to LoL*] (referring to the video on the first page for information about how to play the game, the mechanics of the game, and how the generic MOBA setup operates specifically in League of Legends).

6. See *Game Info*, *supra* note 5.

7. See *Champion Skin*, LEAGUE OF LEGENDS: WIKI, [http://leagueoflegends.wikia.com/wiki/Champion\\_skin](http://leagueoflegends.wikia.com/wiki/Champion_skin) [<https://perma.cc/XY3Y-W3JQ>].

8. See *supra* note 2.

the objective is to destroy the opposing team's base, which is called the "nexus." A typical match is around forty-five minutes long,<sup>9</sup> and although the objective always remains the same—destroy the opposing team's nexus—each match is unique in that a player can always choose a different champion, be teamed with different players and different champion combinations, and make new decisions regarding how to play their specific champion in each match.<sup>10</sup>

Although League of Legends purports to be a free-to-play game<sup>11</sup>—and it is quite possible to play League of Legends without ever spending a penny—the option to make microtransactions within the game exists.<sup>12</sup> A microtransaction is the ability to make a purchase within a game.<sup>13</sup> Generally, a microtransaction provides a player with the opportunity to purchase extra content created for a game after the game has already been released.<sup>14</sup> In League of Legends, microtransactions allow players to purchase a type of currency called "Riot Points."<sup>15</sup> Players can use Riot Points to buy virtually everything in the store,<sup>16</sup> and, in fact, there are some

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9. See Hamitay, Comment to *Average Game Length in Dota 2 vs. LoL*, GAME SPOT (Apr. 2012), <http://www.gamespot.com/forums/pc-mac-linux-society-1000004/average-game-length-in-dota-2-vs-lol-29113042/> [<https://perma.cc/HB3J-QBHC>].

10. See *League of Legends*, KEENGAMER, <http://www.keengamer.com/Game/league-of-legends/detail> [<https://perma.cc/P3LM-XYSU>]; Chipteck, *New Champion Select*, RIOT GAMES, <https://support.riotgames.com/hc/en-us/articles/207267266-New-Champion-Select> [<https://perma.cc/7BUE-3P6N>] (last updated Feb. 8, 2017, 12:39 PM).

11. See *Play for Free*, *supra* note 2.

12. See *How to Unlock a Champion*, LEAGUE OF LEGENDS, <http://na.leagueoflegends.com/en/featured/new-player-guide?source=http://na.leagueoflegends.com/en/site/guide/#/leveling-up/future-milestones/unlock-a-champion> [<https://perma.cc/84TQ-SDKX>].

13. See Dave Smith, *I Miss the Days when I Only Had to Pay Once for a Video Game*, BUS. INSIDER (Apr. 22, 2015, 12:29 PM), <http://www.businessinsider.com/microtransactions-are-ruining-video-games-2015-4> [<https://perma.cc/J4HM-7D6M>].

14. See *id.*

15. See *How to Unlock a Champion*, *supra* note 12.

16. Content called "runes," an item that can boost the power and abilities of a champion, are the only piece of in-game content that cannot be purchased with Riot Points. See *Runes*, LEAGUE OF LEGENDS, <http://gameinfo.na.leagueoflegends.com/en/game-info/summoners/runes/> [<https://perma.cc/8KJ6-97QN>]. Players can only purchase runes with accumulated in-game currency referred to as "Influence Points." See *How to Unlock a Champion*, *supra* note 12; see also *Future Milestones—Now What?*, LEAGUE OF LEGENDS, <http://na.leagueoflegends.com/en/featured/new-player-guide?source=http://na.leagueoflegends.com/en/site/guide/#/leveling-up/future-milestones> [<https://perma.cc/D739-UANJ>].

pieces of content that can *only* be purchased with Riot Points.<sup>17</sup> One of the most important microtransactions players make in League of Legends is purchasing champions—players must have a champion in order to play the game.<sup>18</sup> Players can purchase champions with real money via Riot Points or with an in-game currency called “Influence Points,” which players earn through actually playing the game.<sup>19</sup> Although Influence Points can buy champions—thus potentially eliminating the need to ever purchase Riot Points—the amount of time it would take to earn enough Influence Points to actually buy a champion is often so high that most players would rather just spend real money to obtain their desired champion.<sup>20</sup> Also available for purchase are the purely cosmetic skins, which change the appearance of the champions—usually by changing the champion’s clothing—but offer no advantage to the way the game is actually played.<sup>21</sup> Players, however, can only purchase skins with real money via Riot Points.<sup>22</sup> There are hundreds of items and champions that players can purchase through microtransactions, but in the world of online gaming, these purchases do not give full property rights to a player. Instead, players are merely purchasing licenses to use the content, and game developers employ end user license agreements (EULAs) to ensure that players will only maintain a license interest in the content purchased through microtransactions.<sup>23</sup> Few League of Legends players probably understand that when they make a microtransaction they only receive a license

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17. See Riot Games to Bring Highly Anticipated League of Legends to the Community for Free, RIOT GAMES (July 13, 2009) [hereinafter *LoL for Free*], [http://www.riotgames.com/sites/default/files/uploads/090713\\_NEWS\\_lol\\_lolforfree.pdf](http://www.riotgames.com/sites/default/files/uploads/090713_NEWS_lol_lolforfree.pdf) [https://perma.cc/8J7C-RMC9].

18. See *id.*

19. See *How to Unlock a Champion*, *supra* note 12.

20. One player calculated that it would take twenty-two months playing ten games a day (roughly five hours of play time each day) to unlock every champion that was available in 2012. Subdue, Comment to *Collecting All of the Champions?*, LEAGUE OF LEGENDS: F. ARCHIVE (Apr. 26, 2012), <http://forums.na.leagueoflegends.com/board/showthread.php?t=2063230> [https://perma.cc/923A-Y3UA]. Since 2012, Riot has added more champions, but the player’s analysis and math still make a strong argument highlighting how much easier it is for someone to simply purchase the champions with real money than to spend nearly two years slowly unlocking each champion one-by-one. See *id.*

21. See *Champion Skin*, *supra* note 7.

22. See *LoL for Free*, *supra* note 17.

23. See Steve Fishman, *Why Use a License to Sell Software?*, NOLO.COM, <http://www.nolo.com/legal-encyclopedia/why-use-license-sell-software.html-0> [https://perma.cc/2RDZ-EWEH] (indicating that the majority of software only grants a license to the purchaser).

interest, but whether a player understands this distinction was irrelevant until July 30, 2015, when Riot Games made the unprecedented decision to remove a champion and all of its accompanying vanity items from the game.<sup>24</sup>

On July 21, 2015, Riot released an event called “Bilgewater: Burning Tides.”<sup>25</sup> An “event” is extra, time-sensitive content that players can choose to play or not play.<sup>26</sup> Players who choose not to participate in an event are not penalized in any way.<sup>27</sup> The Burning Tides event followed already-established and playable characters in the League of Legends universe.<sup>28</sup> Riot released the Burning Tides event in story acts in which players essentially picked a side and followed their chosen champion’s exploits—through written narrative and special matches—to earn in-game rewards.<sup>29</sup> When Riot released Act III on July 30, 2015, players learned through the written narrative on a companion website outside of the regular game that the champion Gangplank was dead.<sup>30</sup> In order to keep the game consistent with the event’s storyline, Riot removed Gangplank from the game completely, including from those players who did not participate in the event.<sup>31</sup>

Many players took to the League of Legends forums to discuss their dissatisfaction with Riot’s removal of the character.<sup>32</sup> One

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24. See Steven Bogos, *League of Legends’ Gangplank Has Been Removed from Play*, ESCAPIST (July 30, 2015, 5:18 AM), <http://www.escapistmagazine.com/news/view/141819-League-of-Legends-Champion-Gangplank-Removed-From-The-Game> [<https://perma.cc/6FV5-BJSF>].

25. See Moobeat, *Bilgewater: Burning Tides—Act One*, SURRENDER AT 20 (July 21, 2015, 7:51 PM), <http://www.surrenderat20.net/2015/07/bilgewater-burning-tides-act-one.html> [<https://perma.cc/4PF7-K8ZP>].

26. See *Easter Eggs/Events*, LEAGUE OF LEGENDS: WIKI, [http://leagueoflegends.wikia.com/wiki/Easter\\_eggs/Events](http://leagueoflegends.wikia.com/wiki/Easter_eggs/Events) [<https://perma.cc/AAF2-N3VN>] (“Events ... are extraneous goals meant to deliver lore to players in more exciting ways than the Journal of Justice or champion backgrounds.”).

27. There is no penalty for not participating because the point of the event is to provide lore or background information about the game. See *id.*

28. See Moobeat, *supra* note 25.

29. See *id.*

30. See *Act Three—Part Three: Fire and Rain, a Conclusion, Turn for the Worse*, LEAGUE OF LEGENDS, <http://na.leagueoflegends.com/en/site/bilgewater/#story-3> [<https://perma.cc/38EL-5GAL>].

31. See Bogos, *supra* note 24.

32. See Pearl Millet, Nefas & Victoryensured, Comments to *Act 3: Questions About the Bilgewater Event? We Got You Covered! [COMPLETED]*, LEAGUE OF LEGENDS BOARDS HOME: HELP & SUPPORT, <http://boards.na.leagueoflegends.com/en/c/help-support/tXjcpYAU-act-2->

player even indicated that he had just purchased a skin for Gangplank two days prior to Gangplank's removal, and that had he known the champion would no longer be available for play, he would not have spent the money on the champion.<sup>33</sup> When some players asked for refunds for either the champion himself, or the various skins—that could only be purchased with real money via Riot Points—Riot responded that there would be no refunds.<sup>34</sup> However, on August 3, Gangplank was returned to the game when players learned in the Epilogue that he was never actually dead.<sup>35</sup>

Although the champion Gangplank was removed from play, and really the entire game server, only for about a week, the Burning Tides event elicited a strong reaction from the player base.<sup>36</sup> For the first time in League of Legends, an item that players had purchased was taken from gameplay without a refund.<sup>37</sup> At least on League of Legends forums, no one seemed to question Riot's legal right to remove the champion without compensation,<sup>38</sup> but the question this Note seeks to answer is whether Riot *should* have the legal right to unilaterally remove content purchased with real money through microtransactions. Although the issue in League of Legends' case is moot because Gangplank ultimately returned to gameplay, the Burning Tides event helps demonstrate the underlying issue—that

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questions-about-the-bilgewater-event-we-got-you-covered [https://perma.cc/E8KZ-44HS] [hereinafter *Questions About the Bilgewater Event*] (last updated Aug. 24, 2015). Various users indicated their dismay at the situation, but the comments posted by users Pearl Millet, Nefas, and Victoryensured are quite telling about how the players generally do not understand why a champion would be removed permanently for nongame play reasons. *Id.*

33. *See id.* (referring to the comment by user Pearl Millet: "why did you remove GP from the game permanently? i literally just bought a skin for him two days ago and now i cannot use it. now what you are telling me is that he is no longer going to be in the game? *rolls eyes* you may have lost me as a customer").

34. *See* Bogos, *supra* note 24.

35. *See Epilogue: Chaos, The Ruined Man, Purpose*, LEAGUE OF LEGENDS, <http://na.leagueoflegends.com/en/site/bilgewater/#story-4> [https://perma.cc/W6FS-E4VS]; Kris Wouk, *'Dead' League of Legends Champion Gangplank Returns, Players Get a Free Skin*, DIGITAL TRENDS (Aug. 3, 2015, 5:39 AM), <http://www.digitaltrends.com/gaming/league-of-legends-gangplank-returns/> [https://perma.cc/AF6C-K8N3].

36. *See Questions About the Bilgewater Event*, *supra* note 32 (referring to comments by Pearl Millet, Nefas, and Victoryensured for discussion regarding the removal of Gangplank).

37. *See id.* (referring to the comment by user Hexwater indicating that there are no refunds and that Gangplank has been completely removed from the game, not just gameplay, as he is even unavailable for purchase).

38. *See id.* (referring to comments by users Hexwater and Pearl Millet, indicating that users seemed to only be expressing their annoyance).

game developer companies have complete, unilateral control over access to content purchased through microtransactions.

Part I of this Note answers the question of whether Riot had the legal right to remove the champion in the first place. This Part looks into the history of EULAs, detailing how they have been applied in software cases generally over the past decade and identifying how a court would likely rule if a disgruntled player during the Burning Tides event had tried to bring action against Riot for the removal of Gangplank.

The following two Parts address whether Riot *should* have the right to unilaterally remove in-game content, like Gangplank. This Note argues that Riot should *not* have this unilateral power, at least in League of Legends' unique and specific instance. This Note acknowledges that Riot maintains ownership of all of its content, whether the content was purchased with real money or in-game currency. The central argument of this Note regarding the balance of game developer and player rights relies not on intellectual property theories of authorship or ownership, but instead on contract theories. Part II specifically focuses on whether average League of Legends players, based on the EULA, could predict that they might lose the in-game content they purchased through microtransactions. The underlying argument that this Part considers is that no player would reasonably expect to lose access to content purchased through microtransactions. Therefore, Part II begins the discussion of the issue with regards to the common-law reasonable expectations doctrine. This Part starts with an explanation of how the doctrine developed, then it discusses how the doctrine has been used generally in the past, and finally it concludes with why the doctrine should be applied in cases involving microtransactions, especially in the case of League of Legends.

Part III then analyzes the player's rights in microtransaction content through the use of reliance theory, specifically following the principles of promissory estoppel. This Part operates as an alternative theory to the reasonable expectations doctrine in how to balance a player's rights with the rights of the game developer. Although both theories complement each other, this Note argues that either theory could be used by a court when striking the balance between the rights of a creator (the game developer) and the rights of a



consumer (the player). Following a similar structure as Part II, Part III explains the development of reliance theory and what kinds of cases it has been applied to in the past and then concludes with an argument as to why reliance damages could provide an adequate remedy regarding purchases via microtransactions.

Through the exploration of the rationale behind the reasonable expectations doctrine and reliance theory, this Note ultimately concludes that under either theory EULAs should *not* be the end of an analysis where a player has lost the ability to use content purchased through microtransactions. Rather, this Note suggests that Riot's intellectual property interests in the in-game assets—the items in the game such as champions, skins, and so forth<sup>39</sup>—of League of Legends must be balanced against the reasonable expectations of the players, or should be balanced against a player's reliance on the implied promises underlying the ideas of consumer protection. In this case, that would be that a player would have access to purchased content.

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39. See Oussama Bouanani, *How to Fund Your Games by Creating and Selling Game Assets*, GAMEDEVELOPMENT (July 24, 2015), <https://gamedevelopment.tutsplus.com/articles/how-to-fund-your-games-by-creating-and-selling-game-assets--cms-24380> [<https://perma.cc/8QKS-BXJ7>] (defining game assets as “everything that can go into a game, including 3D models, sprites, sound effects, music, code snippets and modules, and even complete projects that can be used by a game engine”).

## I. THE CURRENT LEGAL FRAMEWORK: END USER LICENSE AGREEMENTS

League of Legends, like any online game, is essentially just a piece of software. And similar to virtually all software—whether it is entertainment, work, or task-related—League of Legends comes equipped with an EULA that a player must assent to before he or she can even install the game on his or her computer.<sup>40</sup> This Part explores the various EULA formats and details the legal history of EULA enforceability before commenting on how the League of Legends EULA would withstand judicial scrutiny in the face of the Burning Tides event.

### A. *EULA History of Enforceability*

An EULA simply states the terms of use between the manufacturer and the user.<sup>41</sup> The vast majority of EULAs come in the form of “click-wrap” agreements, where a list of boxes appears on the user’s screen with a button that says “Next,” which the user will continue to click until finally the button changes to “I accept” or “I agree.”<sup>42</sup> The provisions in an EULA cover a range of topics, from explicitly giving only a license to mandating arbitration in the event of a dispute.<sup>43</sup> But tucked inside the pages upon pages of dull legalese, manufacturers and developers have included clauses that could expose users to potentially unforeseen liability.<sup>44</sup> Other developers have poked fun at the fact that no one reads EULAs, and

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40. See Fishman, *supra* note 23.

41. See Michael Terasaki, *Do End User License Agreements Bind Normal People?*, 41 W. ST. U. L. REV. 467, 468 (2014).

42. See Rebecca K. Lively, *Microsoft Windows Vista: The Beginning or the End of End-User License Agreements as We Know Them?*, 39 ST. MARY’S L.J. 339, 340-41 (2007).

43. See *id.* at 350-51, 350 n.69.

44. See Annalee Newitz, *Dangerous Terms: A User’s Guide to EULAs*, ELECTRONIC FRONTIER FOUND. (Feb. 17, 2005), <https://www.eff.org/wp/dangerous-terms-users-guide-eulas> [<https://perma.cc/52RP-46BV>] (listing examples of clauses that expose users to potentially unforeseen liability).

some have even cleverly included clauses awarding cash prizes for simply reading the clause buried in the EULA.<sup>45</sup>

Although a study found that maybe one or two people out of one thousand actually read the EULAs,<sup>46</sup> courts have continually upheld the validity of numerous EULAs over the past decade.<sup>47</sup> One of the first cases that enforced standard form contracts, like EULAs, was *ProCD, Inc. v. Zeidenberg*.<sup>48</sup> In that case, ProCD had compiled a telephone directory software that it then sold to clients for commercial and noncommercial uses.<sup>49</sup> ProCD had two different prices depending on which version the purchaser wanted to buy.<sup>50</sup> The noncommercial version of ProCD's product included an enclosed license with various restrictions.<sup>51</sup> ProCD included the license in the printed manual and the license appeared on the user's screen every time the user launched the program.<sup>52</sup> Although the restrictions did

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45. PC Pitstop's EULA offered one thousand dollars if a user contacted them saying he or she read the clause in the EULA that offered one thousand dollars. See Chris Hoffman, *10 Ridiculous EULA Clauses that You May Have Already Agreed To*, MAKE USE OF (Apr. 23, 2012), <http://www.makeuseof.com/tag/10-ridiculous-eula-clauses-agreed/> [https://perma.cc/2PT2-RZ3L].

46. See Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 19-22, 21 tbl.4 (2014).

47. Lively, *supra* note 42, at 350.

48. See 86 F.3d 1447 (7th Cir. 1996). *ProCD* is considered a "shrink-wrap" case. See EMERGING TECHNOLOGIES AND THE LAW § 4.06 n.5, LexisNexis (database updated 2015).

Shrink-wrap licenses are typically documents found within off-the-shelf software packages, printed on sealed envelopes containing the product's media. These documents usually provide that the purchaser of the package indicates assent of the terms of the license by opening the package, by using the application, or by failing to return the application to its point of sale within a specified time. *Id.* § 4.06 (footnote omitted). When *ProCD* was decided in 1996, the term "click-wrap" had not been established, but *ProCD* can be considered to have initiated the judicial analysis of "click-wrap" cases nonetheless because on startup users had to check a series of boxes agreeing to the license. See *ProCD*, 86 F.3d at 1450, 1452 ("ProCD proposed a contract that a buyer would accept by using the software after having an opportunity to read the license at leisure. This Zeidenberg did. He had no choice, because the software splashed the license on the screen and would not let him proceed without indicating acceptance."); see also *Specht v. Netscape Comm'ns Corp.*, 150 F. Supp. 2d 585, 593-94, 594 n.12 (S.D.N.Y. 2001) ("A click-wrap license presents the user with a message on his or her computer screen, requiring that the user manifest his or her assent to the terms of the license agreement by clicking on an icon."), *aff'd*, 306 F.3d 17 (2d Cir. 2002); Lively, *supra* note 42, at 350 ("*ProCD* has been widely followed and its principles have been extended to apply to clickwrap agreements as well.").

49. *ProCD*, 86 F.3d at 1449.

50. See *id.*

51. See *id.* at 1450.

52. See *id.*

not appear on the outside of the box—meaning the user could not read the terms prior to purchasing the product—the Seventh Circuit held that under the Uniform Commercial Code § 2-204(1),

“A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.” A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance.<sup>53</sup>

In other words, as long as a purchaser or user merely had the opportunity to *review* the terms, the license is completely valid, regardless of whether the user *actually* read the terms.<sup>54</sup>

Although there was a trend to find EULAs conscionable as long as the purchaser had an opportunity to read the EULA,<sup>55</sup> in 2001 the District Court for the Southern District of New York placed some limitations on the enforceability of click-wrap EULAs in situations where the end user’s assent to the agreement was questionable. In *Specht v. Netscape Communications Corp.*, Netscape offered the ability to download software programs over the Internet.<sup>56</sup> In order to download a program, the user clicked a tinted box labeled “download.”<sup>57</sup> Unlike the defendants in *ProCD* and *M.A. Mortenson Co. v. Timberline Software Corp.*, Netscape’s only mention of the EULA was in text at the bottom of the next screen inviting—not requiring—users to view the EULA.<sup>58</sup> Netscape did not require users to read or view the EULA before beginning the download.<sup>59</sup>

The court held that the users could only be bound by the EULA if they agreed to it, and in this case, the users never agreed to the

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53. *Id.* at 1452 (quoting U.C.C. § 2-204(1) (AM. LAW INST. & UNIF. LAW COMM’N 1977)).

54. *See id.* at 1452-53; *see also* *M.A. Mortenson Co. v. Timberline Software Corp.*, 998 P.2d 305, 313 (Wash. 2000) (en banc) (following the decision in *ProCD* and upholding EULAs as long as there was an *opportunity* to read, understand, and evaluate the EULA).

55. *See, e.g., M.A. Mortenson Co.*, 998 P.2d at 315-16.

56. 150 F. Supp. 2d 585, 587 (S.D.N.Y. 2001), *aff’d*, 306 F.3d 17 (2d Cir. 2002).

57. *See id.* at 588.

58. *See id.*

59. *See id.*

EULA.<sup>60</sup> In order for the EULA to be binding, Netscape needed to ensure that the users assented to the agreement by preventing the ability to download the software until users had read the EULA.<sup>61</sup> The court found that the users did not assent to the agreement because the users could click “download” without ever being required to read the EULA.<sup>62</sup> *Specht*’s holding clarified that EULAs cannot be attenuated;<sup>63</sup> checking the “I agree” box is extremely important in determining user assent to EULAs.

By 2007 the courts had essentially laid down all of the groundwork required to enforce EULAs—by click-wrap, shrink-wrap, or otherwise. Summarizing the issue in *Feldman v. Google, Inc.*, the District Court for the Eastern District of Pennsylvania concluded that, when “determin[ing] whether a clickwrap agreement is enforceable,” courts must determine whether the user “had reasonable notice of and manifested assent to the clickwrap agreement.”<sup>64</sup> Additionally, “failure to read an enforceable clickwrap agreement ... will not excuse compliance with its terms.”<sup>65</sup> Because the text of the EULA at issue in *Feldman* was displayed in a scrollable text box, a preamble explicitly stated in bold type to read the terms and conditions and to indicate assent,<sup>66</sup> and because the user could not continue with the program without checking that he or she assented—the user would be returned to the webpage if he or she did not check the check box—the court held that there was reasonable notice and mutual assent.<sup>67</sup> Therefore, the agreement was enforceable.<sup>68</sup> There has not been much change in the analysis of the enforceability of EULAs, and as late as 2013, courts were still upholding EULAs as valid and binding contracts.<sup>69</sup>

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60. *See id.* at 591, 596.

61. *See id.* at 595-96.

62. *See id.*

63. *See id.*

64. 513 F. Supp. 2d 229, 236 (E.D. Pa. 2007).

65. *Id.*

66. *See id.* at 237-38.

67. *See id.*

68. *See id.* at 238.

69. *See, e.g., Rahimi v. Nintendo of Am., Inc.*, 936 F. Supp. 2d 1141, 1142, 1144 (N.D. Cal. 2013) (finding that a purchaser of a video game console agreed to the terms of an EULA that appeared on his TV screen on the initial start of the console and would not allow the purchaser to use the console until checking the “I agree” box).

By following the cases from 1996 to 2013,<sup>70</sup> it becomes clear that courts are more than willing to enforce EULAs, especially when the program cannot continue unless users check a box indicating their assent to the agreement.<sup>71</sup> The only time when courts have not enforced an EULA is when the agreement is not clearly visible and the user can easily access and use the program without indicating assent to the EULA's terms.<sup>72</sup>

*B. Enforceability of the League of Legends EULA Based on Current Case Law*

In order for a court to find that the League of Legends EULA is enforceable, the court must determine (1) that League of Legends players had “reasonable notice” of the EULA; and (2) that players “manifested assent to the clickwrap agreement.”<sup>73</sup> In order to play League of Legends, players must complete two specific tasks—they must first create an account with League of Legends and then they must download the game.<sup>74</sup>

When a player begins the process to make a new account, he or she must select a username and password.<sup>75</sup> Directly beneath the username and password boxes there is a check box that the player must click stating, “I agree to the Terms of Use and Privacy Policy.”<sup>76</sup> Both documents are hyperlinked, and if clicked, will take the user to a separate webpage displaying the entire corresponding document.<sup>77</sup> If the player tries to select the “Play For Free” button before checking the assent box, an error will appear stating, “This field is required” in red text.<sup>78</sup>

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70. For a comprehensive list of how various states have dealt with the enforceability of clickwrap agreements, see generally Kevin W. Grierson, Annotation, *Enforceability of “Clickwrap” or “Shrinkwrap” Agreements Common in Computer Software, Hardware, and Internet Transactions*, 106 A.L.R.5th 309, 320-35 (2003).

71. See *Rahimi*, 936 F. Supp. 2d at 1142; *Feldman*, 513 F. Supp. 2d at 237-38.

72. See *Specht v. Netscape Commc'ns Corp.*, 150 F. Supp. 2d 585, 595-96 (S.D.N.Y. 2001), *aff'd*, 306 F.3d 17 (2d Cir. 2002).

73. See *Feldman*, 513 F. Supp. 2d at 236.

74. See *Sign Up*, LEAGUE OF LEGENDS, [https://signup.na.leagueoflegends.com/en/signup/index?realm\\_key=na](https://signup.na.leagueoflegends.com/en/signup/index?realm_key=na) [<https://perma.cc/M3X9-SS6A>].

75. See *id.*

76. See *id.*

77. See *id.*

78. See *id.*

Furthermore, when a player attempts to download the game and launches the installer application, the first screen that appears is the entire text of the terms of use in a scrollable box where two options are clearly visible at all times: “I accept the terms in the License Agreement” and “I do not accept the terms in the License Agreement.”<sup>79</sup> The option to continue on to the next part of the setup process prohibits the player from leaving the terms of use box until the player has checked the “I accept” box.<sup>80</sup>

In *League of Legends*, a court would more than likely find that a player both had “reasonable notice” and assented to Riot’s EULA<sup>81</sup> because not only does Riot prevent a player from creating an account without agreeing to the EULA, but Riot also requires players to agree to the EULA a second time before downloading the game to his or her computer.<sup>82</sup> Unlike *Specht*, where a user could download the program without checking a box indicating that he or she accepted the EULA,<sup>83</sup> Riot refuses to permit players to continue in both the creation of an account and the download of the actual game without first checking the “I accept” box.<sup>84</sup>

Therefore, attacking Riot’s EULA based on lack of assent or invalid agreement would be unsuccessful. Like the plaintiff in *ProCD*,<sup>85</sup> a *League of Legends* player could try to argue that the EULA was unconscionable. However, the third paragraph of the EULA—in a readable font size and style—clearly states, “Please read the terms of this Agreement carefully. By clicking the ‘Accept’ button below, or by using any of the Riot Services, you agree that

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79. Installation application for *League of Legends Setup*, LEAGUE OF LEGENDS [hereinafter *League of Legends Installer*], <https://perma.cc/3WC3-UB7H>.

80. *See id.*

81. On May 31, 2016, Riot edited its End User License Agreement. It now titles itself simply as “Terms of Use” and refers to itself as the “Agreement” in the document. *See Terms of Use (NA)*, LEAGUE OF LEGENDS, <http://na.leagueoflegends.com/legal/termsofuse#limited-license> [<https://perma.cc/3ZUT-S2YJ>] (last modified May 31, 2016). Not explicitly calling itself an “End User License Agreement” does not prohibit the document from functioning and being an EULA. Moreover, the installer application does, in fact, refer to the Terms of Use as a “License Agreement.” *See League of Legends Installer*, *supra* note 79 and accompanying text. For clarity of this Note, I will refer to the Terms of Use—the “Agreement”—as an EULA.

82. *See League of Legends Installer*, *supra* note 79; *Sign Up*, *supra* note 74.

83. *See Specht v. Netscape Commc’ns Corp.*, 150 F. Supp. 2d 585, 588 (S.D.N.Y. 2001), *aff’d*, 306 F.3d 17 (2d Cir. 2002).

84. *See League of Legends Installer*, *supra* note 79; *Sign Up*, *supra* note 74.

85. *See ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996).

this Agreement is enforceable like any written contract signed by you.”<sup>86</sup> In order to be unconscionable, the terms must be hidden,<sup>87</sup> and here—just as in *ProCD*—the terms are quite clear.

Because the League of Legends EULA is not procedurally unconscionable,<sup>88</sup> and because players are required to give assent to the EULA twice before ever being able to take a step onto the “Summoner’s Rift,”<sup>89</sup> a court would probably find that the EULA is enforceable.<sup>90</sup> The EULA and the terms of use—which users acknowledge they have read and agree to when agreeing to the EULA—both contain provisions that look like they would protect Riot from liability when Riot decided to remove the champion Gangplank during the Burning Tides event.<sup>91</sup> The EULA states:

8.2. Will the Riot Services stay the same? (No. Like Kha’zix, they will evolve.) ... [Y]ou agree that we may change, modify, update, suspend, “nerf,” or restrict your access to any features or parts of the Riot Services, including Virtual Goods,<sup>92</sup> and may require that you download and install updates to any software required to support the Riot Services, at any time without notice or liability to you.<sup>93</sup>

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86. See *Terms of Use (NA)*, *supra* note 81.

87. *ProCD*, 86 F.3d at 1453.

88. “[U]nconscionability 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.” *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000) (quoting *A&M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 121-22 (1982)), *abrogated by* *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). “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.” *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 145 (1997). At issue with League of Legends would be the procedural element of unconscionability as players are probably unaware of exactly what their rights are. However, because it would be a very tough argument to claim that a license to use the in-game assets is “overly harsh,” and therefore substantively unconscionable, an unconscionability argument would most likely fail.

89. The “Summoner’s Rift” is a game mode for League of Legends and is the classic name of the map used in a League of Legends match. See *Game Modes*, LEAGUE OF LEGENDS, <http://gameinfo.na.leagueoflegends.com/en/game-info/game-modes/> [<https://perma.cc/B8SZ-VNHA>]. The Summoner’s Rift “remains the battleground of choice for the majority of players. Two teams of five champions battle across three lanes and an expansive jungle.” *Id.*

90. *Cf. Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 236 (E.D. Pa. 2007).

91. See *supra* notes 25-31 and accompanying text.

92. The EULA defines “Virtual Goods” as unlockable items including: champions, skins, ward skins, summoner icons, runes, and boosts. See *Terms of Use (NA)*, *supra* note 81.

93. *Id.*



And specifically addressing the idea of a player's rights to virtual goods, the EULA states:

4.3. Do I "own" the Virtual Goods I unlock? (No. What you "unlock" is not the virtual good itself, but rather, a qualified right to access it in the Game.) You have no ownership or other property interest in any of the Virtual Goods you unlock, regardless of whether you acquired access to those Virtual Goods using Riot Points, Influence Points or Hextech Crafting.<sup>94</sup>

Both provisions indicate that Riot owes no liability to a player for removing or changing game assets, such as champions, without notice to the player.<sup>95</sup> Because the EULA would probably be considered an enforceable click-wrap contract, these provisions would be completely valid, and players would have no right to a refund or remedy for the removal of Gangplank. However, *should* these contracts be enforceable? Although not reading an agreement is not grounds for claiming nonassent to the EULA,<sup>96</sup> this Note argues that in cases where players engage in microtransactions courts should also consider—as part of their liability analysis—the reasonable expectations doctrine or reliance theory when balancing the rights of the player versus the rights of the game developer.

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94. *Id.* Riot in fact takes this issue so seriously that it even restates the idea again in bold type and in all caps:

4.4. Once again: I don't *own* these Virtual Goods? ("No!" shouted all the lawyers.) NOTWITHSTANDING ANYTHING TO THE CONTRARY HEREIN, YOU ACKNOWLEDGE AND AGREE THAT YOU SHALL HAVE NO OWNERSHIP OR OTHER PROPERTY INTEREST IN YOUR ACCOUNT, AND THAT ALL RIGHTS IN AND TO YOUR ACCOUNT ARE AND SHALL FOREVER BE OWNED BY AND INURE TO THE BENEFIT OF RIOT GAMES. YOU FURTHER ACKNOWLEDGE AND AGREE THAT YOU HAVE NO CLAIM, RIGHT, TITLE, OWNERSHIP, OR OTHER PROPRIETARY INTEREST IN THE GAME CONTENT THAT YOU UNLOCK OR ACCUMULATE, REGARDLESS OF ANY CONSIDERATION OFFERED OR PAID IN EXCHANGE FOR RIOT POINTS OR VIRTUAL GOODS.

*Id.*

95. *See id.*

96. *See ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996).

## II. THE REASONABLE EXPECTATIONS DOCTRINE

This Part examines the reasonable expectations doctrine and how it relates to EULAs in video games. This Part first explores the legal history of the reasonable expectations doctrine, addressing how it developed, how it is currently being used today, how courts have applied it to cases involving video games generally, and how courts should apply it to the microtransactions involved in League of Legends. Because contract law varies from state to state, this Part will give a general overview of the reasonable expectations doctrine and will use the consensus approach<sup>97</sup> in its analysis and application of the doctrine to the League of Legends EULA.

### *A. History and Development of the Reasonable Expectations Doctrine*

The reasonable expectations doctrine is a rule originally developed for the interpretation of insurance contracts.<sup>98</sup> In 1970 Professor Robert Keeton defined the reasonable expectations principle as how “[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.”<sup>99</sup> In other words, a court can “refuse to enforce even clear and unambiguous contract terms that conflict with what the court determines to be the insured’s reasonable expectations.”<sup>100</sup> Courts have used this extrainterpretive tool because, generally, insurance contracts are contracts of adhesion.<sup>101</sup> The insureds often do not read the contract,

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97. See *infra* notes 128-31 and accompanying text for a discussion of the consensus approach.

98. See Laurie Kindel Fett, Note, *The Reasonable Expectations Doctrine: An Alternative to Bending and Stretching Traditional Tools of Contract Interpretation*, 18 WM. MITCHELL L. REV. 1113, 1117 & n.21 (1992).

99. Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970).

100. Stephen J. Ware, Comment, *A Critique of the Reasonable Expectations Doctrine*, 56 U. CHI. L. REV. 1461, 1469 (1989).

101. An adhesion contract is a contract “drafted unilaterally by the dominant party and then presented on a ‘take-it-or-leave-it’ basis to the weaker party who has no real opportunity to bargain about its terms.” RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 cmt. b (AM.

and unsophisticated parties—like insureds—need extra protection.<sup>102</sup>

One of the earliest cases to rely on the reasonable expectations principles was *Kievet v. Loyal Protective Life Insurance Co.*<sup>103</sup> *Kievet* involved an accident insurance policy.<sup>104</sup> The policy stated that it would not cover injuries from accidents that occur due to a disease.<sup>105</sup> The plaintiff, a healthy, forty-eight-year-old man, was accidentally hit over the eye with a wooden board, which caused him to have tremors on the right side of his body.<sup>106</sup> A doctor later diagnosed the plaintiff with having Parkinson's disease and determined that the disease became active after the accident.<sup>107</sup> Because of his diagnosis, the plaintiff's insurance company refused to send him payments, claiming that his disease was a contributing, disqualifying factor to his injury and disability.<sup>108</sup> The court reasoned that the plaintiff never contemplated the idea that a dormant infirmity would surface after an accident,<sup>109</sup> and that those who purchase insurance policies "are entitled to the broad measure of protection necessary to fulfill their reasonable expectations. They should not be subjected to technical encumbrances or to hidden pitfalls and their policies should be construed liberally in their favor ... 'to the full extent that any fair interpretation will allow.'"<sup>110</sup>

Five years later, the Supreme Court of California likewise determined that the court would "resolve uncertainties [in an insurance policy] in favor of the insured and interpret the policy provisions according to the layman's reasonable expectations."<sup>111</sup> The court

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LAW INST. 1988).

102. See Jeffrey W. Stempel, *Unmet Expectations: Undue Restriction of the Reasonable Expectations Approach and the Misleading Mythology of Judicial Role*, 5 CONN. INS. L.J. 181, 186 n.5 (1998).

103. 170 A.2d 22 (N.J. 1961).

104. See *id.* at 23-24.

105. See *id.* at 24.

106. See *id.*

107. See *id.* at 25.

108. See *id.*

109. See *id.* at 30.

110. *Id.* at 26 (quoting *Danek v. Hommer*, 100 A.2d 198, 202 (N.J. Super. Ct. App. Div. 1953), *aff'd*, 105 A.2d 677 (N.J. 1954) (per curiam)).

111. See *Gray v. Zurich Ins. Co.*, 419 P.2d 168, 174-75 (Cal. 1966) (en banc). In this case, the policy in contention was a comprehensive personal liability contract, which stated that the insurance company would defend the insured in "any suit against the insured alleging ... bodily injury." *Id.* at 173. The insurance company refused to defend the plaintiff because the

found the policy to be ambiguous, and concluded that “the insurer bore the obligation to defend because the policy led plaintiff reasonably to expect such defense.”<sup>112</sup>

In 1975 the Supreme Court of Iowa determined that, even when terms are clearly defined and unambiguous in the contract, if the insured was not aware of the definition, then the insured’s reasonable expectations of the contract should govern.<sup>113</sup> Because insureds do not often read standardized form contracts, the insured typically relies on conversations with insurance agents to understand and assent to the provisions in the contract.<sup>114</sup> The court determined that insureds do not assent to “unreasonable or indecent terms the seller may have on his form.”<sup>115</sup> Evidence showed that the plaintiff had not read the contract’s definition of a particular term—“burglary”—and that he had relied upon the conversation he had with the insurance agent to define that term.<sup>116</sup> Therefore, the court held that because “customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectation.”<sup>117</sup>

Ten years later, the Supreme Court of Minnesota expounded on the Supreme Court of Iowa’s decision by stating that ambiguity in a contract’s language—whether the agent informed the insured of important but obscure provisions, and whether particular provisions are generally known—is a factor to consider when applying the reasonable expectations doctrine.<sup>118</sup> Although the court reasoned that whether the insured knew about the terms of the contract is an important factor in the analysis, the reasonable expectations doctrine “does not automatically remove from the insured a responsibility to read the policy ... [but] recognize[s] that ... where

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plaintiff acted in self-defense and intentionally caused the injuries, which went against the policy’s exclusionary clause. *See id.* at 174.

112. *Id.* at 176.

113. *See* C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 177 (Iowa 1975).

114. *See id.* at 174.

115. *Id.* at 175.

116. *See id.* at 176-77.

117. *Id.* at 176 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 237 cmt. f (AM. LAW INST. 1981)).

118. *See* Atwater Creamery Co. v. W. Nat’l Mut. Ins. Co., 366 N.W.2d 271, 278 (Minn. 1985).

major exclusions are hidden in the definitions section, the insured should be held only to reasonable knowledge of the literal terms and conditions.”<sup>119</sup>

Because the reasonable expectations doctrine is based on state common law, its application and usage varies from jurisdiction to jurisdiction.<sup>120</sup> Pinpointing a majority view of the doctrine at this time is difficult.<sup>121</sup> Although Professor Keeton’s definition clearly indicates that reasonable expectations of the consumer should be considered even when there is “express language” in the contract indicating otherwise,<sup>122</sup> twenty-seven jurisdictions apply the reasonable expectations doctrine only when there is an ambiguity.<sup>123</sup> However, the application of the reasonable expectations doctrine only to cases of ambiguity is essentially an extension of the *contra proferentem* doctrine.<sup>124</sup> Making matters even more troublesome, many other jurisdictions have yet to indicate clearly their current position on the matter.<sup>125</sup> Only Hawaii and Alaska have been confirmed to still completely adhere to Professor Keeton’s classical definition of reasonable expectations that predominated the courts from the 1970s to the mid-1990s.<sup>126</sup>

What the majority approach for reasonable expectations is, or should be, goes beyond the scope of this Note.<sup>127</sup> In 2000, however,

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119. *Id.*

120. See David J. Seno, *The Doctrine of Reasonable Expectations in Insurance Law: What to Expect in Wisconsin*, 85 MARQ. L. REV. 859, 859-61 (2002).

121. See *id.* at 861.

122. See Keeton, *supra* note 99, at 967.

123. See Susan Randall, *Freedom of Contract in Insurance*, 14 CONN. INS. L.J. 107, 114-17 (2008).

124. See *id.* at 112, 114-17, 120-21 (indicating that twenty-seven jurisdictions have conflated “the construction of ambiguities against the insurer with doctrine of reasonable expectations”); see also Seno, *supra* note 120, at 859 (describing *contra proferentem* as a “traditional rule” that “constru[es] ambiguous policy language against the insurance company”).

125. See Randall, *supra* note 123, at 117-18; see also Peter Nash Swisher, *A Realistic Consensus Approach to the Insurance Law Doctrine of Reasonable Expectations*, 35 TORT & INS. L.J. 729, 776 (2000) (“[A] majority of states still have not expressly adopted, or expressly rejected, the Keeton doctrine of reasonable expectations, and apparently have chosen to ignore this jurisprudential brouhaha.”).

126. See Randall, *supra* note 123, at 111-12; see also Bd. of Regents of Univ. of Minn. v. Royal Ins. Co. of Am., 517 N.W.2d 888 (Minn. 1994) (departing from Professor Keeton’s definition and using reasonable expectations only in instances of ambiguity).

127. For more information regarding the debate of the reasonable expectations doctrine’s place in the law, see generally Randall, *supra* note 123, at 111-18; Stempel, *supra* note 102,

Professor Peter Swisher formulated what he calls the “consensus approach” to the reasonable expectations doctrine.<sup>128</sup> This approach:

provides a number of well-established contractual parameters for allowing judicial discretion, when justice and equity requires it, to recognize and honor the reasonable expectations of the parties to coverage in insurance contract disputes that are supplemental to—rather than at variance with—the terms of the parties’ insurance contract.<sup>129</sup>

Particularly important to the consensus approach, and to this Note’s argument, is how courts *should* interpret contracts of adhesion and assent to boilerplate language.<sup>130</sup> According to Professor Karl Llewellyn:

Instead of thinking about “assent” to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has not been read has no business to [undercut] the reasonable meaning of those dickered terms which constitute the dominant and only real expression of agreement.<sup>131</sup>

For the purposes of this Note, the consensus approach, as articulated in Swisher’s article, controls the analysis because it takes a middle-ground position between conflating reasonable expectations with *contra proferentem* and Professor Keeton’s classical approach.

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at 189-201; Swisher, *supra* note 125, at 732-35.

128. See Swisher, *supra* note 125, at 732.

129. *Id.* at 778.

130. See *id.* at 760-61.

131. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (1960).

*B. The Reasonable Expectations Doctrine Examined in Prior Literature Concerning Video Games*

Although the reasonable expectations doctrine originated in the context of insurance contracts, many courts have expanded the doctrine's scope to include "other standard form contracts as well."<sup>132</sup> In 2006, Michael Meehan analyzed the virtual property rights video game players have in massively multiplayer online (MMO) games.<sup>133</sup> Meehan looked at two forms of virtual property players could accumulate: (1) in-game items and currency, and (2) the player's game account.<sup>134</sup> Additionally, Meehan reasoned that the reasonable expectations of the players in regards to these property rights can differ depending on the status of the game at the moment.<sup>135</sup> If a game is continuing, a player in an MMO would reasonably expect to not be arbitrarily terminated from the game and to not have his or her virtual property arbitrarily destroyed.<sup>136</sup> However, if a game were to cease operations, then a player would reasonably expect to lose his or her account and any virtual property associated with the account.<sup>137</sup> In other words, the termination of the game as a whole is within the reasonable expectations of the player.<sup>138</sup>

Meehan argues that "there should be no remedy for termination of a game" because game development companies can better assess the cost of terminating a game.<sup>139</sup> However, Meehan also argues that if a game is continuing, then a player should be compensated for his or her destroyed virtual property.<sup>140</sup> Even if an MMO's EULA is clear that the ownership rights of both in-game property and the

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132. See, e.g., Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 27 (1993).

133. Michael Meehan, *Virtual Property: Protecting Bits in Context*, 13 RICH. J.L. & TECH., no. 2, 2006, at 1, 1-7. An MMO will have thousands of players that can interact with one another in a virtual world. See *id.* at 1.

134. See *id.* at 2.

135. See *id.* at 18.

136. See *id.*

137. See *id.* at 43.

138. See *id.*

139. *Id.* at 40, 44.

140. See *id.* at 44, 48. Specifically, Meehan argues that virtual property should be replaced with equivalent virtual property before pursuing monetary relief. See *id.* at 44. "Where restoration is not possible, monetary damages or equivalent virtual property might be acceptable compensation." *Id.* at 45.

game account belong to the game's developer, if the developer acts against the players' reasonable expectations regarding their accounts, then courts may find those terms invalid.<sup>141</sup>

The material terms regarding how the player can interact with the virtual world will also affect the reasonable expectations a player may have regarding his or her virtual property and account.<sup>142</sup> If the material terms establish a narrative in which the player just moves through what the developer has created, or the player must play the game to advance through the story, then the developer will be free to unilaterally destroy or alter content.<sup>143</sup> In this context, a "narrative" type game is a game where a player must actually interact with and play the game in order to advance the plot.<sup>144</sup> Although the Burning Tides event was a story event, League of Legends is not a narrative type game, as the player does not play a League of Legends match to advance any kind of plot.<sup>145</sup>

On the other hand, if the material terms "establish a collaborative environment where commoditized virtual objects are exchanged for virtual or real currency, the court is likely to treat those objects as it would any other object—subject to standard real-world property law."<sup>146</sup> This distinction is critically important in the analysis of the Burning Tides event because, despite the event's companion story, players interact with the League of Legends client through the commoditization of virtual objects.<sup>147</sup>

### *C. The Reasonable Expectations of a League of Legends Player*

League of Legends is currently still in operation,<sup>148</sup> which places it in the prong favoring the rights of the player.<sup>149</sup> Like Meehan's argument concerning MMOs, a League of Legends player would not

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141. See *id.* at 21.

142. See Jamie J. Kayser, Note, *The New New-World: Virtual Property and the End User License Agreement*, 27 LOY. L.A. ENT. L. REV. 59, 70 (2006).

143. See *id.*

144. See *id.*

145. See *Welcome to LoL*, *supra* note 5; see also *Easter Eggs/Events*, *supra* note 26; *supra* notes 26-31 and accompanying text.

146. Kayser, *supra* note 142, at 70.

147. See *supra* notes 2, 11-22 and accompanying text.

148. That is, League of Legends was still in operation as of the writing of this Note.

149. See Meehan, *supra* note 133, at 44 n.154.



expect his virtual property to be arbitrarily destroyed.<sup>150</sup> However, there is a key difference between the kind of virtual property a player in an MMO has and that of a player in a MOBA. In an MMO, the player has an avatar that he or she uses to interact with anything in the virtual world, and this avatar is able to obtain, make, or purchase different items.<sup>151</sup> Additionally, the player has various types of items and typically some kind of in-game currency.<sup>152</sup>

In contrast, in a MOBA there is not really a virtual world where players interact with one another.<sup>153</sup> When a player logs into his or her account on League of Legends the game transports the player to a staging screen where he or she can talk with other players through chat boxes or queue for a match.<sup>154</sup> Until the player begins a match, the player cannot interact with champions or the game world in any way.<sup>155</sup> The kind of world experienced in the MOBA is more akin to a chess board than a virtual world—which can be explored as experienced in MMOs—because players cannot explore the MOBA world. In fact, the MOBA game world is often referred to as a “map” instead of a “world” because the map will be the exact same layout every time a player enters the game to play a match.<sup>156</sup> So,

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150. *See id.*

151. *See Kayser, supra* note 142, at 73-74, 74 n.116.

152. *See id.*

153. *See Welcome to LoL, supra* note 5.

154. *See id.*

155. *See id.*

156. In League of Legends there are three different game modes that correspond to three different maps where the players will play a League of Legends match. *See Game Modes, supra* note 89. Although players can always pick any champion they want, the champions the players control are the only game assets that vary from match to match. *See id.* The terrain, nonplayer characters, and items available for purchase remain unchanged for the most part—some game modes will restrict a few item choices. *See id.* Contrast this with a game world in an MMO. If a player were to log into a particular game area and then reenter that same area the next day there could be a drastic change in experience because the other players directly affect the game world by harvesting items, attacking towns, and completing quest objectives. *See Meehan, supra* note 133, at 1-2. The physical layout of the world is altered by player interaction in an MMO, which can range from a flower being picked to certain items being purchased by one player and now are unavailable for purchase to another. But this is simply not the case in a MOBA. The purchases where a player buys a virtual good in League of Legends all happen in the staging screen area of the game client, completely outside the game world of the MOBA itself and completely outside any interaction with other players. *See PvP.net / Riot Store, LEAGUE OF LEGENDS: WIKI*, [http://leagueoflegends.wikia.com/wiki/PvP.net/Riot\\_Store](http://leagueoflegends.wikia.com/wiki/PvP.net/Riot_Store) [<https://perma.cc/2FZQ-SBRX>] (showing pictures of the setup of store in the game client (i.e. outside of the game map) and explaining what virtual goods can be bought, how to buy them, and the layout of the store generally). MOBAs have two forms of

considering the MOBA world as a chess board, the kind of items players purchase are simply game pieces that cannot be used until a match is started.

Meehan concluded that an MMO player would not reasonably expect his or her virtual property to be arbitrarily destroyed.<sup>157</sup> Even though the property is different, a League of Legends player also would not reasonably expect his or her virtual goods—the game pieces of the chess board example—to be arbitrarily destroyed. According to Meehan, if a certain player were singled out and not able to use his or her account, or could not have access to a certain item while others could, then that would be arbitrary.<sup>158</sup> The same reasoning would apply in League of Legends, but the argument could extend even further to include arbitrary removal of champions. Champions in League of Legends can be thought of as items under Meehan’s argument. As long as the League of Legends servers are still operating, players expect to have full use and control of the champions that they have purchased. The only time a player expects a champion to be unavailable for play is during the rare occurrences when there is a technical issue with the champion, but this scenario still would not necessitate a complete removal of the champion from the game, like what actually happened in the Burning Tides event.

League of Legends is not a “narrative” type game where players experience a story as they play.<sup>159</sup> Although there is a general story explaining the world of the game and the relationships of the champions, the story is not the focus of the game. In fact, a player learns zero percent of the general background or special story events

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“transactions”: the virtual goods and items used during the actual game match. Virtual goods are the things players buy in the client store. See *Terms of Use (NA)*, *supra* note 81. Items, on the other hand, are part of game mechanics in a League of Legends match. See *Item Shop*, LEAGUE OF LEGENDS, [http://na.leagueoflegends.com/en/featured/new-player-guide#/how-to-play/item-shop?\\_k=eostrx](http://na.leagueoflegends.com/en/featured/new-player-guide#/how-to-play/item-shop?_k=eostrx) [<https://perma.cc/6L9F-BDDX>] (explaining that items are equipped to a champion and only purchased with gold accumulated during the match). Regardless if the transaction is for an item or a virtual good, the other players will have no effect on one’s ability to make a purchase because the items are not limited in quantity. Whereas in an MMO, the items are usually limited by spawn timers. See *Spawn*, WoW: WIKI, <http://wowwiki.wikia.com/wiki/Spawn> [<https://perma.cc/Y3K4-NVGS>] (explaining the limited resource of items via the process of spawning, or entering the game world).

157. See Meehan, *supra* note 133, at 18.

158. See *id.*

159. See *supra* notes 26-30, 144 and accompanying text.

from actually playing League of Legends. All of the story elements are told outside of the actual game matches in champion profiles or through story events that can only be read outside of the game client.<sup>160</sup> League of Legends is better analogized to a virtual board game where players buy pieces in order to play the game with others. When a player purchases a champion—a game piece—he or she would reasonably expect to always have that champion in order to play the game. If Riot were to remove the champion from the game, then the player would expect to be compensated so that he or she could purchase a new game piece and continue playing the game.

Although the Burning Tides event was essentially a story, players did not learn the story through playing a League of Legends match, nor did it impact the game's mechanics—other than removing one of over one hundred champions from play. The Burning Tides event was merely something extra that players could elect to read or participate in without affecting the mechanics and purpose of a League of Legends match. Riot removed Gangplank from play to conform with an elective side project that had no impact whatsoever on the actual match mechanics. Because a champion, like Gangplank, should be considered a game piece, a champion's removal to coincide with an extraneous story would be equally arbitrary and unexpected by players.

Jamie Kayser also argued that players in an MMO would have property rights in a “collaborative environment” with “commoditized virtual objects,”<sup>161</sup> but the conclusion does not translate as easily to a MOBA, like League of Legends, because there is no collaborative environment in the game.<sup>162</sup> The players do not create an avatar, a champion, or any kind of item.<sup>163</sup> The only control the player has in

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160. See *Champions*, LEAGUE OF LEGENDS, <http://gameinfo.na.leagueoflegends.com/en/game-info/champions/> [<https://perma.cc/QXQ2-8YH6>]; see also *Lore*, LEAGUE OF LEGENDS: WIKI, <http://leagueoflegends.wikia.com/wiki/Category:Lore> [<https://perma.cc/Z4LL-JFUK>] (listing “[a]ll articles about the story of League of Legends, not the game itself”).

161. See Kayser, *supra* note 142, at 70.

162. See *Welcome to LoL*, *supra* note 5 (explaining how the game is played in set matches with players making choices based off of already created assets and indicating that there is no instance in which a player will create or contribute his or her own personal ideas into the game world).

163. See *id.*

a MOBA is the customization of his or her champion within a single match.<sup>164</sup>

Although there is no collaboration, players can buy—and even have the option to trade to other players—champions, skins, and a few other miscellaneous items through the use of microtransactions.<sup>165</sup> Using a microtransaction to purchase an item could be considered a “commoditized virtual object,” which leans toward there being some kind of reasonable expectation right in the property.<sup>166</sup> During the Burning Tides event, the “commoditized virtual objects” were the champion Gangplank himself and his seven obtainable skins.<sup>167</sup> Only the champion could be purchased with in-game currency and, even then, players still had the option to purchase Gangplank with real money.<sup>168</sup> Further, players could purchase the skins *only* with real money.<sup>169</sup> Players had an expectation of a property right in the champion and the skins purchased for the champion because both the champion and his skins were commoditized with real money via microtransactions.

Although the League of Legends EULA specifically negates granting property rights to a League of Legends player,<sup>170</sup> the reasonable expectations doctrine should be applied to reach a more favorable balance between the developer and player, especially since microtransactions are involved. There are no ambiguous terms in the EULA, but, like in *C & J Fertilizer*, the average user does not likely read the provisions explicitly detailing his or her property rights.<sup>171</sup> And because the terms explicitly stating that there is no

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164. *See id.*

165. *See id.*

166. *See Kayser, supra note 142, at 70.*

167. *Cf. id.* For a list of Gangplank’s available skins, see *Gangplank*, LEAGUE OF LEGENDS, <http://gameinfo.na.leagueoflegends.com/en/game-info/champions/gangplank/> [<https://perma.cc/5HX6-96PP>].

168. *See How to Unlock a Champion, supra note 12.*

169. *See Champion Skin, supra note 7* (listing the different types of skins in the game and their purchase price). Generally speaking, skins can only be purchased with Riot Points. *See id.* Only in very rare circumstances can skins be obtained without using Riot Points—the “victorious” skins are the best example as they are given to players for reaching a certain rank in the game and as of the writing of this Note, there are only six of these victorious skins, and they cannot be obtained any longer. *See id.*

170. *See Terms of Use (NA), supra note 81.*

171. *See C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 174 (Iowa 1975); Bakos et al., supra note 46, at 1.*

property interest in “virtual goods” were not likely read,<sup>172</sup> the typical League of Legends player would reasonably expect to maintain control over any purchased champions, skins, or items for as long as League of Legends continues to operate.

### III. RELIANCE THEORY

Just as Part II follows the consensus approach to the reasonable expectations doctrine, this Part follows the majority’s view of reliance theory, specifically tracking the elements for a claim of promissory estoppel. This Part first details the history of reliance theory<sup>173</sup> and then moves to its application in video game EULAs generally.<sup>174</sup> Finally, this Part concludes with an analysis of the League of Legends EULA under reliance principles, specifically looking at how microtransactions have commodified in-game assets.<sup>175</sup> Central to this Part’s argument is how commodification and consumer protection trigger reliance principles and should override the EULA constraints on liability.

#### *A. History and Development of Reliance Theory and Damages*

According to Professor Eric Holmes, reliance theory stems from promissory estoppel when courts “focus[] on the promisee’s right to rely and the promisor’s duty to prevent (or not cause) reasonably foreseeable harmful reliance.”<sup>176</sup> Consideration is necessary in order

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172. *Cf.* Bakos et al., *supra* note 46, at 1.

173. *See infra* Part III.A.

174. *See infra* Part III.B.

175. *See infra* Part III.C.

176. Eric Mills Holmes, *Restatement of Promissory Estoppel*, 32 WILLAMETTE L. REV. 263, 288 (1996). “A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.” RESTATEMENT (FIRST) OF CONTRACTS § 90 (AM. LAW INST. 1932).

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (AM. LAW INST. 1981).

to have an enforceable promise,<sup>177</sup> and Corbin explains that “one who acts in reliance on a promise is acting ‘in respect of the promise.’”<sup>178</sup> In other words, acting—or forbearing—based on the reliance that a promisor will act—or not act—is adequate consideration to make a promise enforceable.<sup>179</sup> Additionally, because the promisor is in a better position to prevent the harm caused by a promisee’s detrimental reliance, the promisor must compensate the promisee.<sup>180</sup>

In 1963 the Supreme Court of Tennessee used reliance theory as defined in the *First Restatement of Contracts* to establish that an insurance adjuster may be liable for the medical bills of an insured when he makes an oral promise to the insured and the insured relied on that promise.<sup>181</sup> In that case, an insurance adjuster promised to pay the medical bills for plaintiff’s injuries if plaintiff would not hire an attorney.<sup>182</sup> However, the insurance adjuster later refused to pay the plaintiff’s medical bills, and by that time, the statute of limitations for the plaintiff to file a tort claim had run.<sup>183</sup> Although the issue of whether the contract actually existed is a question for the jury, the court explained that the promise might become enforceable because the plaintiff relied on the insurance adjuster’s promise and acted on that reliance when he did not hire an attorney.<sup>184</sup> In other words, the plaintiff’s forbearance was “sufficient consideration for the [insurance adjuster’s] promise.”<sup>185</sup>

Around twenty jurisdictions use reliance theory, based on the promissory estoppel claim of action, to enforce promises in contracts.<sup>186</sup> Two states have even codified reliance theory in statutes.<sup>187</sup>

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177. See generally 3 WILLISTON ON CONTRACTS § 7:11 (4th ed.), Westlaw (database updated May 2015).

178. 3-8 CORBIN ON CONTRACTS § 8.2 (2015) (quoting *Currie v. Misa* [1875] 10 LR Exch. 153 at 162).

179. See *id.*

180. See Holmes, *supra* note 176, at 289-90.

181. See *Jackson v. Kemp*, 365 S.W.2d 437, 440 (Tenn. 1963); RESTATEMENT (FIRST) OF CONTRACTS § 90 (AM. LAW INST. 1932).

182. See *Jackson*, 365 S.W.2d at 438.

183. See *id.*

184. See *id.* at 440.

185. *Id.* at 439 (quoting 1 CORBIN ON CONTRACTS § 218).

186. See Holmes, *supra* note 176, at 289.

187. The Georgia statute can be found at GA. CODE ANN. § 13-3-44 (2016). The Louisiana statute can be found at LA. STAT. ANN. § 10:3-303 (2016).

The remaining jurisdictions rely on case law. For example, in 2001 the Second Circuit used a four-part test for proving reliance damages in a claim of promissory estoppel in *Abbruscato v. Empire Blue Cross & Blue Shield*.<sup>188</sup> A plaintiff must prove “(1) a promise, (2) reliance on the promise, (3) injury caused by the reliance, and (4) an injustice if the promise is not enforced.”<sup>189</sup> Additionally, the plaintiff must prove that there was an “extraordinary circumstance[ ]” for the promise and subsequent reliance.<sup>190</sup>

In *Abbruscato*, a company promised its employees certain life insurance benefits if they retired early.<sup>191</sup> However, after retiring, the company substantially modified the insurance benefits, which the retirees found unacceptable.<sup>192</sup> The Second Circuit concluded that inducing the employees to retire early was an extraordinary circumstance.<sup>193</sup> There was a promise to give certain life insurance benefits, the employees relied on the promise by retiring early, the reduction in benefits clearly injured the employees, and “an injustice [would] result should Empire’s promise not be enforced.”<sup>194</sup> Although states have altered the wording of the Second Circuit’s test, many jurisdictions today still consider, and sometimes award, reliance damages,<sup>195</sup> which means that if video game players can

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188. 274 F.3d 90, 100-01 (2d Cir. 2001) (citing *Kunkel v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 85 (2d Cir. 2001)). The Second Circuit originally compiled the four elements of this test from the Restatement of Contracts and American Jurisprudence in *Schonholz v. Long Island Jewish Medical Center*, 87 F.3d 72, 78-79 (2d Cir. 1996). Although the Second Circuit did not change the elements in *Abbruscato*, they articulated the rule more clearly and succinctly in *Abbruscato*, making it ideal as an example in this discussion. See *Schonholz*, 87 F.3d at 78-79, for more information regarding the specific provisions of the Restatements and American Jurisprudence used in creating the four elements of the rule.

189. *Abbruscato*, 274 F.3d at 100 (quoting *Kunkel*, 274 F.3d at 85).

190. See *id.* (quoting *Kunkel*, 274 F.3d at 85).

191. See *id.* at 94.

192. See *id.* at 95.

193. See *id.* at 101.

194. *Id.*

195. See, e.g., *Barrie-Chivian v. Lepler*, 34 N.E.3d 769, 772 (Mass. App. Ct. 2015) (finding that the statute of frauds did not overcome the fact the plaintiff relied on the oral promise of defendant to execute a written agreement); *Schroeder v. Pinterest Inc.*, 17 N.Y.S.3d 678, 694 (App. Div. 2015) (dismissing a claim when plaintiff failed to prove any kind of detrimental reliance since plaintiff neither did or refrained from doing anything after receiving a promise not to profit from plaintiff’s design in an email); *Davis v. Tex. Farm Bureau Ins.*, 470 S.W.3d 97, 108-09 (Tex. App. 2015) (finding that plaintiff failed to prove a definite and unconditional promise to settle for \$12,000 and therefore failed to meet the essential element of a promissory estoppel claim and was not entitled to reliance damages).

meet these four elements, then perhaps reliance damages would serve as an adequate remedy. Of course, finding an explicit “promise” made by a game developer to the players will rarely ever happen; however, implied promises may come into play via the developer’s EULAs and the nature of microtransactions.

*B. How Scholars Have Argued Reliance Theory in Prior Video Game Literature*

Game development companies use their EULAs to create licenses.<sup>196</sup> By licensing the use of their games and all in-game content, the companies get around the first sale doctrine in copyright law<sup>197</sup> and maintain full ownership of their content.<sup>198</sup> However, even though most EULAs explicitly state that transactions will only give a license over in-game assets, when game development companies treat players as consumers, the players come to expect and rely on consumer protection found in the real world.<sup>199</sup> The commodification of game assets causes players to rely on theories of consumer protection when engaging in microtransactions despite any EULA wording to the contrary.<sup>200</sup>

Although the majority of game development companies are careful to make it explicitly clear in their EULAs that in-game assets are licenses, in an extraordinary case, a game developer implied in an interview that in-game assets had the same kind of property rights as real-world property.<sup>201</sup> The plaintiff brought suit when the developer removed a certain piece of virtual property from

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196. See Lively, *supra* note 42, at 346.

197. The relevant provision for the first sale doctrine states that “[n]otwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.” 17 U.S.C. § 109(a) (2012).

198. See Lively, *supra* note 42, at 345.

199. See Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043, 2073 (2004).

200. See Paul Riley, Note, *Litigating Second Life Land Disputes: A Consumer Protection Approach*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 877, 883 (2009). Riley defines commodification as “the buying and selling of virtual items in the [virtual] world using real-world currency.” *Id.* at 909.

201. See *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 596 (E.D. Pa. 2007).



his account.<sup>202</sup> The plaintiff argued that he relied on the game developer's statements that the virtual property would have "free and clear" title, like property in the real world.<sup>203</sup> The game developer answered that the use of the word "title" was simply a metaphor.<sup>204</sup> Unfortunately, the court did not get an opportunity to decide if or how far reliance on the developer's statements would go because the case settled out of court.<sup>205</sup>

The major hurdle in using reliance theory to protect players' consumer rights is finding the promise made by a game developer.<sup>206</sup> However, if commodification of game assets through microtransactions "invites the law in," as some commentators suggest,<sup>207</sup> then there may still be a promise based on the notion of consumer law in spite of explicit EULAs stating that the transactions are only for licenses and not true ownership. The courts will need to balance the right of the player as a consumer and the intellectual property rights of the game developer.<sup>208</sup> In League of Legend's case, the ability to purchase champions—the most essential in-game asset to even be able to play the game—via microtransactions might be "inviting the law in" and giving players a remedy via reliance damages.

### *C. Reliance Theory and Purchases of Champions and In-Game Assets in League of Legends*

The League of Legends EULA explicitly states that virtual goods, or in-game assets, are the property of Riot, and that users only receive a license in the asset.<sup>209</sup> However, there is commodification of these assets through microtransactions.<sup>210</sup> Although Riot makes no explicit promise to its players that their purchases will remain usable, the commodification of the game assets implies a promise

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202. See *id.* at 596-97.

203. See Riley, *supra* note 200, at 897-98 (quoting Complaint at 9-10, *Bragg*, 487 F. Supp. 2d 593 (No. 06-04925)).

204. See *id.* at 899-900.

205. See *id.* at 900.

206. There must be a promise in order for there to be reliance. See *Abbruscato v. Empire Blue Cross & Blue Shield*, 274 F.3d 90, 100 (2d Cir. 2001).

207. See Riley, *supra* note 200, at 909 (citing Balkin, *supra* note 199, at 2046-47).

208. See Lively, *supra* note 42, at 369.

209. See *Terms of Use (NA)*, *supra* note 81.

210. See *How to Unlock a Champion*, *supra* note 12.

that players will be able to use their purchases. Because of that commodification, coupled with the fact that in order to play League of Legends players generally must purchase champions,<sup>211</sup> players can easily view themselves as consumers and rely on consumer protection law to meet the “promise” element of the reliance test.<sup>212</sup>

Regarding the actual reliance portion of the four-pronged reliance test, League of Legends players rely on the fact that their purchases of champions or items will remain active. Players not only spend money or in-game currency, but they can also spend a considerable amount of time playing and learning the champions they have purchased. If a player could not rely on the champion to remain active in their account, then players would have little incentive to purchase champions or spend hundreds of hours playing with their purchased champions. League of Legends is a free-to-play game—this means that in order to install the game and continue playing the game, the player will never have to spend money for the initial installation nor submit payments to keep the account active.<sup>213</sup> League of Legends’ free-to-play business model of generating revenue by selling champions, skins, and items through micro-transactions implies that the player will retain control over his or her purchases as long as League of Legends continues to operate.

If Riot were to remove a champion permanently, the player would suffer a harm both through loss of money or in-game currency and loss of time. For example, when Riot removed the champion Gangplank from play during the Burning Tides event, many players felt harmed and requested refunds for their purchases.<sup>214</sup> One player in

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211. It is possible to play League of Legends without purchasing champions by relying on the free-to-play champions that change weekly. See *Starter Guide*, LEAGUE OF LEGENDS, <https://perma.cc/29GS-E4BX>. However, learning the game would be exceedingly difficult, and probably not much fun to play, if a player attempted to learn and play a new champion every week.

212. See Riley, *supra* note 200, at 910 (“This idea that ‘consumers are different’ is an important theory underlying consumer protection law. It recognizes that the consumer, a single person, often has neither the power nor the information to appropriately protect her own interests and that the common law often does not adequately protect these interests either. Consequently, the legislature must provide the protection that the common law cannot. The purpose of contract and property law, on the other hand, has little to do with a rightholder’s special status as a consumer.” (footnotes omitted)).

213. See *LoL for Free*, *supra* note 17.

214. See *Questions About the Bilgewater Event*, *supra* note 32 (referencing specifically the post made by user Pearl Millet); see also Matt Liebl, *Gangplank Killed off in League of*

particular indicated in a forum post that he had purchased a skin for Gangplank two days before Gangplank was removed.<sup>215</sup> The harm suffered is explicit in this player's case. The player, Pearl Millet, relied on the fact that Gangplank was a playable champion and would generally always be available for play. Pearl Millet purchased cosmetic skins based on reliance that the champion would remain available for use. Refusing to compensate the player after purchasing skins for a defunct champion imposed a financial loss on the player. In fact, it is possible that the player never even got the chance to enjoy his purchase at all.

The way players play League of Legends can be viewed as an extraordinary circumstance.<sup>216</sup> League of Legends has over one hundred playable champions.<sup>217</sup> Generally, players pick a few champions to learn so they can play competitively with other players. If a player used Gangplank to "climb the ladder"<sup>218</sup> and was ranked in the top percentage of League of Legends players, then the removal of Gangplank could hinder his or her ability to play competitively. Losing the ability to play League of Legends at the skill level a player spent many hours achieving, and not being able to use skins purchased through microtransactions, directly affects a player's enjoyment of the game. Although a player could always learn a new champion, if Riot can remove champions on a whim, then players lose both time and financial investments. If we consider the "injustice" prong of the reliance theory test<sup>219</sup> as a fairness prong, then players are being treated unfairly if microtransactional content can be unilaterally removed without compensation. After all, removing such content directly affects a player's ability to actually play the game.

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*Legends' Latest Event*, GAMEZONE (July 30, 2015, 9:42 AM), <http://www.gamezone.com/news/gangplank-killed-off-in-league-of-legends-latest-event-3422417> [<https://perma.cc/MU4Q-TLBG>].

215. See *Questions About the Bilgewater Event*, *supra* note 32 (referencing specifically the post made by user Pearl Millet).

216. See *supra* notes 189, 192-94 and accompanying text.

217. See *Champions*, *supra* note 160.

218. League of Legends offers a competitive game mode called "Ranked Play" where players' skill levels are ranked against each other. See, e.g., NotNert13, Comment to *Climbing the Ladder*, LEAGUE OF LEGENDS: F. ARCHIVE (May 18, 2014), <http://forums.na.leagueoflegends.com/board/showthread.php?t=4531889> [<https://perma.cc/75UL-BDEU>]. When a player moves up in ranking, this is referred to as "climbing the ladder." See *id.*

219. See *supra* note 188 and accompanying text.

The four factors considered in a reliance theory analysis show how players come to rely on the purchasing power of microtransactions. In the case of League of Legends, a player receives a promise to use microtransactional content through making a purchase. He relies on the promise by actually making the purchase and investing time using the purchase. There is an injury from the arbitrary removal of the content through the loss of the purchase price and possibly loss of invested time using the purchase, and there is an injustice or inherent unfairness if Riot can arbitrarily remove content necessary to play the game, or more specifically, play the game well. Additionally, the implied promise of access to content should be protected despite EULA language because there is an exchange of currency for that purchasable content. Protecting a player's purchases from arbitrary removal would better balance players' consumer rights and perceptions with the intellectual property rights of the game developers.

#### CONCLUSION

Currently, EULAs protect game developers and are especially careful to only grant players a license to the developers' games and in-game assets.<sup>220</sup> The League of Legends EULA operates in this way.<sup>221</sup> However, courts should not give EULAs and terms of use agreements ironclad protection, especially when microtransactions are involved. First, a study has shown that most people do not read standardized form contracts such as EULAs.<sup>222</sup> Although players assent to the terms when they click the "I accept" box, the reasonable expectations doctrine or reliance theory of promissory estoppel, or even both theories, should still maintain some control on the enforcement of the provisions in the agreement in order to maintain a balance between the rights of the players and the rights of the game developer.

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220. See, e.g., *Terms of Use (NA)*, *supra* note 81.

221. See *id.*

222. See Bakos et al., *supra* note 46, at 24 (finding that less than 0.1 percent of one thousand buyers access software companies' EULAs).

Neither the consensus approach<sup>223</sup> nor Professor Keeton's classical approach to the reasonable expectations doctrine<sup>224</sup> would enforce provisions that the consumer/insured did not reasonably expect to be in the agreement, regardless of whether there was a clause explicitly stating a provision to the contrary. Players do not typically read the EULAs,<sup>225</sup> but they do expect to be able to have access to items purchased via microtransactions.<sup>226</sup> Although players are only given a license to play the game and to use any purchased content, players do have *access* to that content by having the ability to actually play the game or actually use their microtransactional purchases.<sup>227</sup> Players can easily understand and expect to no longer have access to the game if the game stops operating, but they would not expect an arbitrary removal of content that would render their purchases useless.<sup>228</sup> The reasonable expectations doctrine would prohibit a game developer from arbitrarily removing purchased content, regardless of an EULA, because no player would invest into a game where *access* to the content would be taken away the very next day.<sup>229</sup>

Alternatively, because microtransactions, by definition, commodify in-game assets, players feel like consumers and they rely on the game developers' implicit promise to have *access* to purchased content and view themselves as purchasers, who would then have rights under consumer protection law.<sup>230</sup> Especially in cases like League of Legends, where a player must make purchases to even play the game,<sup>231</sup> the players rely on the game developer to continue to provide access to the players' purchases so that they can enjoy and use the game. Reliance theory's promissory estoppel could be used to help prevent loss, or it could at least provide a remedy to

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223. See *supra* notes 128-31 and accompanying text.

224. See *supra* notes 97-98 and accompanying text.

225. See Bakos et al., *supra* note 46, at 1.

226. See *supra* Part III.C.

227. See *supra* notes 132-37 and accompanying text.

228. See *supra* notes 132-37 and accompanying text.

229. See *supra* note 33 and accompanying text (referring to the post by user Pearl Millet, who explicitly indicates that had he known Gangplank would be removed from the game the very next day, he would not have made the microtransaction).

230. See Balkin, *supra* note 199, at 2073; Riley, *supra* note 200, at 883.

231. See *supra* notes 18-19 and accompanying text.

players who lose access to content they relied on being able to utilize when they made their purchases.<sup>232</sup>

Whether a player could have brought suit against Riot for removing Gangplank is a moot point as Riot returned the character to play a few weeks after his removal.<sup>233</sup> However, the champion's unprecedented removal begs the question of whether Riot was within its rights to remove the champion without compensation to the affected players. This Note suggests that although current case law would most likely side in favor of Riot and its EULA terms,<sup>234</sup> courts should balance the interests of players as consumers, emphasizing the players' reliance on developers' implicit promises to content or their reasonable expectations against the intellectual property rights of the game developers in order to have a healthier relationship between game developers and their player base.

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232. Although players were angry that Gangplank was removed suddenly, one of the reasons this unprecedented removal caused such a controversy was because Riot Games was not offering refunds for Gangplank or his skins. *See supra* note 34 and accompanying text. There may not have been such a backlash if Riot had offered refunds, which is how promissory estoppel could have helped alleviate the situation had courts been involved.

233. *See Wouk, supra* note 35.

234. *See supra* Part II.B.

\* J.D. Candidate 2017, William & Mary Law School; B.A. 2014, Southern Methodist University. I would like to thank Professor Nathan Oman for providing me with a good foundation to begin researching and writing this Note. Many thanks to all of my gamer friends who encouraged me to pursue this topic. A quick shout out to Riot Games, League of Legends is fantastic (really, go play it) and I appreciate all the work that goes into the game, despite this Note being critical of some of the actions taken. And finally, thank you to all of the *Law Review* editors and staff for their hard work and having to put up with my various and odd sources!