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# Digital Assets & License Protections in an Age that Denies Class Actions and Mandates Arbitration

Kevin Carr\*

## I. INTRODUCTION

The battle of star system B-R5RB is probably a conflict and place that you have never heard of, even though an estimated £300,000 worth of property damage and loss occurred due to an interstellar battle on July 27, 2014.<sup>1</sup> Hundreds of competing rival ships were destroyed, with over 7,600 individuals taking part in one of the single largest property disputes of the 21<sup>st</sup> century. The conflict lasted approximately 21 hours and had ripple effects across an entire galaxy. If this sounds like fiction, I assure you, it is not. You have likely never heard of star system B-R5RB or the interstellar battle that happened there because it is not a physical place, insofar as computer servers do not count as a physical places.<sup>2</sup> It is a digital location within the online Massive-Multiplayer-Online-Roleplaying-Game (“MMORPG”) *Eve Online*.<sup>3</sup> *Eve Online* uses an “open currency system” that allows the user to buy in-game currency with real-world cash, effectively setting a measurable market price for in-game currency.<sup>4</sup> So when a member of the in-game “H A V O C” corporation failed to pay an in-game rent to an in-game security agency, their digital property went unprotected and vulnerable to attack by the Clusterf\*\*k Coalition (“CFC”) and Russian Coalition forces.<sup>5</sup> Seeing an opportunity to cause unprecedented digital economic damage, the CFC and Russian Coalition launched one of the most devastating attacks in digital history, causing massive in-game chaos that resulted in players losing assets that had a real world value.<sup>6</sup>

This dispute is just one example of how digital goods and services are becoming more complex. In the past decade, and especially in the last year, the demand

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1. *Eve Online Virtual War ‘costs \$300,000’ in Damage*, BBC NEWS (Jan. 29, 2014), <https://www.bbc.com/news/technology-25944837>.

2. *Id.*

3. L. J. Kuttan & Frederic M. Wilf, *Computer Software Protection-Liability-Law-Forms* § 20.19 (2021). *Eve Online* is a science fiction multiplayer game where players collect virtual goods for their characters. Players can form trading alliances, form virtual governments, and steal other players’ virtual goods.

4. See, e.g., *Buy Plex*, EVE ONLINE, <https://secure.eveonline.com/plex> (last visited November 19, 2020). This is similar to how some countries peg their currency against the U.S. dollar; *Floating Exchange Rate*, INVESTOPEDIA (Oct. 5, 2020), <https://www.investopedia.com/terms/f/floatingexchangerate.asp#:~:text=Some%20countries%20that%20choose%20to,include%20China%20and%20Saudi%20Arabia>.

5. CCP Dolan, *The Bloodbath of B-R5RB, Gaming’s Most Destructive Battle Ever*, EVEONLINE, (Jan. 2, 2014), <https://www.eveonline.com/news/view/the-bloodbath-of-b-r5rb>.

6. *Id.*

for digital goods and digital services has rapidly increased.<sup>7</sup> With the rise of digital property assets also comes an increase in digital property disputes. These disputes concern questions that normally arise in real property disputes such as, “Can this person be here,” “Is this person a nuisance to the community,” or “Who owns the thing in question?” How these questions are answered is important, but reaching answers is usually a difficult task. To begin to understand how these questions are resolved requires a look at how digital licensing companies treat consumers in licensing disputes and how different sets of consumers raise different concerns from a digital property-licensure perspective.

Licensing companies almost always reserve the right to revoke licenses to digital goods or services if consumers’ use of the digital good violates companies’ terms of use policy.<sup>8</sup> If a consumer takes issue with their punishment then companies typically manage the dispute either through an informal in-house review or through mandatory arbitration.<sup>9</sup> Sometimes the digital consumer has invested a hefty amount of money or time into the digital service; license distributors that offer digital goods quite often invite consumers to make a career out of the consumer’s use of the digital goods. Despite this, outside of an internal and informal in-house review, companies leave consumers with little to no recourse when their digital license is revoked, outside of contractually mandatory arbitration.<sup>10</sup>

This Note looks to examine the benefits and detriments of using mandatory arbitration clauses in digital license disputes from the perspective of a typical non-commercial consumer and also from the perspective of a quasi-commercial user. This Note does not address a licensor’s ability to remove users or content from their platform. Section II describes the legal landscape of arbitration clauses between video game platforms and content creators. Section III discusses the more common use of a platform and how arbitration creates negative externalities that invite public scrutiny. The analysis in Section IV delves into the origins of arbitration and argues that arbitration is too specific a tool to handle all the concerns of a video game platform’s community. Section V concludes that arbitration prevents digital goods from becoming a recognized property interest and that arbitration shrouds the community from information that would help them make better decisions on what platforms and which content creators to support.

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7. Sarah Davis & Lauren Toney, *How Coronavirus (COVID-19) is Impacting Ecommerce*, ROIREVOLUTION (Mar. 12, 2020), <https://www.roirevolution.com/blog/2021/02/coronavirus-and-ecommerce/> (last updated Feb. 25, 2021); *see also*, *The American Economy is Experiencing a Paradigm Shift*, THE ATLANTIC, <https://www.theatlantic.com/sponsored/citi-2018/the-american-economy-is-experiencing-a-paradigm-shift/2008/>.

8. MDY Industries, LLC v. Blizzard Ent., Inc., 629 F.3d 928, 939 (9th Cir. 2010) (finding that Blizzard “may terminate the EULA and ToU if players violate their terms.”); *see also*, Annalee Newitz, *Dangerous Terms: A User’s Guide to EULAs*, ELECTRONIC FRONTIER FOUNDATION (Feb. 2005), <https://www.eff.org/wp/dangerous-terms-users-guide-eulas>.

9. G.G. v. Valve Corp., No. 2:16cv01941, 2017 U.S. Dist. LEXIS 50640 (W.D. Wa. Apr. 3, 2017); *see, e.g.*, *Blizzard Entertainment Dispute Resolution Policy*, BLIZZARD ENTERTAINMENT (May 19, 2015), <https://www.blizzard.com/en-us/legal/b2e0b082-fddb-4824-93fa-ee9c1bf814f8/blizzard-entertainment-dispute-resolution-policy>.

10. G.G. v. Valve Corp., No. 2:16cv01941, 2017 U.S. Dist. LEXIS 50640 (W.D. Wa. Apr. 3, 2017).

## II. ABUSES IN QUASI-COMMERCIAL USE OF DIGITAL LICENSES

When we think of digital goods and competitive interactions, eSports<sup>11</sup> and streamers can be viewed as quite analogous to people who play traditional physical sports such as football, baseball, or basketball. Often, a traditional physical sports player's career could be relatively short due to injury<sup>12</sup> or various disputes that prevent them from being able to play in the regular season, either by contract<sup>13</sup> or by the culture within the game that bars the person from being able to compete.<sup>14</sup> Though the competition is different, similar disputes and problems arise in eSports because a game may only be popular for a few years, and a potential quasi-commercial<sup>15</sup> user may have their earning potential significantly diminished in the event of prolonged litigation.<sup>16</sup>

A. *Mandatory Arbitration Makes Quasi-Commercial Disputes Shorter and More Efficient*

One place to examine the disparities between litigation and arbitration comes in the form of third-party contracts within streaming services.<sup>17</sup> Users create contracts with other users and form groups that help promote and create digital content.<sup>18</sup> This is somewhat similar to how unsigned professional players in traditional sports will enter contracts with established teams and then compete with other players. A difference between traditional sports and eSports is that while games like football are well established and will more than likely be watched for decades to come, the newest *Call of Duty*<sup>19</sup> title is usually only widely relevant for one year. Other digital games can be popular for an even shorter period of time.<sup>20</sup> When the

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11. See, e.g., AJ Willingham, *What is eSports? A Look at an Explosive Billion-Dollar Industry*, CNN (Aug. 27, 2018), <https://www.cnn.com/2018/08/27/us/esports-what-is-video-game-professional-league-madden-trnd/index.html> (eSports is a term that describes competitive and organized video gaming. Leagues of players have formed to compete and has generated millions of viewers worldwide in recent years).

12. Meghan Walsh, *'I Trusted "Em": When NCAA Schools Abandon Their Injured Athletes*, THE ATLANTIC, (May 1, 2013), <https://www.theatlantic.com/entertainment/archive/2013/05/i-trusted-em-when-ncaa-schools-abandon-their-injured-athletes/275407/>.

13. See Nick Barden, *The Toronto Maple Leafs Won't be Trading William Nylander*, FANSIDED (May 2, 2020), <https://editorinleaf.com/2020/05/02/toronto-maple-leafs-trade-william/>.

14. See generally, Juan Carlos Guerrero, *TIMELINE: Colin Kaepernick's journey from San Francisco 49ers Star to Kneeling to Protest Racial Injustice*, ABC 7 NEWS (Aug. 29, 2020), <https://abc7news.com/colin-kaepernick-kneeling-when-did-first-kneel-date-what-does-do-now/4147237/>.

15. Some examples of quasi-commercial uses of digital goods licenses are esports competitors, streamers, and commentators.

16. See Nathan Grayson, *Popular Twitch Streamer Tfue's Contract with FaZe Leaks as Public Dispute Rages On*, KOTAKU (May 23, 2019), <https://kotaku.com/popular-twitch-streamer-tfues-contract-with-faze-leaks-1834987080>.

17. *Id.*

18. *Id.*

19. *Call of Duty* is a first-person shooter video game that has published eighteen titles in their franchise series since their first debut in 2003.

20. Helen Kantilafitis, *Three Creative Ways Developers are Increasing the Lifespan of Games*, NEW YORK FILM ACADEMY (Sept. 26, 2014), <https://www.nyfa.edu/student-resources/developers-increasing-lifespan-games/>.

popularity of any source of content is fleeting at best, streamers<sup>21</sup> need to have the flexibility to adapt and change in order to continue creating relevant content that people enjoy watching. This leads to potential problems when streamers engage in third-party contracts which are outside of their arbitration agreement with the streaming service. In some cases, a streamer's contract can prevent them from hosting or participating in certain types of licensed content.<sup>22</sup> Because streamers and eSports competitors are participating in volatile markets, they should consider arbitration as a means of solving their disputes quicker to avoid long disputes. Shorter disputes would help participating parties get "back in the game."

One prime example of litigation-fatigue is the 22 year old Turner "Tfue" Tenney, who was signed to the eSports organization called "FaZe."<sup>23</sup> Tfue signed an exclusive contract with FaZe. That contract came under extraordinary scrutiny when relations between the two parties soured.<sup>24</sup> Tfue's dispute highlights the potential for abuse in contracting, as Tfue was an unsophisticated party when he first entered into the agreement and has since gained millions of followers worldwide. His reputation and success has allowed him to hire counsel to properly represent him in contract disputes.<sup>25</sup>

The contract and the relationship was scrutinized through several digital news organizations and has prompted conversations about the important role lawyers play in pre-signing contract review and negotiation.<sup>26</sup> For example, it is not uncommon for teams to contract with eSports competitors under the age of 18, taking as much as 80% of all the profits the underage competitor generates.<sup>27</sup> The terms of those contracts, when applied in other contexts outside of eSports, have been labeled as overreaching and unfair.<sup>28</sup> Because the economic foundation of the eSports and streaming industry is still uncertain, contracting on equitable and fair terms by emphasizing the advantages and disadvantages of arbitration can help stabilize eSports industries.<sup>29</sup>

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21. A "streamer" is someone who broadcasts themselves performing online. They create digital content for their audience to watch and interact with.

22. Michael McCann, *Inside the Lawsuit that Could Shake up the Entire Esports Industry*, SI.COM (May 30, 2019), <https://www.si.com/more-sports/2019/05/31/turner-tenney-faze-clan-esports-lawsuit-fortnite> ("[Tfue's] attorneys assert that FaZe Clan illegally 'owns' the streaming content Tenney creates and, through the exclusivity clause, prevents him from offering his talents to competing companies.").

23. Grayson, *supra* note 17.

24. *Id.*

25. *See id.*

26. Andrew Burrows, *Turner Tenney ("Tfue") v. Faze Clan Inc. et al. - An Example of why it is Absolutely Essential to Hire an Attorney Before you Sign a Contract*, WILLIAMS & KNACK (May 24, 2019), <https://www.williamsandknack.com/blog/57-turner-tenney-tfue-v-faze-clan-inc-et-al-an-example-of-why-it-is-absolutely-essential-to-hire-an-attorney-before-you-sign-a-contract> ("[Arbitration] could also have aided FaZe Clan in avoiding the publicity headache that FaZe Clan now faces, and the potential backlash from their and Tfue's fans.").

27. *See, e.g., id.*

28. McCann, *supra* note 23. ("In some ways, Tenney's complaint is reminiscent of Curt Flood's case against Major League Baseball 50 years ago. Flood . . . argued that while he voluntarily signed a contract to play professional baseball, baseball's system of contracts was illegally rigged to prevent players from ever becoming free agents.").

29. Cecilia D'Anastasio, *Shady Numbers And Bad Business: Inside The Esports Bubble*, KOTAKU (May 23, 2019), <https://kotaku.com/as-esports-grows-experts-fear-its-a-bubble-ready-to-po-1834982843> ("I feel like esports is almost running a Ponzi scheme at this point," Frank Fields, Corsair's sponsorship manager, told an audience at San Francisco's Game Developers Conference.").

B. *Mandatory Arbitration Shrouds the Misdeeds of Contracting Parties*

More people than ever are creating digital content and putting that content online for others to enjoy.<sup>30</sup> Twitch is one such platform where users can host, archive, and share their online content with people that follow them.<sup>31</sup> The content creators can monetize their channels and earn a fair amount of cash from their channel subscribers.<sup>32</sup> Some content creators make millions of dollars because of their widespread popularity.<sup>33</sup> Skilled content creators on Twitch make between \$3,000 and \$5,000 each month.<sup>34</sup> This creates conflict when creators are barred from posting content. For some streamers, creating digital content is their full-time job.<sup>35</sup> Mandating arbitration onto all content creators creates a business environment where parties can come away from most disputes relatively unscathed in popular media.<sup>36</sup> While this may be good for the ongoing financial health of the content creator and also the content platform, it also leaves an enormous vacuum of mystery when other platform users demand accountability.<sup>37</sup>

One such example is the notorious Guy Beahm, also known as Dr. Disrespect. Dr. Disrespect is a content streamer that is well known for his menacing-80s-retro persona.<sup>38</sup> While Dr. Disrespect has earned himself a great amount of wealth and fame through his antics, his most recent contract with the streaming platform Twitch came to an abrupt halt when Twitch terminated his contract agreement.<sup>39</sup> While Dr. Disrespect claims that Twitch prematurely violated the contract for no good cause,<sup>40</sup> speculation around potential criminal misconduct by Dr. Disrespect is cited as the possible reason he was removed from Twitch.<sup>41</sup>

In either case, content creators and content consumers will likely never know the full details of why the contract was ended. Ideally, creators and consumers alike would be informed about whether Twitch wrongfully and prematurely ended Dr. Disrespect's contract or whether Dr. Disrespect breached the contract by engaging in illegal conduct. This information could help content creators and users of Twitch

30. Caroline Tam, *Twitch Sees Rapid Growth with 3.5 Million New Streamers YTD*, HIVE LIFE (June 10, 2020), <https://hivelife.com/twitch-rapid-growth-3-5-million/>.

31. *Twitch Partner Program*, TWITCH, <https://www.twitch.tv/p/partners/> (last visited Nov. 19, 2020).

32. *Id.*

33. See, e.g., Bijan Stephen, *The Man Behind the Mustache Guy 'Dr Disrespect' Beahm opens up about his Twitch alter ego*, THE VERGE (May 12, 2020, 12:50 PM), <https://www.theverge.com/2020/3/12/21151223/twitch-dr-disrespect-streaming-contract-personality-mixer-kobe-bryant>.

34. *Twitch Affiliate Partner Program*, BUSINESS OF APPS, <https://www.businessofapps.com/affiliate/twitch/#:~:text=On%20average%2C%20expert%20streamers%20can,Twitch%20can%20certainly%20be%20lucrative> (last visited Mar. 6, 2021) [hereinafter *Twitch Affiliate Partner Program*].

35. *Id.*

36. See, e.g., Steffan Powell, *Dr Disrespect: The mystery surrounding his Twitch ban*, BBC NEWS (June 30, 2020), <https://www.bbc.com/news/newsbeat-53225035>.

37. See *id.*

38. *Id.*

39. *Id.*

40. Erik Kain, *Dr. Disrespect Finally Breaks His Silence On Twitch Ban, Raises More Questions Than Answers*, FORBES (June 30, 2020, 8:45 PM), <https://www.forbes.com/sites/erikkain/2020/06/30/dr-disrespect-finally-breaks-his-silence-on-twitch-ban-raises-more-questions-than-answers/?sh=3d4130e4bc5a> (quoting Dr. Disrespect that "Twitch has not notified me on the specific reason behind their decision.").

41. Prateek Jain, *Dr Disrespect Hints that he Might Know the Reason for his Controversial Twitch ban*, TALKESPORT (Oct. 3, 2020), <https://www.talkesport.com/news/dr-disrespect-hints-that-he-might-know-the-reason-for-his-controversial-twitch-ban/>.

decide whether to continue their use of the platform. Instead, Twitch sees more people than ever on its platform, and Dr. Disrespect moved to YouTube Gaming and developed a subscriber count of over three million subscribers in three months. Both moved away from the extremely unordinary conflict, seemingly unscathed, and the consumer public has proceeded to forget all the same.<sup>42</sup>

Meanwhile there is some evidence that when content creators are policed closely for their behavior inside and outside of the content stream, the streaming platform and the individual content creators tend to take on more public relations damage.<sup>43</sup> While ousting bad actors from streaming services is something consumers have grown to expect from platforms, platforms police their creators at the risk of alienating their users, content creators, and advertisers.<sup>44</sup> The fledgling and now-defunct service known as Mixer, produced by Microsoft, faced these woes as they attempted to enter the streaming service business.<sup>45</sup> While smaller content creators largely felt that their concerns of sexual and racial harassment were being heard and managed appropriately, irregularities in conflict disputes among Mixer's highest paid streamers stuck out as unusual and irregular and upset the community as a whole.<sup>46</sup> This is not to say that other streaming services provide better or worse content policing than Mixer did. But arbitrating disputes in private rather than publicly has advantages that benefit platforms and creators alike.

### III. ABUSES IN TYPICAL CONSUMER USE OF DIGITAL GOODS

Individual consumers play a wholly different role in the digital goods market than professional and quasi-commercial users. The average consumer of digital goods will likely never see any monetary gain for their use of the product and instead will only invest time and money into the digital goods they intend to use.<sup>47</sup> However, the company that provides the digital platform has the right to regulate who uses its platform and can terminate user's accounts for the reasons it determines are appropriate.<sup>48</sup>

Digital platforms have diametrically opposed incentives. On one hand, platforms want to ensure fair use of their platform and dissuade people from violating community norms. User violations may outrage communities with offensive, or even outright illegal behavior. On the other hand, platforms want to maximize the

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42. It may be of, at least some, consequence that Twitch is owned by Amazon. Max Willens, *Once dominant, Amazon-owned gaming platform Twitch has more competition and more problems*, DIGIDAY (Aug. 19, 2020), <https://digiday.com/future-of-tv/dominant-amazon-owned-gaming-platform-twitch-competition/#:~:text=Amazon%20acquired%20Twitch%20almost%20exactly,active%20users%2C%20according%20to%20executives>.

43. E.g., Matt Brown, *Microsoft is closing Mixer – what went wrong?*, WINDOWS CENTRAL (June 22, 2020), <https://www.windowcentral.com/mixer-what-went-wrong>; see also, Julia Alexander, *Why is Mixer's community seen as more positive than Twitch and YouTube?*, *The company says it has to do with transparency*, POLYGON (Feb. 9, 2018, 3:12 PM), <https://www.polygon.com/2018/2/9/16993134/microsoft-mixer-twitch-youtube-streaming-toxicity-harassment>.

44. Brown, *supra* note 44.

45. *Id.*

46. Alexander, *supra* note 44.

47. See, e.g., Ryan Gilliam, *A Look at World of Warcraft's \$500 Mount*, POLYGON (May 23, 2018, 5:16 PM), <https://www.polygon.com/2018/5/23/17386428/world-of-warcraft-battle-for-azeroth-mount-bfa-auction-house>.

48. See generally Konstantinos Stylianou, *Exclusion in Digital Markets*, 24 MICH. TELECOMM & TECH L. REV. 181 (2018).

number of people on their platform. How do platforms maximize the total amount of users of their license, while keeping in mind consumer freedom and preventing potential human rights abuse? It comes down to a calculus that must fairly balance interpretation of the platform's End User License Agreement ("EULA"),<sup>49</sup> while also making sure that license users are not overburdened or over targeted for their conduct.

### A. *Consumer Freedom*

Digitally licensed goods are different than physical goods in the sense that they can be taken away from the consumer by the digital platform that they bought it from, even after the consumer has paid full price. Consumers have to conform to a set of behavioral standards that the platform sets in order to keep and retain their digital goods. However, there are many different behaviors that would be protected and perhaps even encouraged if they occurred in public.<sup>50</sup> For example, if one were to scream vulgarities at their television while watching a pay-per-view sports broadcast,<sup>51</sup> the service provider would not revoke their subscription. However, if one were to type the same comments on a digital platform or say them in a streamed broadcast, they may be removed from those digital services. This removal from a platform's streaming service would most likely be resolved by arbitration, if the platform refused to reinstate the user's license.

This raises the question of whether arbitration helps or hurts noncommercial license consumers. Keep in mind that with many modern digital licenses the retail consumer may have invested thousands, or even tens of thousands of dollars in the license at issue.<sup>52</sup> Allowing content platforms to revoke access to a digital good can thus mean that the user is out of substantial amounts of money and time because the user did not follow appropriate behavior guidelines that were set by the platform. On most platforms, consumers are not required to learn the platform's rules in order to participate in the use of the platform. In essence there are sets of consumers who are investing time and money into a platform and those same consumers could have their use of the platform denied because of their failure to understand how the platform works. This dichotomy creates the potential for abuse when the bargaining power between the parties is substantially different.

Activision Blizzard ("Blizzard") is among the largest gaming producers worldwide. They produce popular titles such as *Candy Crush*, *World of Warcraft*, *Overwatch*, *Hearthstone*, the *Diablo* series, *Starcraft*, and the *Warcraft* series.<sup>53</sup> Their

49. An End User License Agreement describes how software can be used by the licensee. It frequently includes terms such as when a licensor can be liable, in what jurisdictions they may be liable, the method of resolving the legal dispute, and for how much they may be liable. *End User License Agreement: Everything You Need to Know*, UPCOUNSEL, <https://www.upcounsel.com/end-user-license-agreement-replace> (last updated Nov. 5, 2020).

50. See, e.g., L. J. KUTTEN & FREDERIC M. WILF, COMPUTER SOFTWARE PROTECTION-LIABILITY-LAW-FORMS §§ 20:16-20:17, 20:24 (2021).

51. Dan Steinberg & Emily Guskin, *Rage, Rage at the Sporting Game on the Television Screen*, THE WASH. POST (Oct. 18, 2017), <https://www.washingtonpost.com/news/dc-sports-bog/wp/2017/10/18/rage-rage-at-the-sporting-game-on-the-television-screen/> (19% of sports fans "always" find themselves yelling at the TV while watching sports).

52. See, e.g., *Eve Online Virtual War 'costs \$300,000' in Damage*, *supra* note 2.

53. *About Us*, ACTIVISION BLIZZARD, <https://activisionblizzard.com/home> (last visited April 11, 2021); see also *Our Iconic Franchises*, ACTIVISION BLIZZARD, <https://www.activisionblizzard.com/games> (last visited April 11, 2021).



influence on what is and is not proper in digital worlds helps set the guidelines for what other companies may deem acceptable.<sup>54</sup> Blizzard even hires professionals from outside the gaming industry to promote its expansive role in digital standard making.<sup>55</sup> Blizzard's role in shaping and maintaining communities has an important and sizeable impact in the global digital license market. This market power comes with a unique challenge. Because Blizzard oversees and manages multiple global communities, they must also manage clashes when cultural differences collide in their digital communities.

During the 2019 Hong Kong protests, Blizzard removed the championship title from its global *Hearthstone*<sup>56</sup> winner for discussing the Hong Kong protesters and giving the protesters a nod of encouragement.<sup>57</sup> It should be noted that the global tournament championship was held in Beijing.<sup>58</sup> Some critics of Blizzard have stated that Blizzard's censorship is attributable to the fact that it seeks to expand its market in Asian countries.<sup>59</sup> This particular instance garnered a fair amount of international criticism and resulted in scathing letters from US Senators and US Representatives asking for Blizzard to explain its actions.<sup>60</sup> Digital license disputes have shown that they have the ability to attract legislative attention, and it is still unclear if and how future policymakers will address the recurrent cultural clash of censorship. This conflict is an example of where dispute resolution fails and how rapidly disputes can arise from digital interactions. It is also the case that a consumer's interactions, entirely on platform, can result in a consumer facing online consequences.

In another act of censorship, Blizzard banned a player from *World of Warcraft* because the player required other players to say "trans rights" to join a voluntary player-led group.<sup>61</sup> While the player has since had their account restored, the only payment that Blizzard made to the player was in the form of an in-game pet.<sup>62</sup> It stands to reason that other players may have endured similar instances of censorship in the interests of enforcing community standards. However, because Blizzard retains the right to determine what in-game behavior is appropriate and what in-game

54. See *Protecting Our Fans and Customers*, ACTIVISION BLIZZARD, <https://www.activisionblizzard.com/code-of-conduct/ourfans.html> (last visited April 11, 2021) ("Whether it's games, esports or film and TV, what we do influences and enriches people's lives.").

55. *Tony Petitti Named Activision Blizzard's President of Sports and Entertainment*, GamesIndustry (Aug. 12, 2020), <https://www.gamesindustry.biz/articles/2020-08-12-jobs-roundup-tony-petitti-named-activision-blizzards-president-of-sports-and-entertainment>.

56. *Hearthstone is a competitive card game first launched in 2014. Players create decks of cards and compete against other players or simulated AI.* Will Bindloss, *Hearthstone Review*, PC GAMER (May 22, 2018), <https://www.pcgamer.com/hearthstone-review/>.

57. *Hearthstone Gamer Banned for Hong Kong Protest*, BBC NEWS (Oct. 8, 2019), <https://www.bbc.com/news/technology-49971077>.

58. *Id.*

59. Zack Beauchamp, *One of America's Biggest Gaming Companies is Acting as China's Censor*, VOX (Oct. 8, 2019, 12:10 PM), <https://www.vox.com/2019/10/8/20904433/blizzard-hong-kong-hearthstone-blitzzchung>.

60. Letter from Ron Wyden, Marco Rubio, U.S. Senators, & Alexandria Ocasio-Cortez, Mike Gallagher, Tom Malinowski, Members of Congress, to Robert A. Kotick, Chief Executive Officer, RON WYDEN U.S. SEN. FOR OR. (Oct. 18, 2019), <https://www.wyden.senate.gov/imo/media/doc/101819%20Wyden%20Letter%20to%20Activision%20Blizzard%20RE%20Hong%20Kong.pdf> (last visited April 11, 2021).

61. Gita Jackson, *'World of Warcraft' Player Penalized for Asking Players to Say 'Trans Rights'*, VICE (July 15, 2020, 12:03 PM), <https://www.vice.com/en/article/xg8vmz/world-of-warcraft-player-penalized-for-asking-players-to-say-trans-rights>.

62. *Id.*

behavior is not appropriate, individuals must resolve their claims with Blizzard individually.<sup>63</sup> Through the EULA, publishers first use their in-house resolution process to manage the dispute. If that fails and the consumer wants a different result, arbitration is mandatory, and class actions are prohibited. This means that individuals who are similarly situated with relatively small claims may never have the attention that their claim deserves.<sup>64</sup>

In an unrelated but analogous scenario, a Twitch streamer known as Dr. Witnesser was removed from the streaming platform for expressing his views on Christianity.<sup>65</sup> In that dispute, the adult streamer told a minor player, of Muslim faith, that the child would “go to hell” if he did not believe in Jesus Christ.<sup>66</sup> This interaction raises concerns on both sides of the dispute. From a consumer freedom perspective, consumers and quasi-commercial users want to continue to be able to discuss faith and politics with their viewers.<sup>67</sup> Digital license holders have enjoyed a long leash regarding the choice of discussion topics in many online platforms, especially in circumstances where companies explicitly warn users that chat and voice services are not monitored or regulated.<sup>68</sup> From a consumer protection perspective, many parents often worry about the interactions their minor children may have online with people they do not know.<sup>69</sup> With service platforms needing to strike a balance between consumer freedom and consumer protection, these types of disputes are unlikely to disappear any time soon.<sup>70</sup>

### B. Unregulated Human Rights Abuses

The substance of this Note has thus far had a definitively America-centric basis for consumer freedom in digital licensing disputes. Americans sharply criticize online censorship and de-platforming as a modern reality,<sup>71</sup> in part because they exercise the freedom to discuss and freedom to associate throughout their everyday

63. *Blizzard Entertainment Dispute Resolution Policy*, ACTIVISION BLIZZARD (May 19, 2015), <https://www.blizzard.com/en-us/legal/b2e0b082-fddb-4824-93fa-ee9c1bf814f8/blizzard-entertainment-dispute-resolution-policy>.

64. *Id.* See also, e.g., Jeff Sovern, *Free-Market Failure: The Wells Fargo Arbitration Clause Example*, 70 RUTGERS U. L. REV. 417, 419-22 (2018) (“[I]n invocation of the Wells Fargo arbitration clause was likely to have a profound impact on the ability of injured Wells customers to obtain compensation. Perhaps even worse, Wells Fargo’s use of an arbitration clause may have enabled Wells to extend its fraud, thereby afflicting more consumers.”).

65. Quinn Mathys, *Twitch Streamer Suspended for Preaching to Fortnite Players About Religion*, GAMERANT (July 14, 2020), <https://gamerant.com/twitch-dr-witnesser-fortnite-religion/>.

66. *Id.*

67. See generally Colin Kaepernick’s *America*, THE FREE SPEECH PROJECT, <https://freespeechproject.georgetown.edu/colin-kaepernicks-america/> (last visited April 11, 2021).

68. Joshua Goodpastor, *Is Call of Duty: Black Ops Cold War’s Toxicity Out of Control?*, GAMERANT (Nov. 21, 2020), <https://gamerant.com/call-duty-black-ops-cold-war-community-toxic-bad/> (“For many members of the *Call of Duty* community, trash-talking and verbal hazing is part of the game as much as guns and game modes are.”).

69. Nellie Bowles & Michael H. Keller, *Video Games and Online Chats Are ‘Hunting Grounds’ for Sexual Predators*, THE N.Y. TIMES (Dec 7, 2019), <https://www.nytimes.com/interactive/2019/12/07/us/video-games-child-sex-abuse.html> (last visited Nov. 19, 2020).

70. (Now): Proclamation No. 2020-12030, 85 Fed. Reg. 34079 (May 28, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-06-02/pdf/2020-12030.pdf> [hereinafter Exec. Order on Preventing Online Censorship].

71. Exec. Order No. 13925, 3 C.F.R. § 34079-83 (2020-1); see also *Online Censorship in the States*, AM. CIV. LIBERTIES UNION (2021), <https://www.aclu.org/other/online-censorship-states> (last visited Nov. 19, 2020).

lives.<sup>72</sup> This behavior carries over into American's views of how online communities should behave and how online communities should police their users.<sup>73</sup> What is happening in the backdrop of this America-centric discussion is something quite different. Various platform services are being used to prop up anti-western regimes,<sup>74</sup> enhance terroristic capabilities,<sup>75</sup> monitor and punish political dissidents,<sup>76</sup> money launder,<sup>77</sup> prevent discussion of peaceful regime changes,<sup>78</sup> and even act as a humanitarian lifeline to otherwise impoverished people in countries whose economic policy has failed.<sup>79</sup> In essence, conflicts in the real world spill over into digital communities. How a platform manages the conflict spillover can mean the difference between consumers trusting or distrusting the platform.

Platforms are thus faced with a problem. Ineffective management of in-game license disputes have real consequences in the real world. Ineffective license dispute management also discourages other in-game consumers because the consumer may feel as if their license is devalued if noxious license users go unpunished.

The resulting product of the license equation is antithetical to the goals of arbitration. That is to say, disputes can become greatly amplified and cause intense public scrutiny. The disputes move public sentiment in long lasting and unpredictable ways. If the end goal of a EULA's mandatory arbitration clause is to reduce liability, publicity, and promote business efficacy, the previously mentioned disputes outline underlying problems with the current arbitration formula. If arbitration is being used to manage digital disputes privately, there is an underbelly of

72. Exec. Order No. 13925, 3 C.F.R. § 34079-83 (2020-1).

73. See generally Amy J. Schmitz, *American Exceptionalism in Consumer Arbitration*, 10 LOY. U. CHI. INT'L REV. 81 (2012).

74. Ryan Gallagher, *Google Plans to Launch Censored Search Engine in China, Leaked Documents Reveal*, THE INTERCEPT (Aug. 1, 2018), <https://theintercept.com/2018/08/01/google-china-search-engine-censorship/>.

75. Charlotte Jee, *Germany's Synagogue Shooting was Live-Streamed on Twitch—But Almost No One Saw It*, MIT TECH. REV. (Oct. 10, 2019), <https://www.technologyreview.com/2019/10/10/132662/germanys-synagogue-shooting-was-live-streamed-on-twitch-but-almost-no-one-saw-it/>; see also Bart Pursel, *Case Study: Terrorist Usage of Social Media*, INFO., PEOPLE, AND TECH., <https://psu.pb.unizin.org/istl110/chapter/10-4-case-study-terrorist-usage-of-social-media/> (last visited Nov. 19, 2020); see also Nina Iacono Brown, *Social Media and Terrorism*, SYRACUSE UNIV. NEWHOUSE SCH. OF PUB. COMM'NS (Feb. 1, 2018), <https://newhouse.syr.edu/news/social-media-and-terrorism/>.

76. Alexandra Ma, *China has Started Ranking Citizens With a Creepy 'Social Credit' System – Here's What You Can do Wrong, and the Embarrassing, Demeaning Ways They Can Punish You*, BUS. INSIDER (Oct. 29, 2018), <https://www.businessinsider.com/china-social-credit-system-punishments-and-rewards-explained-2018-4>; see also Charlie Campbell, *How China is Using "Social Credit Scores" to Reward and Punish its Citizens*, TIME MAG., <https://time.com/collection/davos-2019/5502592/china-social-credit-score/> (last visited Nov. 19, 2020).

77. Press Release, The United States Department of Justice, *Two Chinese Nationals Charged with Laundering Over \$100 Million in Cryptocurrency From Exchange Hack* (Mar. 2, 2020), <https://www.justice.gov/opa/pr/two-chinese-nationals-charged-laundering-over-100-million-cryptocurrency-exchange-hack>; see also Kelly Phillips Erb, *Justice Department Seeks To Recover Hacked Cryptocurrency Funds Tied to North Korea*, FORBES (Aug. 31, 2020), <https://www.forbes.com/sites/kellyphillipserb/2020/08/31/justice-department-seeks-to-recover-hacked-cryptocurrency-funds-tied-to-north-korea/#20efcd468783>; see also Contessa Brewer & Scott Zamost, *Gift Card Crime Fueling Opioid Addiction Across the US*, CNBC (Dec. 7, 2017) (stating that law enforcement is not equipped to handle anonymous credit transactions), <https://www.cnbc.com/2017/12/07/gift-card-crime-fueling-opioid-addiction-across-the-us.html>.

78. Steven Murdoch & Hal Roberts, *Introduction to: Internet Censorship and Control* (July 11, 2014), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2268587](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2268587).

79. See generally Julian Dibbell, *The Life of the Chinese Gold Farmer*, N.Y. TIMES MAG. (June 17, 2007), <http://www.nytimes.com/2007/06/17/magazine/17lootfarmers-t.html>.

digital transactions that should be dealt with in a public and open discussion. Failure to implement effective in-game license dispute management systems means that platforms that publish something as innocuous as a children's game can become potential tools for criminal actors.<sup>80</sup>

An example of a noxious digital transaction that strains traditional consumers is the inflation of "currency-farming" users, who sell their digital currencies or digital assets for real-world money. Currency-farming is perhaps not the most exact string of words to describe what is occurring since the practice can also include the theft of in-game goods to resell to an otherwise bona fide purchaser.<sup>81</sup> This should raise flags among anyone who is even marginally concerned about unrestricted and unmonitored trade,<sup>82</sup> which is extraordinarily common.<sup>83</sup> One of the defining problems with currency-farming is that it generates real wealth anonymously, since user accounts do not have to be linked to an identifiable person.<sup>84</sup> The person ultimately collecting digital currencies or digital assets could be a warden in a prison collecting off the work of prisoners,<sup>85</sup> a poor family who supplements their monthly income during a national depression,<sup>86</sup> or a teenager who steals their parents' credit card to gamble online funds.<sup>87</sup>

Each of these situations are not merely hypothetical, but present real and practical examples of how United States' domestic and foreign policy measures can be effectively thwarted through digital currency transactions. Much of this behavior goes on because courts are reluctant to recognize formal rights to online goods. Some courts have recognized the great importance that digital goods play in our

80. Anton Moiseienko & Kayla Izenman, *Gaming the System: Money Laundering Through Online Games*, 39 ROYAL UNITED SERVICES INST. 9 (Oct. 2019) ("Online games are not regulated, which means there are no clear expectations of what game operators can or should do to identify criminal activity.").

81. Andy McAdams, *Lawful Neutral: Money Laundering and Micro-Laundering in the MMO Industry*, MASSIVELY OVERPOWERED (Aug. 9, 2019), <https://massivelyop.com/2019/08/09/lawful-neutral-money-laundering-and-micro-laundering-in-the-mmo-industry/>.

82. Press Release, U.S. Department of the Treasury, Treasury Sanctions Eighteen Major Iranian Banks (Oct. 8, 2020).

83. Shawn Boburg, *Stephen K. Bannon Once Guided a Global Firm that Made Millions Helping Gamers Cheat*, THE WASH. POST (Aug. 4, 2017), [https://www.washingtonpost.com/investigations/steve-bannon-once-guided-a-global-firm-that-made-millions-helping-gamers-cheat/2017/08/04/ef7ae442-76c8-11e7-803f-a6c989606ac7\\_story.html](https://www.washingtonpost.com/investigations/steve-bannon-once-guided-a-global-firm-that-made-millions-helping-gamers-cheat/2017/08/04/ef7ae442-76c8-11e7-803f-a6c989606ac7_story.html).

84. Larry Greenemeier, *Chinese Prison Inmates Forced to Moonlight as World of Warcraft "Gold Farmers" for Guards*, SCI. AM. (May 27, 2011), <https://blogs.scientificamerican.com/observations/chinese-prison-inmates-forced-to-moonlight-as-world-of-warcraft-gold-farmers-for-guards/>.

85. *Id.* See also Weijing Zhu, *The Chinese Prison that Prisoners to Play WoW*, THE WORLD OF CHINESE (Jan. 27, 2015), <https://www.theworldofchinese.com/2015/01/the-chinese-prison-that-forced-prisoners-to-play-wow/>; see also Paul Tassi, *Chinese Prisoners Forced to Farm World of Warcraft Gold*, FORBES (June 2, 2011), <https://www.forbes.com/sites/insertcoin/2011/06/02/chinese-prisoners-forced-to-farm-world-of-warcraft-gold/#5a79d43e5fe4>.

86. Mat Omber, *How RuneScape is Helping Venezuelans Survive*, POLYGON (May 27, 2020), <https://www.polygon.com/features/2020/5/27/21265613/runescape-is-helping-venezuelans-survive>; see also *Venezuela's Paper Currency is Worthless, So Its People Seek Virtual Gold*, THE ECONOMIST (Nov. 21, 2019), <https://www.economist.com/the-americas/2019/11/21/venezuelas-paper-currency-is-worthless-so-its-people-look-for-virtual-gold>.

87. Michael McWhertor, *Counter-Strike Player Files Suit Against Valve Over 'Illegal Gambling' Surrounding CS:GO*, POLYGON (June 23, 2016), <https://www.polygon.com/2016/6/23/12020154/counter-strike-csgo-illegal-gambling-lawsuit-weapon-skins-valve>; see also Jeffrey Neuberger, *Court Enforces Arbitration Clause in Online Terms of Service Accepted by a Minor*, PROSKAUER (Feb. 14, 2020), <https://newmedialaw.proskauer.com/2020/02/14/court-enforces-arbitration-clause-in-online-terms-of-service-accepted-by-a-minor/>.

modern world,<sup>88</sup> with some jurisdictions formally recognizing virtual goods as a real property right.<sup>89</sup> Some foreign courts have gone so far as to issue awards to users that have had their goods stolen by other users or deleted from their accounts by the licensing company.<sup>90</sup> Because digital license disputes happen more frequently and with a greater amount of wealth at stake, it is likely that courts will continue to recognize the importance of digital goods. Similarly, if the technological-literacy of judges or arbiters increases, a plaintiff's claim may have an easier time finding an audience to hear their claim regarding their digital goods.

To reiterate, the demand of digital goods is increasing and if consumers want formalized rights to their digital goods, arbitration may not be the best method of achieving legal precedent. Arbitration shrouds exploitive business practices that consumers would be better off knowing. For example, many consumers have expectations that their goods are sourced fairly and are not created using exploitive labor practices.<sup>91</sup> However, digital goods are subject to the same ethical sourcing problem that physical goods are.<sup>92</sup> Consumers may want to know where their digital goods are coming from. This may especially be true if the consumer's purchases are being used as a band-aid to fix large scale foreign policy crises.<sup>93</sup>

Ultimately, digital platforms and digital goods have a unique challenge as people from across the globe interact with each other, often in competing ways. Platforms have to create standards that are applicable across drastically different jurisdictions that enable users to enjoy the benefit of their digital goods. Platforms have to work across language barriers, cultural barriers, and regulatory barriers. Where consumers from one region do not understand the cultural differences in another, platforms have to explain their EULA enforcement decisions to consumers or potentially face public scrutiny.<sup>94</sup>

#### IV. ANALYSIS

What binds all of the aforementioned harm together is the common element of mandatory arbitration and class action waivers by a platform's users.<sup>95</sup> Whether

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88. Richard Heeks, *Current Analysis and Future Research Agenda on "Gold Farming": Real-World Production in Developing Countries for the Virtual Economies of Online Game*, INST. DEV. POL'Y & MGMT. (2008), [https://hummedia.manchester.ac.uk/institutes/gdi/publications/work-ingpapers/di/di\\_wp32.pdf](https://hummedia.manchester.ac.uk/institutes/gdi/publications/work-ingpapers/di/di_wp32.pdf).

89. *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 613 (E.D. Pa. 2007).

90. Sarah Xuan, *Virtual Property in Greater China*, MMLC GRP., <https://www.hg.org/legal-articles/virtual-property-in-greater-china-5538> (last visited Nov. 19, 2020).

91. See Lan Cao, *Made in the USA: Race, Trade, and Prison Labor*, 43 N.Y. REV. L. & SOC. CHANGE 56-8 (2019).

92. Danny Vincent, *China Used Prisoners in Lucrative Internet Gaming Work*, THE GUARDIAN (May 25, 2011), <https://www.theguardian.com/world/2011/may/25/china-prisoners-internet-gaming-scam>.

93. *Venezuela's Paper Currency is Worthless*, *supra* note 87; see also Doug Dubrowski, *Playing for Their Lives: How a 2001 Video Game is Feeding Venezuela*, NAT'L INT. (Mar. 26, 2019), <https://nationalinterest.org/feature/playing-their-lives-how-2001-video-game-feeding-venezuela-49187>.

94. Tara Law, *Reddit Users Rally Against Chinese Censorship After \$300 Million Funding Round*, TIME MAG. (Feb. 11, 2019), <https://time.com/5526128/china-reddit-tencent-censorship/>.

95. Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, ECONOMIC POLICY INSTITUTE (Dec. 7, 2015), <https://www.epi.org/publication/the-arbitration-epidemic/> (last visited Nov. 19, 2020), see also Amy J. Schmitz, *Curing Consumer Warranty Woes through Regulated Arbitration*, 23 OHIO ST. J. DISP. RESOL. 627 (2008).

you are a minor who entered into a EULA without your parent's informed consent,<sup>96</sup> an eSports competitor who has 80% of their profits taken from them, a political dissident of an authoritarian regime, a father farming digital goods to supplement their monthly income, or a cartel looking to launder money, you are bound by the same binding arbitration agreement and class action waivers that platforms establish. What differs, however, is the enforcement of the arbitration agreement.<sup>97</sup>

Over the past three decades, corporations have increasingly made arbitration the standard in dispute resolution between themselves and consumers.<sup>98</sup> The guiding law, the Federal Arbitration Act ("FAA"), passed in 1925,<sup>99</sup> did not see much use until the 1980's when the United States Supreme Court revisited the law to give it renewed importance.<sup>100</sup> The FAA limits what courts may do to review the enforcement of arbitration agreements and arbitration awards<sup>101</sup> even where there are errors of fact, contract interpretation, or errors in law.<sup>102</sup>

What is unnerving is that the legislative intent behind the FAA was so that businesses could better self-regulate amongst themselves.<sup>103</sup> Upon its passage, any agreements to arbitrate "involving commerce" were "valid, irrevocable, and enforceable, save on such grounds as exist in law or in equity for the revocation of any contract." However, as times changed, so too did the scope of what "commerce" entailed. Businesses began applying the FAA in what were, at the time, novel ways to try and expand the usability of arbitration agreements. What would follow is that while the pot sweetened for businesses, eager to minimize, individualize, and privatize disputes, consumers and employees would be left with minimal protection at the federal level and no protection at the state level.

Unsurprisingly, employees and consumers do not typically look to arbitration as a useful method of resolving their claims, since the dispute will be private, cannot be joined with other similarly situated claims, and often in the case of consumer agreements, the expenses of going to arbitration are not worth the potential outcome.<sup>104</sup> Where businesses were left to self-regulate between themselves in 1925, they have failed to involve their employees and consumers in any potential share of the proverbial fruit of the FAA.<sup>105</sup> If the purpose of arbitration was to resolve

96. Jeffrey Neuburger, *Court Enforces Arbitration Clause in Online Terms of Service Accepted by a Minor*, PROSKAUER (Feb. 14, 2020), <https://newmedialaw.proskauer.com/2020/02/14/court-enforces-arbitration-clause-in-online-terms-of-service-accepted-by-a-minor/#page=1>.

97. Jared L. Hubbard, *Advantages to International Arbitration: Enforceability*, FITCH LAW PARTNERS, LLP (Oct. 14, 2020), <https://www.fitchlp.com/blog/2020/10/advantages-to-international-arbitration-enforceability.shtml> (last visited Nov. 19, 2020) (Chinese Courts have only enforced two court judgements from the United States, but have enforced approximately 86.4% of arbitration agreements).

98. Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, ECONOMIC POLICY INSTITUTE (Dec. 7, 2015), <https://www.epi.org/publication/the-arbitration-epidemic/>.

99. 9 U.S.C. §§ 2, 3 (2018).

100. 9 U.S.C. § 3 (2018). In order to come under the FAA, an agreement must involve commerce and include a written arbitration clause; 9 U.S.C. § 2 (2018); *see also* Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, ECONOMIC POLICY INSTITUTE (Dec. 7, 2015), <https://www.epi.org/publication/the-arbitration-epidemic/>.

101. Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, ECONOMIC POLICY INSTITUTE (Dec. 7, 2015), <https://www.epi.org/publication/the-arbitration-epidemic/>.

102. *Id.*

103. *Id.*

104. Peter J. Quinn, *A Click Too Far: The Difficulty in Using Adhesive American Law License Agreements to Govern Virtual Worlds*, 27 WIS. INT'L L. J. 757 (2009).

105. Employees and consumers have not seen the benefits of arbitration in the same scale as businesses had. At one point individual states could establish their own consumer protection regime as it applies to

disputes between parties of equal bargaining power and relatively equal knowledge of the legal landscape, then arbitration has extended too far as it applies to digital licenses.

### A. History of the FAA

Originally, the FAA was drafted and envisioned to resolve trade association business disputes.<sup>106</sup> The original statute even mentions exemptions for contracts of employment, because the arbitration of employment agreements were considered to be largely against public policy. Thus, from 1925 to the 1980s, the FAA applied to a quite narrow set of cases, which primarily involved trade disputes between extraordinarily sophisticated parties who could bear the risks associated by having a mere third-party neutral resolve the dispute. It was a cost savings measure that made sense in business practice because trade customs were not codified into state or federal law, it left no dispute as to what set of law the parties would be using, and both parties could make an educated assent into the agreement. Furthermore, the private proceedings between two parties allowed them both to move forward unscathed outside of their immediate dispute. Then, the FAA would undergo a series of revisions in the 1960s and 1980s that would expand its scope and influence.

The first major increase in FAA authority came through the Supreme Court in 1967, where it eradicated traditional contract defenses to arbitrate.<sup>107</sup> This meant that traditional defenses of contract such as incapacity, that it runs contrary to public policy, or even that it is unconscionable, ran secondary to the arbitration agreement.<sup>108</sup> So, for example, if the contract clearly involved a minor that was unable to contract, the dispute could not be resolved in federal court. The dispute had to be arbitrated. This left potential arbitration challengers with only the ability to challenge the arbitration clause itself, if the clause was procured by fraud or other illegal means.<sup>109</sup> The second major increase in FAA authority came in 1983 when the Supreme Court adopted a presumption in favor of arbitration when parties use arbitration clauses.<sup>110</sup> When there was a dispute over whether or not to arbitrate, federal courts were mandated to resolve all doubts in favor of arbitration.<sup>111</sup> At this point, it was unclear if the FAA also included claims brought in state court, and individual states could still establish policy and law that ran contrary to the FAA.<sup>112</sup> However, this state exemption was short lived.<sup>113</sup> The elimination of traditional contract

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arbitration. Today, arbitration is presumed to be advantageous over traditional contract law, “so long as arbitration preserves the fundamental values of traditional contract law.” Stone & Colvin, *supra* note 102.

106. *Id.*

107. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

108. *Id.*

109. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006).

110. *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 23 (1983).

111. *Id.* at 24-25.

112. Stone & Colvin, *supra* note 102.

113. In 1984, the Supreme Court expanded its presumption in favor of arbitration built in *Moses*, by requiring state courts also follow the FAA so long as the dispute arose through means of interstate commerce. See *Southland Corp. v. Keating*, 465 U.S. 1 (1984). Not only did this prevent states from creating unique policy to tailor consumer protection for its constituents, but it also added a special preemption effect against state laws. In other words, any state law that ran contrary to the FAA would be preempted as a matter of federal law. This is important because the FAA originally explicitly allowed for state law to run contrary to federal law. 9 U.S.C. § 2 (2018).

defenses and the presumption in favor of arbitration has greatly shifted power in favor of contract drafters.<sup>114</sup>

Individual states, seeing an increase in arbitration between businesses and consumers in the 1990s, attempted to create law that provided greater protection to their respective constituents.<sup>115</sup> However, the Supreme Court would often find that state law was preempted by the FAA because it was restrictive of arbitration, in a manner that traditional contracting methods were not.<sup>116</sup> Thus, measures that were designed to prevent the proceeding from happening in a distant jurisdiction, in a state that the plaintiff may not live in, would be declared invalid and contrary to the presumption to arbitrate.<sup>117</sup> Even in cases where it would be prohibitively expensive for plaintiffs to bring their case in arbitration, the dispute would never-the-less be enforceable.<sup>118</sup>

What employees and consumers are left with was the bare minimum assumption that if you were party to a contract that contained an arbitration agreement, you were stuck with the terms unless the specific arbitration clause itself was procured by fraud or illegal means. This is not to say that some businesses did not attempt to regulate themselves,<sup>119</sup> but some businesses have taken advantage of the favorable terms of arbitration to effectively rule out many types of claims from ever being disputed.<sup>120</sup>

### *B. Adding Class-Action Waivers to the Expanded FAA; the Snuffing Out of Aggregate Small Claims Plaintiffs*

Given the FAA's large and commanding authority, states have established ways of providing protection to consumers from what they deemed to be unconscionable adhesion contracts.<sup>121</sup> California devised a legislative test to determine if companies were using what they deemed to be unconscionable arbitration agreements. To examine if arbitration agreements were unconscionable, courts were required to engage in a three-part test. If the plaintiff's claim (1) was caused by a contract of adhesion, (2) involved a small amount of money, and (3) included the party with superior bargaining power deliberately participating in the harmful conduct, then the arbitration agreement would be unenforceable.<sup>122</sup> This meant that if litigating the enforceability of the arbitration agreement was not necessary, then plaintiffs could still make small claims without participating in arbitration.

The Ninth Circuit Court of Appeal in *Laster v. AT&T Mobility LLC* allowed for a class to be certified against the cell-phone service company AT&T, which had

114. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html>.

115. See Mont. Code Ann. § 27-5-114 (1993).

116. See *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. (1996).

117. *Id.*

118. *Green Tree Fin. Corp. -Ala. v. Randolph*, 531 U.S. 79, 91 (2000).

119. AMERICAN ARBITRATION ASSOCIATION NATIONAL CONSUMER DISPUTES ADVISORY COMMITTEE, CONSUMER DUE PROCESS PROTOCOL STATEMENT OF PRINCIPLES 2 (Apr. 17, 1998), [https://www.adr.org/sites/default/files/document\\_repository/Consumer%20Due%20Process%20Protocol%20%281%29.pdf](https://www.adr.org/sites/default/files/document_repository/Consumer%20Due%20Process%20Protocol%20%281%29.pdf) (stating that companies should preserve consumer's rights to due process through the use of small claims courts).

120. See, e.g., *Lieitra v. Gateway, Inc.*, 734 N.Y.S.2d 389 (2001) (holding denial of small claims court litigation proceedings valid under arbitration agreements).

121. CAL. CIV. CODE § 1141.10-.31 (West 2005).

122. *Id.*



allegedly engaged in a fraudulent sales tax scheme where AT&T charged \$15 in sales tax on an otherwise free phone.<sup>123</sup> The Supreme Court later reversed this decision, holding that arbitration was not an appropriate forum for class action lawsuits since defendants could lose their right to interlocutory appeals or judicial review.<sup>124</sup> In fact, so long as substantive rights are effectively maintained in the arbitration proceedings, then class-action waivers requiring individual arbitration are generally upheld.<sup>125</sup>

### *C. Applying Arbitration Principles to Digital License Claims Disputes*

It should be abundantly obvious that the FAA has been grossly expanded through the advancement of court precedent, likely in a way never intended during its original passage in 1925. Not only is arbitration covering contracts of sophisticated parties where parties are engaged in complex interstate commerce, but it also now includes contracts with minor children,<sup>126</sup> the infirm,<sup>127</sup> intra-state commerce, foreign commerce, employee and employer relationships, effective consumer rights validation, and a complete repudiation of state's attempts to provide uniquely tailored consumer protection. Coupled with the presumption that class-action waivers are enforceable, the consumer is left with little in terms of statutory remedy.<sup>128</sup>

The concern for consumers is that absent direct congressional attention directed at curbing arbitration agreements to digital goods, the executive branch will be encouraged<sup>129</sup> to take decisive action that ham-fistedly resolves digital disputes, leaving consumers and companies alike worse off.<sup>130</sup> Some international consumers have taken matters into their own hands and have gone outside of the traditional justice system to ensure that their virtual goods are protected.<sup>131</sup> Thus, individual arbitration damages in digital goods usage is likely to be nearly immeasurable or, at best, minor.<sup>132</sup> Moreover, since plaintiff's claims cannot be merged into a class action, it is vastly easier for every user to simply acquiesce to greater corporate and

123. *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *rev'd sub nom.* *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

124. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

125. One could wonder how courts could maintain a policy in favor of joinder of claims, yet also allow for the requirement that plaintiffs who are similarly situated be bound by arbitration agreements that prevent class actions. This, however, would be the topic for a whole different paper. See *Mitsubishi Motors v. Soler Chrysler-Plymouth*, *supra* note 98; see generally George B. Fraser, *Ancillary Jurisdiction and the Joinder of Claim*, 33 F.R.D. 27 (J.P.M.L. 1963), <https://casertext.com/case/ancillary-jurisdiction-the-joinder-of-claims> (last visited Apr. 16, 2021).

126. Jeffrey Neuberger, *Court Enforces Arbitration Clause in Online Terms of Service Accepted by a Minor*, PROSKAUER (Feb. 14, 2020), <https://newmedialaw.proskauer.com/2020/02/14/court-enforces-arbitration-clause-in-online-terms-of-service-accepted-by-a-minor/#page=1>.

127. Andi Alper, *Seeking Justice for Grandma: Challenging Mandatory Arbitration in Nursing Home Contracts*, 2016 J. DISP. RESOL. 469 (2016).

128. Amy J. Schmitz, *Curing Consumer Warranty Woes through Regulated Arbitration*, 23 OHIO ST. J. DISP. RESOL. 627 (2008).

129. Or, from the executive branch's perspective, "left with no other choice."

130. Selina Wang, *TikTok's US ban is on hold. What Comes Next?*, CNN (Oct. 5, 2020), <https://www.cnn.com/2020/10/05/tech/tiktok-what-next-intl-hnk/index.html>.

131. Justin M. Ackerman, *An Online Gamer's Manifesto: Recognizing Virtual Property Rights by Replacing End User Licensing Agreements in Virtual Worlds*, 6 PHOENIX L. REV. 137, 138 (2012).

132. Protocol on Determination of Damages in Arbitration, International Institute for Conflict Prevention & Resolution, <https://www.cpradr.org/resource-center/protocols-guidelines/protocol-on-determination-of-damages-in-arbitration>, (last visited Apr. 16, 2021).

soft-foreign-power influence over their individual license usage.<sup>133</sup> This leaves consumers in a situation where their ability to use specific digital goods may very well be determined by what country has exerted influence over the digital good provider.<sup>134</sup>

During the Trump Administration, the Internal Revenue Service provided guidelines that digital currencies that leave a platform are taxable.<sup>135</sup> This suggests that virtual currencies are treated like property for tax purposes.<sup>136</sup> Should a future presidential administration find that providing direct aid or financial assistance to impoverished people abroad is against US foreign policy,<sup>137</sup> it may attempt to block access to platform services that openly encourage and provide a forum for digital goods transactions.<sup>138</sup> It would not be the first time that the US denied the use of international digital consumer services to countries with economic or political differences.<sup>139</sup> Or, suppose that the United States wanted to prevent bad actors from being able to launder currency through digital currency exchanges.<sup>140</sup> Both examples present potential pressure valve situations regarding the arbitration of digital goods disputes; if digital goods disputes are not handled in a way that solves consumer frustration, the enlarged dispute may lead to extraordinary backlash. Essentially, if consumers are prevented from asserting their interests in an effective manner,<sup>141</sup> then the dispute may drastically enlarge,<sup>142</sup> and invite legislative or executive bodies to take divisive action to protect consumers.

## V. CONCLUSION

Companies should continue the use of arbitration processes because it is quick, gives users some property rights within regular means of effecting commerce, can apply industry standards to disputes that may otherwise be hard for a judge or jury to take sympathy with, and can enforce some legal standards broadly to consumers who enjoy the product globally. However, with regard to the presumption against class action waivers, this dramatically hinders users' ability to recover small amounts of money. Consumers should consider that an arbitration clause may prevent them from seeing their disputes over digital property ever resolved. Consumer frustration partially stems from the use of class-action waivers, as it flies in the face of the federal desirability of the joinder of claims. The courts have, effectively, said that the clogging of arbitration procedures is fine, so long as these small consumer contract disputes do not clog up their dockets. The price users—and eventually

133. James Bonar-Bridges, *Regulating Virtual Property with EULAS*, 2016 WIS. L. REV FORWARD 79, 79-91 (2016).

134. Ethan D. Jeans, *Funny Money or the Fall of Fiat: Bitcoin and Forward-Facing Virtual Currency Regulation*, 13 COLO. TECH. L. J. 99 (2015).

135. Brian Fung, *IRS Quietly Deletes Guideline That Fortnite Virtual Currency Must be Reported on Tax Returns*, CNN (Feb. 14, 2020), <https://www.cnn.com/2020/02/13/tech/fortnite-taxes/index.html>.

136. *Id.*

137. *Id.*

138. Ombler, *supra* note 87.

139. *Facebook Deletes North Korean Account, but it Resurfaces*, REUTERS (Aug. 23, 2010), <https://www.reuters.com/article/urnidgns852573c400693880002577880027acfa/facebook-deletes-north-korean-account-but-it-resurfaces-idUS388795273320100823>.

140. Clare Chambers-Jones, *Virtual World Financial Crime: Legally Flawed*, 7 L. & FIN. MKT REV. 48, 50-51 (2013).

141. *Id.*

142. Sovern, *supra* note 65.

companies—pay, is that their practices incrementally coalesce into a problem that the executive or legislative branches of government are practically called to cure.