

Law of the Level

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Downloadable Content Without Downloading End User License Issues[\[1\]](#)

Let's start with the basics. When someone purchases a video game, an end-user license agreement (EULA)[\[2\]](#) details the rights the purchaser has to play and use the game. Additionally, users can often buy optional downloadable content such as map-packs, mini-expansions and the like. Users may also elect to purchase small add-ons to games (such as power-ups, new costumes, or equipment fully capable of being taken off sweet jumps) via microtransactions. For ease of reference, we'll call both categories "DLC" (but we recognize some distinction may be drawn between the two). Purchasing DLC is typically handled in three ways: integrating the transaction into the video game itself, conducting the transaction externally via a game platform, such as video game platform, or through a third-party provider such as LiveGamer or Paypal. When the transaction relies on a third party, there may be a terms of sale (apart from the game developer's EULA) that governs a user's purchase of the DLC. Two distinct legal agreements from two separate companies relating to the same game content creates the potential for conflict. For example, the third party's terms of sale governing the purchase of DLC may be silent on the topic of content ownership or may even conflict with the EULA.

ONE EULA, INDIVISIBLE, WITH LIMITED LICENSES FOR ALL

Video game publishers can streamline the DLC transaction process by conducting the sale themselves. Second Life and Habbo Hotel are two examples of games that do not rely on any outside party to conduct microtransactions. Linden Lab, the publisher of Second Life, has a single, consistent policy for Second Life and its virtual exchanges (LindeX and Xstreet SL). Likewise, Habbo Hotel's terms of use and terms of sale both explicitly state that users have no property interest in coins, items, or goods, and that all virtual items remain the exclusive property of the publisher, Sulake. Thus, by handling the entirety of a microtransaction in house, the game developer/publisher can minimize the risk of a potential conflict regarding ownership rights by creating a single, unified policy that incorporates both the EULA and the terms of sale.

PLATFORMS: ONE EULA TO RULE THEM ALL (AND IN THE FINE PRINT...BIND THEM)

Currently, many video game developers and publishers make use of external platforms for running and distributing their games (Kongregate, Facebook, Apple's iPhone, Nintendo's Wii, Sony's Playstation, and Microsoft's Xbox 360). Often the platform provides an omnibus EULA

for all games making use of the platform, and the game developer and/or publisher does not provide a game specific EULA. As a result, the game developer and/or publisher may not be in a position to cater the terms under which the end user will interact with a game or purchase downloadable content. Therefore, the platform's EULA may handle rights to game content or downloadable content in a manner inconsistent with the intentions of the game developer/publisher.

This concern is somewhat mollified by the fact that most major platforms model their approach to end users' rights in a manner very similar to that taken by a game developer distributing its own game. Typically, the platform EULA clearly spells out that the game developer/publisher utilizing the platform retains full ownership of all game content, DLC and content purchased through microtransactions while the end user gains only a restricted license to make use of this content. However, video game developers/publishers should always review the platform EULA to ensure there is no inconsistency between the game developer/publisher's intended approach to handling rights to DLC and the platform's method of handling the user's license to the products.[\[3\]](#)

In the event an inconsistency exists between the platform's EULA and the game developer/publisher's intended purpose for the game, the game developer/publisher should attempt to negotiate with the platform owner for an amendment to the omnibus EULA, or, alternatively, the right to create a parallel EULA that governs the particular game or interaction in question.[\[4\]](#) In the absence of a credible legal option, the game developer/publisher should consider whether modifications to the technical design of the game could eliminate the potential for harm to the game developer/publisher's interests.

A THIRD PARTY APPROACHES! EXTERNAL SERVICE PROVIDERS AND EXTERNAL USER CONTRACTS.

When relying on independent third-parties to conduct DLC transactions, the risk of conflict between the third party's terms of sale and the game developer/publisher's EULA increases. Unaffiliated third-parties may look to protect themselves from liability at the expense of video game publishers since the terms of sale are drafted with the third party's interests in mind. Third-party providers often require users to acknowledge that they, the providers, take no position on the ownership, transferability, or use of items purchased or sold through their services. These disclaimers, however, may lack language that reaffirms a publisher's ownership rights, or they may fail to instruct users to refer to their game EULAs for specifics on content ownership. Thus, third-party disclaimers may leave publishers without the best protection, as the absence of clarifying terms may foster ambiguity and confuse users as to the exact nature of the rights they have acquired to the DLC they have purchased.

To prevent conflicts with third-party providers, a video game publisher can establish a partnership with the provider. One example of this is the partnership between Sony Online Entertainment (SOE) and LiveGamer. For several of its titles, SOE allows LiveGamer to conduct microtransactions for virtual goods. SOE's EULA and LiveGamer's terms of sale complement each other to ensure that a user cannot participate in a transaction without the consent of both companies. SOE places responsibility on LiveGamer to determine the eligibility of a user to

participate in exchanges; whereas LiveGamer places responsibility on SOE to determine a user's rights to acquire and use virtual items. More importantly, the terms of service for SOE and LiveGamer are both very clear that a user obtains no ownership rights in purchased game content. Thus, a collaborative partnership with a third-party provider affords a publisher the opportunity to cooperate on terms that regulate a user's ownership rights.

MAKING PEACE WITH EXTERNAL CONTRACTS^[5]

As discussed above, many of the solutions are context dependent; however, there are several proactive steps a publisher can take to reduce potential conflicts over DLC ownership. If the DLC only contains slight additions and minor changes to the game (patches, new items, or new outfits), it may be easier to have a EULA that specifically extends to cover such minor additions (for example, specifically referencing such additions in the EULA itself). If the DLC contains major additions or changes to the game (adding levels or characters, altering the ESRB rating, or allowing online interaction between users), it may be easier to create a separate, compatible EULA to handle the complexities of such significant additions. Furthermore, video game publishers can educate their users on which third party providers are authorized to provide DLC and which are unauthorized. By listing the items that may be traded and by listing sanctioned third-party providers, video game publishers can help reduce the potential for conflict. Finally, a EULA can require that even if a user purchases DLC from an unauthorized third-party, the EULA's terms will govern the DLC despite any representations made by the third-party.

Regardless of the method used to conduct microtransactions, and regardless of whether there are issues of content ownership, merchantability, or IP infringement, video game publishers should ensure they have a fully developed EULA that not only specifically addresses DLC, but also considers the many legal issues that DLC creates.

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[1] Ok, it's a terrible title, but it's better than the typical legalese: "On Downloadable Content: Moving Toward A Broader Consensus Of First Party And Third Party Contracts In A Digital Millennium."

[2] I'll go to the grave defending the relevance (and usefulness) of these documents. Every time you scroll down and click without reading a piece of me dies.

[3] The game developer should also make sure that the technical design of the game is compatible with the platform's method of handling DLC.

[4] Realize that most developers and publishers will not have the requisite leverage to negotiate a change to the platform's EULA. Also, permitting parallel EULAs may be untenable for many platform owners, particularly where there would be technological ramifications to permitting changes to the omnibus EULA. Long story short? Make sure you design your game with the intended platform (and its EULA) in mind.

[5] Or, to paraphrase a particularly famous line: "All of the DLC are belong to you."