

Due to adult content today, I will record part of today's session. If adult content (about sex) troubles you, please go out to the hall and we'll retrieve you after we cover these cases:

"Bragg v. Linden Research, Inc. and Philip Rosedale, No. 06-4925, USDC (E.D. Pa., May 30, 2007)."

We've discussed this: cast negative light on reasonableness and strength of Linden Lab's Second Life TOS.

"Eros, LLC, et al. v. Simon, et. al"

"Eros, LLC v. Robert Leatherwood and John 1-10 Does"

These are the copyright cases. Found in favor of Eros, makers of the sex beds in question. Shows that copyright infringement that happens in virtual spaces can be successfully litigated in terrestrial courts.

"Estavillo v. Sony Computer Entertainment America"

Dude. A virtual world is NOT A PLACE! and you HAVE NO RIGHTS THERE! Another TOS verification and indication of judicial unwillingness to treat virtual spaces the way that some users/residents would like: as a place.

"Abreu v. Slide, Inc.,

TOS again: "No you can't violate our TOS by coding a bot to play the game for you."

"Hart v. Electronic Arts, 717 F.3d 141 (3rd Cir. 2013)."

In re NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268 (9th Cir. 2013)."

"Hart v. Electronic Arts, 717 F.3d 141 (3rd Cir. 2013)."

"In re NCAA Student-Athlete Name & Likeness Licensing Litig., 724 F.3d 1268 (9th Cir. 2013)."

VERY important rights of publicity cases that established RoP standards for former student athletes. These stand as precursors to recent events that granted RoP to ALL college and HS athletes.

Some recent cases not in our books (all excerpts quoted from Eric Goldman's Technology & Marketing Law Blog)

"Saber Interactive Inc. v. Oovee, Ltd, 2:21-cv-01201-JHC (W.D. Wash. Oct. 6, 2022)."

"First Amendment Protects Videogame's Depiction of Tractor's Trade Dress-Saber v. Oovee"

The plaintiff is a videogame manufacturer suing another videogame manufacturer for violating the rights of a third-party trademark owner.

Permission Culture

It's easy to see how permission culture took root in this corner of the videogame market. Once a game manufacturer pays for an exclusive license, they stop being a potential defendant and turn into a litigious plaintiff seeking to recoup their investments. This then motivates rivals to get their own exclusive licenses, and it's a race to the (very expensive) bottom. But if everyone could freely proceed without a license, the entire industry will benefit. So Oovee is working towards a public good.

Implications for Videogames and the Metaverse

We're in the midst of a battle royale over the legally permitted verisimilitude of commercial videogames and immersive environments like virtual worlds and the metaverse. It seems obvious that game designers should be able to depict real-life without running into a rights thicket, which almost certainly would make verisimilitude financially and operationally infeasible. Yet, the rulings in this genre are not all good news. It's great to see First Amendment limits on trademark claims, but that doesn't extend to copyright claims—leading to troubling rulings like the Orton case, where one heavily tattooed wrestler can single-handedly turn into an insurmountable rights thicket. As we spend more of our lives in these virtual realities, we need clarity ASAP about whether they can accurately depict our physical reality.

"Doe v. Roblox Corp., 2022 WL 1459568 (N.D. Cal. May 9, 2022)."

"If TOS Formation Fails, Bad Legal Outcomes Are Likely to Follow—Doe v. Roblox"

Roblox discovers a virtual user-made item violates its TOS, Roblox nukes the item...but apparently didn't refund the buyers' money, so buyers lost both their money and the item. (The buyer also claims that Roblox deletes items to induce buyers to buy them again).

Contract Formation

Roblox's TOS said that "Roblox may 'at any time and without prior notice, screen, remove, edit, or block any [User Generated Content ('UGC')] that in our sole judgment violates these Terms or is otherwise objectionable' and that the user agreed 'to waive, and do waive, any legal or equitable right or remedy you have or may have against us with respect to UGC.'" Other favorable TOS provisions

include a class action waiver and a 60-day negotiation period before filing suit.

None of this matters. The court says the TOS formation failed with the named plaintiff in part because the formation process wasn't sufficiently clear to minors.

the named plaintiff was 10 at the time of TOS formation, and the court says this matters: "Even if the notice would be sufficiently conspicuous and understandable for an adult, it is not for a child...A child—even a reasonably prudent one—would not be on inquiry notice that she was assenting to an agreement from this set of facts." The court makes it clear that it's not voiding the contract due to the minor status; it's adjusting the "reasonably conspicuous" standard to reflect Doe's minority.

Section 230.

Roblox invoked Section 230 as a defense. The court disagrees

Implications

15 years ago, one of the buzziest cyberlaw topics was ownership of assets in virtual worlds, like property acquisitions in Second Life. Lots of academics and bloggers wrote about the topic, but we had very few actual court cases addressing it. All you Second Life pundits, here's an opinion you were waiting for!

Standard online account termination and content removal discretion looks weird when consumers buy in-game/in-world virtual assets. This issue puzzled me for years because those buyers spend their money knowing it's predicated on a shaky TOS foundation, eventually resulting in this article. Today, I think it's clearer that services may not be able to freely terminate users or remove paid-for items without making the users financially whole—or at least having a solid TOS warning users of the risks of losing their money.

Once the court struck down Roblox's TOS, many of its defenses fell apart. I have stressed many times over the years: FAILURE ISN'T AN OPTION WHEN IT COMES TO TOS FORMATION. That's why you need two clicks, not one, for formation—better safe than sorry. And as this opinion indicates, if your clientele involves minors, you need a kid-friendly interface; adult-focused UI tactics may not cut it.

"Quinteros v. Innogames, 2022 U.S. Dist. LEXIS 55640 (W.D. Wash. March 28, 2022)."

"Section 230 Preempts Game User's Lawsuit Over Game Moderators' Behavior—Quinteros v. Forge of Empires"

The plaintiff, Penny Quinteros (a/k/a TwoCents), claims she became addicted to the game. She played the game virtually every day from

2016–19—over 10,000 hours worth—and spent over \$9,000 on in-game transactions. She also claims that she was harassed by in-game moderators who are “volunteers” but compensated with extra in-game privileges and currency. She reported the harassment to support staff, but in profane and impolite messages that themselves might be construed as harassing. Eventually, it appears the game restricted her access. She sued pro se for a variety of claims. The court dismisses them all.

Implications

This lawsuit raises SO many key issues of Internet Law, including what steps games need to take to address online harassment (especially gender-based harassment), the legality of “addictive” games, liability for “unsafe” online environments, the implications of the freemium business model, the legal consequences of “inconsistent” content moderation, the implications of in-game “cheating,” the legal responsibility for volunteer moderators, customers’ harassment of CSRs, and legal claims for account termination/restrictions (I can’t tell if this case fits our dataset of such cases or not).

The court’s opinion breezes through most of these important and complicated topics, mostly due to the plaintiff’s pro se arguments (representing herself---not a lawyer and made lots of “amateur” mistakes. and Section 230.