Adaptive Contracting and the Unilateral Modification Clause

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This paper examines the implications of unilateral modification clauses in software contracts, using Unity Technologies' implementation of a "Runtime Fee" in its End User License Agreement as a case study. Unilateral modification allows companies to alter contract terms without mutual agreement, and presents unique challenges in the software industry due to the critical role software tools play in various creative endeavors. The essay emphasizes the importance of addressing these challenges to ensure stability and consistency for software developers and users. Proposed safeguards, including defined cooling-off periods and expanded definitions of unconscionability, aim to protect users and maintain an equitable balance between company interests and user needs within the dynamic landscape of technological innovation. Issues around unilateral modifications have a profound effect not only on intellectual property but contract law generally.

TABLE OF CONTENTS

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I. INTRODUCTION

Software developers faced a harsh reality this year. Due to a modification made by the software company Unity Technologies to its end user license agreement (EULA), many developers who had relied on its cross-platform engine to create their video games found themselves facing insolvency.[1] A cross-platform engine is a digital tool that allows a developer to create a computer program, such as a videogame, which can be utilized on a variety of different platforms. It essentially allows a creator to make a single program that can then be run on a phone, a computer, or even a car.[2] These cross-platform engines are usually licensed to developers by large software companies via licensing agreements that charge on a per-user basis.[3]

Unity's EULA modification, which was announced in September 2023, introduced an unprecedented shift in Unity's payment scheme.[4] Under this new regime, Unity extracted royalties from game developers predicated upon the number of software install occurrences if certain circumstances were met.[5] In light of the revised EULA, developers who have devoted years to the production of their game under the previous framework found themselves subject to increased financial obligations to Unity, potentially surpassing the revenue derived from sales.

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[1] Jamie J. Kayser, *The New New-World: Virtual Property and the End User License Agreement*, 27 Loy. L.A. Ent. L. Rev. 57 (2007) (outlining the function of end user license agreements and their importance to the software space).
[2] Andrew J. Hawkins, *Tesla is off the hook for allowing gaming while driving,* The Verge, (Feb. 9, 2024), https://www.theverge.com/2023/5/30/23742199/tesla-video-games-driving-nhtsa-investigation-closed.
[3] *Game Engines*, Microsoft, (Feb. 9, 2023), https://dotnet.microsoft.com/en-us/apps/games/engines.
[4] *See* Marc Whitten, *An open letter to our community*, Unity, (Feb. 9, 2024), https://blog.unity.com/news/open-letter-on-runtime-fee.
[5] *Runtime Fee Estimator*, Unity, (Feb. 11, 2024), https://unity.com/runtime-fee-estimator; *see infra* Part II.C.

So, how was this possible? In Unity's EULA, a provision exists wherein all users are bound to a unilateral modification clause.[6] Most unilateral modification clauses boil down to one seemingly straightforward sentiment: *anything in the contract is subject to change by the drafter*.[7] This may seem absurd. However, while unilateral modification does grant one side of the transaction a disproportionate amount of rights, this type of clause is extremely important for many technology companies that use standard form contracts or contracts of adhesion. The speed at which technology, particularly software, is advancing necessitates the flexibility to alter contracts to suit an ever-evolving environment. Due to the rapid pace dictated by the market, many younger companies are striving to identify swift methods for generating revenue.[8] In turn, this demand for speed means that new features are constantly undergoing experimentation and implementation, with new modified contracts being created to reflect those changes.[9] Swift innovation holds potential benefits; however, abrupt and drastic changes can lead to unintended consequences for everyone involved. Unilateral modification is a powerful tool; like any other powerful tool, it should be used thoughtfully and sparingly.

Implementing unilateral modifications can adversely affect long-term transactions irrespective of the parties involved. More narrowly tailoring the clause would not only be advantageous to specialized sectors such as the video game or technology industries but also positively impact the area of contract law generally.

Although prevailing law permits companies like Unity to enact comprehensive and significant modifications within the confines of their agreements, such practices may not

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[6] *Unity Terms of Service*, Unity, (Dec. 17, 2023), https://unity.com/legal/terms-of-service.
[7] *See* Shmuel I. Becher & Uri Benoliel, *Sneak in Contracts*, 55 Ga. L. Rev. 657, 661 (2021).
[8] *See* Nadir Hirji, *Moving At The Speed Of A Startup*, (Feb. 9, 2024), https://www.forbes.com/sites/forbestechcouncil/2022/09/07/moving-at-the-speed-of-a-startup/?sh=17e824f11e38.
[9] *See* Brad Stone & Brian Stelter, Facebook Withdraws Changes in Data Use, N.Y. Times, (Feb. 18, 2024), https://www.nytimes.com/2009/02/19/technology/internet/19facebook.html.

necessarily align with the broader interests of the technology industry.[10] In fact, after the implimentation of the new payment scheme there was such heightened backlash from users that Unity revised and then later canceled it.[11] This paper argues that positive changes can be made to curtail many of the possible adverse effects of sudden unilateral modifications.[12] One such remedy would involve mandating defined cooling-off periods as a required component of any unilateral modification clause.[13] Cooling-off periods would help take the surprise out of unilateral modifications by giving the user consistent notice within a set window of time before any change occurs.

Another positive adjustment would be to make certain unilateral modifications unconscionable.[14] While certain contractual changes, such as data security updates, are necessary in order to match pace with evolving technology, others, such as implementations of completely different payment schemes, may not be. By limiting the changes a drafter can make unilaterally, the risk that the user takes on when investing heavily in certain software tools is drastically reduced. This would not only benefit users by providing them with a sense of stability to develop their products, but it would also offer the entire technology industry flexible guidelines to manage changes within reasonably foreseeable bounds. Ultimately, if users do not have some

[10] *See* Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to Be Met*, 45 AM. BUS. L.J. 723, 733–35 (2008).
[11] *See* Parrish, *Unity has eliminated its controversial runtime fee,* The Verge, (Sep. 12, 2024), https://www.theverge.com/2024/9/12/24242937/unity-runtime-fee-cancelled-subscription-pricing; *see also* Bromberg, A message to our community: Unity is canceling the Runtime Fee, Unity, (Sep. 12, 2024), https://unity.com/blog/unity-is-canceling-the-runtime-fee.
[12] *See infra* Part III.B.
[13] *See infra* Part III.B.1.
[14] *See infra* Part III.B.2.

level of trust for their contractual partners, inefficiencies will result that impede creativity and innovation.[15]

II. TECHNOLOGY AND THE MODIFICATION DILEMMA

A. UNILATERAL MODIFICATION DOCTRINE

Despite the rapid advancements in technology over recent decades, courts have lagged behind in adjusting their enforcement practices to align with these changes.[16] Setting aside a few outliers, courts have articulated that substantial unilateral contract alterations are permissible as long as some form of notification is provided.[17] While it is heartening to know that technology companies cannot make changes in secret, this stance offers limited redress for the actions of entities like Unity.

In *Asmus v. Pacific Bell*, the Supreme Court of California weighed in on unilateral modification, taking the stance that it would be permitted so long as reasonable notice was given.[18] Pacific Bell terminated its original employment contract, called the Management Employment Security Policy (MESP), and subsequently instated a modified one.[19] The court found that the enforceability of this unilateral modification did not necessarily hinge on an overt acceptance by the employees.[20] The court stated, "When Pacific Bell terminated its original MESP and then offered continuing employment to employees who received notice and signed an acknowledgement to that effect, the employees accepted the new terms, and the subsequent

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[15] *See* Dori Kimmel, From Promise to Contract at 60, Hart Publishing (2003) (commenting on the use of trust when contracting).
[16] *See Regulation and Legislation Lag Behind Constantly Evolving Technology*, Bloomberg Law, (Feb. 10, 2024), https://pro.bloomberglaw.com/insights/technology/regulation-and-legislation-lag-behind-technology/.
[17] *See e.g., Asmus v. Pac. Bell*, 23 Cal. 4th 1, 11, 999 P.2d 71, 76 (2000).
[18] *Id.* (setting forth that acceptance could be implied if given proper notice).
[19] *Id.*
[20] *Id.* at 82.

modified contract, by continuing to work."[21] Effectively, their implicit acceptance of the new employment agreement was inferred from their decision not to resign and thus continue employment, indicating acquiescence to its terms.[22]

While *Asmus* is not a technology case, software companies have consistently applied the Asmus rule to service agreement modifications.[23] Applying the logic of the *Asmus* ruling to software services contracts or EULAs, continued use of a company's software would constitute acceptance of the unilaterally modified agreement relating to that specific piece of software if given proper notice. Effectively, any update to a piece of software and subsequent use would be deemed consent for the underlying contract. While it may appear that the unilateral modification clause had free reign in *Asmus*, the court stated some limitations, one of them being that the modifier has a responsibility to give reasonable notice of the change to the other party.[24] By giving contracting parties fair warning of what is to come, the *Asmus* rule dulls the power wielded by contract drafters under the doctrine of unilateral modification.[25] While the court in *Asmus* put forth that overt acceptance of a modified contract is not necessary for enforcement, this should not necessarily mean that the contract drafter should wield unlimited authority within the four corners of the agreement.[26]

While in *Asmus* the court allowed unilateral modification with prior notice, that does not mean that any type of cursory notice is enough. In *Rodman v. Safeway Inc.* the court showed

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[21] *Id.* at 80.
[22] *Id.*
[23] *Hewlett-Packard Co. v. Oracle Corp.*, 65 Cal. App. 5th 506, 536, 280 Cal. Rptr. 3d 21, 48 (2021); *see also Storms v. Paychex, Inc.*, No. LACV2101534JAKJEM, 2022 WL 2160414, at *2 (C.D. Cal. Jan. 14, 2022); *Sarafa v. PC Quote, Inc.*, No. D036652, 2001 WL 1506659, at *8 (Cal. Ct. App. Nov. 28, 2001).
[24] *See Asmus v. Pac. Bell*, 23 Cal. 4th at 82.
[25] *See* Bryce Yoder, *How Reasonable Is "Reasonable"? The Search for a Satisfactory Approach to Employment Handbooks*, 57, Duke L.J. 1517, 1534 (2008).
[26] *See Asmus v. Pac. Bell*, 23 Cal. 4th at 94.

disdain for a contractor's unilateral modification when proper notice was not given.[27] Rodman brought suit regarding a price discrepancy between an item sold in store and the same item sold online on Safeway's website.[28] Midway through the case, Safeway unilaterally changed their online terms clarifying that there may be price differences when buying a product in-store versus online.[29] This action was likely taken by Safeway to retroactively safeguard itself against the discrepancy.[30] Safeway argued that because customers read their contract terms once, which included a unilateral modification clause, they were put on notice for any possible subsequent changes.[31] Safeway's assertion was peculiar, as it essentially posited that effective notice pertained to the unilateral modification clause itself, rather than notice of a subsequent change permissible under the unilateral modification clause. The court rejected this argument, stating that "[t]he Safeway.com agreement did not give Safeway the power to bind its customers to unknown future contract terms, because consumers cannot assent to terms that do not yet exist."[32] The court went on to state, "the revised Terms cannot be inferred from their continued use of Safeway.com when they were never given notice that the Special Terms had been altered."[33] Here, the significance of providing proper notice for the enforceability of a contract unilaterally modified is clearly underscored. While the qualitative aspect of the modification was not called into question, the notice and timing surrounding it is what gave the court pause.[34]

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[27] *Rodman v. Safeway Inc.*, No. 11-CV-03003-JST, 2015 WL 604985, at *10 (N.D. Cal. Feb. 12, 2015), aff'd, 694 F. App'x 612 (9th Cir. 2017).
[28] *Id.* at *1.
[29] *Id.* at *3.
[30] *See* Venkat Balasubramani, *Safeway Can't Unilaterally Modify Online Terms Without Notice*, Technology & Marketing Law Blog, (Feb. 10, 2024), https://blog.ericgoldman.org/archives/2015/01/safeway-cant-unilaterally-modify-online-terms-without-notice.htm.
[31] *Rodman v. Safeway Inc.*, No. 11-CV-03003-JST, 2015 WL 604985, at *9 (N.D. Cal. Feb. 12, 2015), aff'd, 694 F. App'x 612 (9th Cir. 2017).
[32] *Id.* at *10.
[33] *Id.*
[34] *Id.*

When one party has the sole authority to alter terms, it is imperative that they are transparent when communicating that change to the other party.

B. DOCTRINE APPLICATION

Asmus was primarily an employment law case but the Supreme Court of California's ruling had a widespread effect on contract variation in general.[35] The application of the *Asmus* rule on unilateral modification has given various contracting entities the leeway to push for more aggressive changes without the direct consent of the other party. As time goes on, companies will likely attempt to implement unilateral modifications that add more and more favorable terms at the expense of their software users. As shown in *Asmus*, the problem of unilateral modification is not limited to just the technology sector. It is just that, in recent years, technology companies have been more flagrant with their modifications due to the fast pace of innovation.

Unity is a recent shrewd example, but various technology companies have used their EULA's unilateral modification clause to push contractual boundaries in the wake of *Asmus*. The reaction to these contractual changes have varied, but in each instance cited below the contracting party has attempted to push the boundaries of unconscionability. This concern does not apply to Unity alone or even the videogames industry but has gained traction throughout the software industry. As more companies expand their digital presence, restrictions on unilateral modification will become a larger issue within contract law.

[35] *Hewlett-Packard Co. v. Oracle Corp.*, 65 Cal. App. 5th 506, 536, 280 Cal. Rptr. 3d 21, 48 (2021); *see also Storms v. Paychex, Inc.*, No. LACV2101534JAKJEM, 2022 WL 2160414, at *2 (C.D. Cal. Jan. 14, 2022); *Sarafa v. PC Quote, Inc.*, No. D036652, 2001 WL 1506659, at *8 (Cal. Ct. App. Nov. 28, 2001).

1. Instagram's User Data Policy

In 2012, following Facebook's completed acquisition of Instagram, the photo sharing platform announced a unilateral modification to its EULA which would give the company perpetual rights to sell its users' photos without having to pay or notify them of having done so.[36] Instagram alerted its users through a policy change notice, indicating that there would be no option to opt out of the policy alteration aside from deleting one's account.[37] The ability to opt out of these changes essentially gave users two options. Either they could accept the changes as is or delete the account that they may have been cultivating over several years. There was no middle ground. This policy pushed users to accept these unfavorable terms in order to safeguard their online profile. For a casual user, the choice to delete one's account may have been an easy one since an individual could just switch to a different social media platform. But, for businesses and larger influencer accounts, the supposed option to opt out via account deletion could have serious negative effects to their core business.[38]

The company provided Instagram users with nearly one month's notice regarding the proposed change, yet retracted the alteration in response to public outcry and concerns that the new policy may trigger state mandated privacy regulations.[39] The public outcry did not originate from a minor change in Instagram's EULA but a shift in their core business model, specifically

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[36] Declan McCullagh, *Instagram says it now has the right to sell your photos,* CNET, (Mar. 19, 2023), https://www.cnet.com/tech/tech-industry/instagram-says-it-now-has-the-right-to-sell-your-photos/?_escaped_fragment_.

[37] *Id.*

[38] *See e.g.*, MD. Shams Mukhtar ET AL., *Social Media Relevance For Business Marketing and Preferences for Customers*, 58, 157, Brit. J. Admin. Mgmt. 39, 44-46 (2023) (discussing the necessity of social media influence on particular platforms).

[39] Matthew Lynley, *Why the Web Is Freaking Out Over Instagram's New Terms of Service,* The Wall Street Journal, (Feb. 17, 2024), https://www.wsj.com/articles/BL-DGB-25732; *see also* Jenna Wortham & Nick Bilton, *What Instagram's New Terms of Service Mean for You*, The New York Times, (Feb. 17, 2024), https://archive.nytimes.com/bits.blogs.nytimes.com/2012/12/17/what-instagrams-new-terms-of-service-mean-for-you/; Cal. Bus. & Prof. Code § 22580 (West) (outlining specifically the application data directed to minors).

that it would now involve selling user data rather than solely offering marketing space to advertisers.

Instagram applied the *Asmus* rule by giving proper notice, but the proposed modification itself sat on questionable ground. If the policy change had occurred today, Instagram would likely face charges based on the California Consumer Privacy Act (CCPA) which protects a consumer's right to opt out of the sale of personal information such as photos.[40] While adhering to the *Asmus* rule may be straightforward, it provides limited protection against specific proposed modifications.

2. *Netflix Password Sharing*

In 2023, the streaming service behemoth, Netflix, unveiled a proposed amendment to its EULA aimed at restricting users' capacity to share their account passwords with others.[41] As with Instagram, Netflix abided by the *Asmus* rule and notified users several months prior to the effective date of the modification.[42] While Netflix did issue proper notice to users, the relational shift between the users of the application and the company was drastic.

The modification was not merely a price increase; rather, it entailed the rescission of the previously granted core privilege to share a purchased software license. Before Netflix's unilateral modification, a single account could be utilized by multiple users, essentially granting a software license with multiple free seats available.[43] A per-seat license is a common software license model based on the number of actual real-world users of the product.[44]

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[40] *See* Cal. Civ. Code § 1798.100 (Westlaw).
[41] Chengyi Long, *An Update on Sharing*, Netflix, (Mar. 7, 2023), https://about.netflix.com/en/news/an-update-on-sharing; Netflix, *Netflix Media Center Terms & Conditions*, (Mar. 7, 2023), https://help.netflix.com/en/legal/media-terms-and-conditions.
[42] *Id.*
[43] *Id.*
[44] *See* Nick Bontis & Honsan Chung, 10(3), *The Evolution of Software Pricing: A Framework for Box Licenses to Application Service Provider Models*, J. of Internet Research, 246-55 (2000).

Netflix has not revealed its precise method for detecting password-sharing, but it likely involves tracking a user's login location.[45] Not only does this change the core transaction occurring between users and the software company, but it also may raise possible privacy issues if Netflix is tracking location data to enforce its policies without explicitly informing its users.[46] In this case, Netflix did notify users of the unilateral modification but has since failed to reveal the methods by which it will enforce the change to its EULA.

3. Uber Claim Suppression

In a recent case, Uber Technologies attempted to enforce a unilateral modification which introduces an arbitration clause to their existing EULA.[47] This modification, similar to many other mandatory arbitration clauses, served as claim suppression which discourages one party from filing a complaint against the other due to conceded right to a jury trial.[48]

While Uber followed the *Asmus* rule by providing notification prior to effectiveness, it may have failed at providing an enforceable click-wrap agreement.[49] A click-wrap agreement is a digital agreement with which a contracting party clicks on a provided prompt in order to accept the terms of the contract.[50] Typically, the prompt consists of a simple phrase such as "I Accept." While click-wrap agreements may suffice for simple application updates, the addition of an

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[45] Hamish Hector, *Netflix password-sharing: how the crackdown works and what it costs*, Techradar, (Feb, 20, 2024), https://www.techradar.com/news/netflix-password-sharing.

[46] *See* Cal. Civ. Code § 1798.100 (West) (The California Consumer Privacy Act (CCPA) does not explicitly mention locational data in its language but one's geolocation is often considered personal data which would mean it falls under the protection of the CCPA), *See also* FTC, *In the Matter of Snapchat, Inc.*, 16 C.F.R. § 45 *et seq.*, C-4501 (2014) (In the FTC's final rule it states that Snapchat had violated federal regulations by collecting user location data without explicitly notifying them).

[47] *Good v. Uber Technologies, Inc.*, Mass.No. 1:23-CV-03492.

[48] *See* Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 Ind. L.J. 239, 239 (2012) (While a complaint could be brought to a third party arbiter the lack of options dissuades some from bringing a complaint at all).

[49] *Id.*

[50] *Id; See also ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1455 (7th Cir. 1996) (describing shrink wrap licenses which are in many ways the precursor to click-wrap agreements).

arbitration clause may warrant more substantive notice due to it being a substantial change in the relationship between parties to the contract.[51]

While companies utilize unilateral modification in differing ways, the risk of unfavorable changes to one of the contracting parties is commonly shared. This paper explores the specific risk to software developers but as outlined above, unilateral modification can have a negative effect on long-term transactions regardless of the types of parties involved. To reign in the implementation and use of the clause would benefit not only a niche market like the videogames industry but would have a profound positive impact on contract law.

C. IMPLICATIONS FOR UNITY

The software company Unity does not develop games itself; rather, it licenses its software to developers and other creatives, who then utilize its tools to create video games.[52] The Unity Engine is a highly popular toolset used to create games and other interactive simulations.[53] Due in part to its previous pricing model and marketing strategies, Unity had emerged as the preferred cross-platform game engine for small independent game studios and mobile game creators.[54] Under Unity's earlier EULA version, users were only required to pay a flat yearly fee per seat for various versions of the Unity engine.[55] Based on this flat fee, game developers calculated their

[51] Uber has also made similar changes to its driver agreement but this particular modification relates to its customer agreement.
[52] *Unity Engine*, Unity, (Feb. 10, 2024), https://unity.com/products/unity-engine.
[53] *Unity Vs Unreal Engine: In-Depth Comparison*, 6sense, (Feb. 6, 2024), https://6sense.com/tech/game-development/unity-vs-unrealengine.
[54] Diogo Abreu, *The big choice for game developers: Unity versus Unreal*, Medium, (Feb. 10, 2024), https://medium.com/telos-foundation/unity-vs-unreal-ea12c6ccbe77.
[55] Unity, *supra* note 6.

expenses and relied on the premise that they would be able to pay for a certain amount of developer seats in order to create their project when mapping out their expenses.[56]

Unity's payment plan instantly sparked outrage in 2023, when the company announced a change in their EULA that would implement what it called a "Runtime Fee".[57] The Runtime Fee imposed a small charge on game developers for each game installation.[58] On its face, this was a similar fee structure to song royalties in the music industry, wherein the song owner is paid based on the number of times their song is played.[59] The issue with Unity's fee modification was that, in the game industry, the roles are reversed. The developer incurs charges instead of receiving payments and may not necessarily have control over the number of software installations.[60] A video game, similar to any other software, can be installed and uninstalled multiple times for various reasons. Perhaps a player aims to free up space on their device but subsequently changes their mind, or decides to transfer their digital game license to another device. Some developers have even voiced fears that their games could be "install-bombed" wherein a user could delete and then reinstall a game multiple times in order to punish a developer by imposing fees on them.[61] Similar to many other forms of media, users may endeavor to penalize creators due to ideological disparities or even racist motives.[62] This fear may actually manifest due to Unity's proposed Runtime Fee, under which a developer who uses the Unity game engine and hits certain thresholds would have to pay Unity every single time a

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[56] *See* Parrish, *Unity has changed its pricing model, and game developers are pissed off,* The Verge, (Dec. 16, 2023), https://www.theverge.com/2023/9/12/23870547/unit-price-change-game-development.
[57] *Id.*
[58] *Summary of Unity Runtime Fee program*, Unity, (Dec. 29, 2023), https://unity.com/pricing-updates.
[59] *Royalties*, Spotify, (Feb. 9, 2024), https://support.spotify.com/us/artists/article/royalties/.
[60] Unity, *supra* note 58.
[61] Stephen Totilo, *Unity rushes to clarify price increase plan, as game developers fume*, Axios, (Dec. 22, 2023), https://www.axios.com/2023/09/13/unity-runtime-fee-policy-marc-whitten.
[62] Julia Alexander, *Rotten Tomatoes responds to fringe group's Black Panther review bomb threats*, Polygon, (Dec. 23, 2023), https://www.polygon.com/2018/2/2/16963988/rotten-tomatoes-black-panther-review-bombing-alt-right.

player installs their game, whether it occurs one time or one hundred times.[63] Many video games being made today are also free-to-play, meaning that they are not monetized by their purchase and subsequent installation.[64] Developers and users do not participate in the traditional exchange of money for a service.[65] Instead developers may recoup their investment through optional transactions that the user is not required to participate in.[66] Since their installations do not directly correlate with the game's revenue generation, a game developer could abruptly find themselves responsible for millions of charges with no feasible means to settle their fee.

After facing backlash from the wider community, Unity did make a clarification regarding its Runtime Fee by stating that the fee only applies to users who have the latest version of their cross-platform engine.[67] While facially this may have cleared up any unconscionability issues surrounding the unilateral enactment of the Runtime Fee, in reality it did very little to assuage the concerns of long term software users. Like many other applications, Unity's cross-platform engine receives regular updates that help the user in various ways such as increasing data security, fixing software bugs, and making a better user interface.[68] These regular updates are part of what a user pays for when contracting for a software license. By cordoning off a user to only older versions of the software, they are denying a key element of the original transaction and essentially forcing developers to adopt the Runtime Fee. If they choose not to, they may find

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[63] Unity, *supra* note 5.

[64] *See* Daniel Tack, *The Subscription Transition: MMORPGs And Free-To-Play*, Forbes, (Feb. 9, 2024), https://www.forbes.com/sites/danieltack/2013/10/09/the-subscription-transition-mmorpgs-and-free-to-play/?sh=2569e80a2c35.

[65] *Id.*

[66] *Id.*

[67] *See Changes to Unity plans and pricing*, Unity, (Mar. 15, 2024), https://unity.com/pricing-updates#:~:text=The%20Runtime%20Fee%20is%20only,1%2C000%2C000%20initial%20engagements.

[68] *See* Lisa Eadicicco, *The Latest Ransomware Attack Shows Why You Shouldn't Ignore Those Annoying Software Updates*, Time, (May 15, 2017), https://time.com/4779750/wannacry-ransomware-patch-windows-cybersecurity/ (Software updates are essential to maintaining data security and are not in fact as optional as they may seem).

themselves using an unsafe product that is more vulnerable to cyberattacks due to its lack of continual updates.[69] Because a developer's product may take years to create, switching to a different cross-platform engine may end up being a costly and possibly impossible task. While Unity's subsequent clarification to its unilateral modification may have seemed to indicate that the EULA change only affected new users it realistically affected any developer or user with a long term project that needs to derive the benefits from continual software updates.

Unity's specific use of the unilateral modification clause may have been particularly extreme, so much so that they reverted it after widespread backlash, but the usage of the clause in general is fairly common within the technology sector.[70] As mentioned above, some would argue that the clause is now a necessity in such a rapidly evolving landscape. One of the more unique aspects of the technology sector is the prevalence of startups.[71] Because startups usually demand fast growth as part of their pitch to investors, they often undergo large scale changes as they move through different phases of their life cycle.[72] With more established software companies like Unity, these changes may not necessarily demand larger offices and more employees, but they often do necessitate larger income streams to effectively manage and rapidly expand their user base. This is where the unilateral modification clause becomes relevant. To keep pace with the scale of expansion, companies may implement drastic changes to their EULAs to finance a rapidly growing enterprise with evolving income streams.

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[69] *See F.T.C. v. Wyndham Worldwide Corp.*, 799 F.3d 236, 241 (3d Cir. 2015) (In which the court found that Wyndham had failed to use commercially reasonable methods to protect user data. If a developer fails to use the most up-to-date tools when programming their software and a data breach subsequently occurs, they may be found to be violating the Federal Trade Commision Act).

[70] *See* Woodrow Hartzog, *Website Design as Contract*, 60 Am. L. Rev. 1635, 1657 (2011); *see also* Shmuel I. Becher & Uri Benoliel, *Sneak in Contracts*, 55 Ga. L. Rev. 657, 661 (2021).

[71] *See* Abdelaziz M.E, *Why Tech Startups Are Irresistible to Venture Capitalists?*, Medium, (Feb. 6, 2024), https://medium.com/illumination/why-tech-startups-are-irresistible-to-venture-capitalists-85255bcf4b6a.

[72] *Id.*

While enhancing notification requirements can and should be considered, doing so may not necessarily alleviate concerns for users of platforms like the Unity Engine who invest years to learn and create with these particular tools. The courts have intervened to mandate, in the majority of cases, some form of notice; however, a comprehensive approach is needed to restrict unilateral modifications of EULAs while also maintaining flexibility for technology companies to expand their platforms.

III. STRIKING A BALANCE

A. AN ARGUMENT FOR UNILATERAL MODIFICATIONS

When a software company is dealing with only a handful of users it may be a manageable task to keep track of all the different iterations of the terms of service executed with each individual partner. In such a scenario, the terms given to an early adopter of a software could potentially be grandfathered in, remaining active despite widespread changes to the company and its current EULA.[73] However, as the user base of a software platform reaches into the millions, maintaining the same contract management regime may become increasingly challenging.[74] Adding to the complexity, it is not only the contracts that necessitate meticulous tracking; the software versions must also be accounted for, rendering the situation increasingly untenable. Consequently, it is often much more manageable to transition everyone onto the new contract when it comes into effect.[75] The unilateral modification clause is such a potent tool for technology companies because it facilitates the swift and straightforward modification of a single

[73] *See* William D. Henderson, *Innovation Diffusion in the Legal Industry*, 122 Dick. L. Rev. 395, 402–03 (2018) (describing the role of an early adopter in technology innovation).
[74] *See* Jake Linford, *Unilateral Reordering in the Reel World*, 88 WASH. L. REV. 1395, 1396 (2013).
[75] *See* David Gilo & Ariel Porat, *The Hidden Roles of Boilerplate and Standard-Form Contracts*, 104, 5, MICH. L. REV. 983, 988 (2006).

EULA without necessitating communication and negotiation with each contractual partner individually.

Suppose a EULA's terms were changed in order to accommodate an update which patches up a security vulnerability.[76] This would be a beneficial change to the user since their data would be better secured.[77] If some users illogically choose to reject the terms, then they would likely be locked out of the latest version of the program. If the program operates offline on a closed personal system, this arrangement may suffice. However, modern-day technology increasingly employs "live-service" software, which is often cloud-based and requires an internet connection to the company's server to function.[78] Because of its connection to a live server, the program may not even function unless it has the latest update. This restriction is likely due in part to safety concerns and a desire to have a uniform user experience. Just as a chef may struggle to accommodate every dinner guest's dietary restrictions, a software company would prefer not to have to manage all previous versions of their program. As integrated technologies increasingly operate primarily online and necessitate verification from a company's server for functionality, opting out of an update and its corresponding modification to the EULA is frequently impractical unless one chooses to discontinue use of the service altogether.[79]

While the unilateral modification clause does present challenges, completely abolishing it could significantly impede the development of software and various other technologies. Small

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[76] *Customer Privacy Notice,* Tesla, (Oct. 20, 2023), https://www.tesla.com/legal/privacy; *Terms of Use*, OpenAI, (Oct. 20, 2023), https://openai.com/policies/mar-2023-terms.

[77] Emily Heaslip, *What Are Security Patches and Why Are They Important for Your Business?*, U.S. Chamber of Commerce, (Feb. 8, 2024), https://www.uschamber.com/co/run/technology/security-patches-guard-against-online-threats#:~:text=Security%20patches%20are%20software%20and,a%20way%20into%20your%20network.

[78] Peter Mell & Timothy Grance, *The NIST Definition of Cloud Computing*, NIST Special Publication 800-145, Sep. 2011.

[79] *See* Eric S. Steiner, Esq., *Law Firm Automation Reducing Human Error and Increasing Efficiency*, Md. B.J., 2020, at 86 (describing the difference between cloud-based software which functions primarily online as opposed to on a local computer server).

independent startups may be disadvantaged in entering the market, as they would lack the capacity to scale up rapidly and maintain flexibility with their contracts. From a technological standpoint, doing away with the clause completely would also stifle changes to software. Updates would slow to a crawl unless deemed absolutely necessary due to the contractual work that would be needed to accompany them. Not all software updates require a change to a EULA, but many more significant updates do.[80] Having to renegotiate a new EULA or risk losing their customer base would cause many technology companies to only make the most significant updates if deemed worthy of the risk. Reduced innovation could result in fewer participants in the market overall.[81] This would be an inefficient outcome since it would stifle competition.[82] This is not to say that the unilateral modification clause as it currently stands is necessary for efficiency, much the opposite. Modification clauses must be thoughtfully crafted to enhance efficiency. While integral to our constantly evolving technological landscape, the clause requires restraint and careful calibration.

B. PROPOSED SAFEGUARDS

1. Cooling-Off Periods

As demonstrated by the cases examined thus far, transparency regarding unilateral changes is a significant concern, even if it may not have been the paramount issue with Unity. One possible solution to the lack of transparency in many unilateral contract modifications is the

[80] *See Updates: Terms of Service*, Google, (Mar. 7, 2023), https://policies.google.com/terms/archive?hl=en-US.
[81] *See* Heather Boushey & Helen Knudsen, *The Importance of Competition for the American Economy*, The White House, (Oct. 17, 2023), https://www.whitehouse.gov/cea/written-materials/2021/07/09/the-importance-of-competition-for-the-american-economy/.
[82] *Id.*

implementation of a cooling-off period.[83] A cooling-off period will keep companies accountable for their modifications even if many users do not ultimately read their EULAs before agreeing.

This additional restriction to the clause would mandate a preset window in between the notice of a modification and its implementation.[84] The consistency of such notice would serve two purposes. First, it would afford software users the opportunity to evaluate a future modification and exit the agreement if necessary.[85] This may not necessarily address the concerns of long-term users who have built their careers around these software tools. However, depending on the length of time provided in the cooling-off period, it could offer some aid. The second advantage the cooling-off period provides is that it relieves the burden set on the user to constantly monitor their terms of service.[86] Many software companies do technically give advance notice but rarely ever specify how advanced the notice will be.[87] This creates a situation in which a user must check their terms constantly if they want to keep up-to-date on any changes.[88] For instance, if a cooling-off period were set to thirty days, a consumer could check every two weeks and always have at least an additional two weeks to review the changes and make an informed decision on whether to exit the contract or not. While a cooling-off period,

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[83] *See Byrne & Co v. Leon Van Tienhoven & Co*, (1880) 5 CPD 344 (wherein the court preceded the concept of a cooling-off period by asserting that the revocation of a contractual offer should be understood by the offeree before taking effect); *Cooling-Off Rule*, 16 C.F.R. § 429 (The rule applies primarily to ex ante entrance into a contract, but could possibly be used for ex post modifications).

[84] *See* Becher & Benoliel, *supra* note 7, at 684.

[85] *Id.*

[86] *See, e.g.,* Terms of Service Didn't Read, (Nov. 15, 2023), https://tosdr.org/ (Due to terms of service modifications becoming so prevalent, private entities have created consumer watchdogs to monitor changes to some of the biggest web applications such as Amazon and Youtube).

[87] *See* Becher & Benoliel, *supra* note 7, at 681. (finding that less than ten percent of high traffic websites include a cooling-off period in their modification clause).

[88] *See e.g.,* Visualping, (Nov. 15, 2023), https://visualping.io/ (Automated monitoring via web apps such as visual ping can make it easier for sophisticated businesses to track term changes but still puts the onus on the contractee).

theoretically, could impede innovation by necessitating that developers wait before implementing modifications, in reality, most modifications are typically pre-planned anyway.[89]

To Unity's credit, it provided more than three months' notice before implementing the additional Runtime Fee provision to their EULA.[90] For a casual user, this would indeed constitute a very generous cooling-off period. However, if a developer is engaged in a multi-year project and has already invested millions of dollars into work reliant on a specific software tool, a few months of notice may not significantly mitigate the impact of the modification.[91]

2. Expansion of Unconscionability

One change that would significantly benefit software users would be to impose limitations on the terms that can be unilaterally modified within a EULA. One approach to achieve this could involve expanding the definition of an unconscionable contract.[92] By doing so, companies would have to identify certain elements that are deemed essential to the core transaction of the contract. These provisions would be immune to unilateral modification and thus would remain consistent over time.

The Uniform Commercial Code (UCC) does offer some safeguards against unconscionable clauses within contracts.[93] While the UCC does not constitute actual law itself,

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[89] Interview with Tommy Nguyen, Former Meta Engineer. (Mar. 16, 2023) (Nguyen discussed industry standards for software update timelines. They revealed that even small system updates are usually planned at least a month in advance. This indicates that drafters would potentially have several weeks time in which to notify users before a feature implementation.).

[90] *Summary of Unity Runtime Fee program*, Unity, (Dec. 29, 2023), https://unity.com/pricing-updates (Unity's Runtime fee was first publicly announced on September 12, 2023 and is set to be implemented at the start of 2024.).

[91] *See* George Gorringe, *SideQuest's Official Response to Unity's New Runtime Fee*, Medium, (Feb. 10, 2024), https://medium.com/sidequestvr/sidequests-official-response-to-unity-s-new-runtime-fee-553dbb4d0f41#:~:text=In%20the%20past%2C%20it%20was,be%20rewarded%20for%20their%20work.

[92] *See* Philip Bridwell, *The Philosophical Dimensions of the Doctrine of Unconscionability*, 70, 4, U. Chi. L. Rev. 1513, 1514 (2003).

[93] U.C.C. § 2-302 (Am. L. Inst. & Unif. L. Comm'n 2002); *See also* Restatement (Second) of Contracts § 208 (Am. L. Inst. 1981).

many states have adopted various parts of its language into their own statutes.[94] Section 2-302 of the UCC addresses unconscionability, but only states that if a *court* finds a clause unconscionable it can refuse to enforce all or parts of the contract in order to avoid an unconscionable result.[95] If the definition of unconscionability explicitly encompassed unilateral changes to the fundamental transaction of a contract, it would substantially enhance protection for software users. However, such specific definitions are not typically found within the UCC. If courts adopted this interpretation of unconscionability it would limit the unilaterally modified EULAs while still allowing flexibility for software companies to make changes in other ways. In Unity's case, this would mean that smaller modifications such as data security updates or even price increases could be implemented, while changes to the core transaction, such as how Unity extracts money from its user base, would need to remain unaltered. A software company would not be permitted to execute an agreement and then unilaterally switch to an entirely new business model. This would afford software users a degree of security and foresight when investing significant amounts of money and time into these technologies.

State legislators have failed to address these modification issues likely due to various corporate interests and the courts have only confronted the issue in part.[96] The courts have thus far focused on the effects of the unilateral modification clause rather than the clause itself.[97] There is a distinction between the clause itself being unconscionable and the clause being utilized to generate an unconscionable modification.

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[94] *Uniform Commercial Code*, Uniform Law Commision, (Feb. 10, 2024), https://www.uniformlaws.org/acts/ucc#:~:text=Summary,a%20uniformly%20adopted%20state%20law..

[95] U.C.C. § 2-302, *supra* note 93.

[96] *See* infra III.C.

[97] *Ozormoor v. T-Mobile USA, Inc*., No. 08-11717, 2008 WL 2518549, at *3 (E.D. Mich. June 19, 2008), aff'd, 354 F. App'x 972 (6th Cir. 2009).

In Unity's case, it was not the pricing model that was unconscionable but the unilateral modification which changed the pricing model without explicit consent of the users. For new users who started to use the program after the Runtime Fee was implemented there would be no contractual unconscionability because the user entered into the contract with Unity after the modification. This differentiation is crucial because untethered unilateral modification could potentially transform a contract into a blank canvas upon which a nearly infinite array of terms might be inscribed.[98] If a clause's unconscionability is judged solely by its result, rather than by its potential, unilateral modification would never be unconscionable unless it was actively used to modify a contract in an unconscionable way. Restricting the wording of the unilateral modification clause itself would be a superior solution because it would confine guidance on how to interpret valid changes strictly within the four corners of the agreement. This approach would diminish the potential for future litigation, which would be advantageous to both parties involved.

Due to the contentious nature of Unity's Runtime Fee, some developers had suggested the possibility of initiating a class action lawsuit to reverse the EULA modification.[99] While a class action lawsuit would have drawn significant negative attention to the Runtime Fee, the likelihood that the courts would rule in favor of the developers is dubious, since Unity's EULA specifically asserts that Unity has unilateral modification rights without any restrictions and also includes notification details.[100] In this case, the doctrine of unconscionability and the covenant of good faith may have swayed the courts despite the specific assertions in the contract. As mentioned

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[98] *See* DeMichele & Bales, *Unilateral-Modification Provisions in Employment Arbitration Agreements*, 24 Hofstra Lab. & Emp. L.J. 63, 64 (2006).
[99] Stephen Totilo, *1 big thing: Developers unite against Unity*, Axios, (Sept. 14, 2023), https://www.axios.com/newsletters/axios-gaming-2bd8e041-f778-43db-bdbf-d85b8eb133ee.html.
[100] Unity, *supra* note 6.

before, Unity has also voluntarily set a cooling-off period of over three months for this specific modification which complies with the *Asmus* rule.[101] Members of the class action might assert a promissory estoppel claim stating that they relied on these tools remaining available to them under the previous fee structure. But that would be an equitable claim, outside the four corners of the agreement.[102] In fact, the inclusion of a modification clause would be more akin to a promise to modify, not a promise to refrain from modifying. Restricting the language of the clause itself alleviates the burden on courts to interpret the meaning of unconscionability under varying circumstances. Developers contemplating initiating a class action lawsuit may have faced challenges in making their case to the courts. Nonetheless, it is evident that Unity eroded the trust of its user base.[103] Incorporating restrictions into the contract would significantly contribute to fostering trust between developers and their tool licensors.

Restrictions embedded within the clause itself would also prevent incremental unilateral changes that, when acumulated, could lead to a fundamental alteration to the transaction. The UCC may offer protection against unconscionable contracts that evolve through multiple iterations of an original agreement, particularly when the substantial transformation of the contract is given greater consideration.[104] The process of implementing changes iteratively, which gradually deviates from the original core transaction and language of the contract, could be perceived as unfair or oppressive, depending on the extent to which the core transaction has evolved. For instance, Google's terms of service have undergone numerous modifications over

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[101] Unity, *supra* note 52.

[102] *In re Lua*, 692 F. App'x 851, 852 (9th Cir. 2017) (in which the court outlined the requirements for an equitable estoppel claim).

[103] Stephen Totilo, *supra* note 61.

[104] U.C.C. § 2-302, *supra* note 92; *See also Armendariz v. Found. Health Psychcare Servs.*, Inc., 24 Cal. 4th 83, 114, 6 P.3d 669, 690 (2000) (The court defined the difference between procedural and substantive unconscionability. The procedural element highlights the unconscionable aspect of formation which is more closely tied to modification.).

just the past ten years.[105] While a significant portion of the actual language in the terms has evolved, the core transaction has remained relatively stable.[106] The user is granted access to Google's proprietary web browser, and in exchange, Google collects data on the user which it uses to manage its advertisement marketplace.[107] The modification of the language accounts for the heightened level of data collection, but the nature of the transactional relationship has remained relatively consistent.[108] This contrasts with Unity's EULA modifications which have been far fewer in number but have dramatically changed the way developers pay for Unity's software tools.[109]

While software companies are given broad powers to adapt their contracts in any way they see fit, only a few apart from Unity have acted in such drastic ways.[110] Instead, changes have been made piecemeal, often involving small service changes, security updates, or for a variety of other reasons.[111] Because the changes are often minor, beneficial, and fairly common within the industry, these particular changes should not be limited. Small modifications to a software's terms of service, from time to time, have come to be an expectation.[112]

In considering the broader implications of unconscionability, it is essential to recognize that an expanded definition should encompass unilateral changes to the core transaction. This

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[105] *See* Google, *supra* note 68, (running a comparison of past and present terms revealed that almost all the text in the contract had iteratively been replaced by different language).
[106] *Id.*
[107] *How our business works*, Google, (Dec. 23, 2023), https://about.google/how-our-business-works/.
[108] *Id.*
[109] *Legal Information*, Unity, (Feb. 10, 2024), https://unity.com/legal.
[110] *See* Declan McCullagh, *supra* note 36.
[111] *Previous Terms of Service*, Twitter, (Nov. 18, 2023), https://twitter.com/en/tos/previous (indicating that Twitter's terms of service have been modified at an average rate of about once a year and the changes have been modest, focusing mostly on security updates).
[112] *See e.g.,* Terms of Service Didn't Read, (Nov. 15, 2023), https://tosdr.org/ (Because terms of service modifications have become so commonplace, consumer watchdogs have been created by private entities to monitor changes to some of the biggest web applications such as Amazon and Youtube).

would accommodate smaller unilateral changes necessary for many service companies while capturing changes outside the scope of the original agreement. Mere unexpectedness would not suffice under this new rule; the change would also need to be significant to the core transaction.

Applying this new unconscionability test to Unity's prior unilateral modification, it becomes apparent that their EULA changes are not only unexpected but also involve alterations to the original core transaction. Users of Unity's cross-platform engine built their products with the belief that they would be paying for their licenses at a flat rate that could easily be accounted for.[113] The implementation of the Runtime Fee flipped the core transaction on its head, requiring a fluctuating payment scheme based on user downloads.[114] Pricing is a core component of the transaction and the implementation of the Runtime Fee is a significant change to it.[115] Under this new proposed rule, a minor increase in fee price might not be considered unconscionable. However, in Unity's case, the company redefined not only the financial structure of the transaction but also the core business model of the users, which goes beyond mere unexpectedness.

A cooling-off period in conjunction with a limitation on unilaterally modifiable terms would strike a balance between contractual flexibility and the requirement for stability that developers need in order to do their best work. These restrictions are not only for the benefit of end users but would bring a level of trust for the software companies which could in turn result in a stronger revenue stream. If the objective for companies like Unity is expansion, bankrupting its user base would certainly be an undesirable long-term outcome. It is crucial for companies to

[113] *See* Ash Parrish, *supra* note 56.
[114] *Id.*
[115] *Id.*

balance growth with maintaining a sustainable and supportive relationship with their user communities.

C. IMPLEMENTATION OF SAFEGUARDS

The implementation of the proposed safeguards poses a difficult challenge. Contractual regulations have largely fallen under the jurisdiction of individual states.[116] The UCC has attempted to fill the role of a federal contract authority but the choice to adopt specific provisions has been left to the discretion of each state.[117] While the UCC offers a possible legislative approach to execute statutory change, there are significant challenges. Lobbyists play a large part in the technology industry and are backed by a variety of corporate interests.[118] The corporations that utilize unilateral modification clauses in their contracts would be hard pressed to relinquish any of their contractual rights.[119] Modifying the UCC to add more substantial language to its unconscionability definition is possible, but to then have that portion of the UCC adopted into statutory law by any state would be an extremely difficult task due to the heavy lobbying against any type of corporate regulation in the technology sector.[120] Because proposed amendments to state statutory law would be met with significant pushback and likely not be enacted, modification of current contract laws via UCC adoption would be an unrealistic solution.

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[116] Norman Silber, *Why the U.C.C. Should Not Subordinate Itself to Federal Authority: Imperfect Uniformity, Improper Delegation and Revised Section 3-102(c)*, 55 U. Pitt. L. Rev. 441, 442-6 (1994).
[117] *Id,*
[118] *See* Richard Alford, *The Bipartisan Consensus on Big Tech*, 71 Emory L.J. 893, 930 (2022); *See also* Crews, Melugin & Hedger, *House Hearing with Big Tech Companies Unwarranted on Antitrust Grounds*, Competitive Enter. Inst. (July 28, 2020), https://cei.org/news_releases/house-hearing-with-big-tech-companies-unwarranted-on-antitrust-grounds/.
[119] *See Good v. Uber Technologies, Inc.*, Mass.No. 1:23-CV-03492.
[120] *See* Alford*, supra* note 118.

As mentioned above with Uber Technologies, there have been judicial actions filed which challenge the conscionability of unilateral modification doctrine as it stands today.[121] A favorable outcome with any of these cases has the potential to sidestep an explicit legislative change to state contract statutes. By doing so, the influence of lobbyists and corporate interests could be reduced and allow for safeguards against certain unilateral modifications that do not implement a cooling-off period or undermine the core transaction. Some courts have established, in an employment law context, that the covenant of good faith applies even towards contracts that are terminable at will.[122] Violating such a covenant would thus make the contract unconscionable. While these are minority opinions, the application of these cases towards unilateral modification generally may be an easier path for change than an expansion of the good faith obligations under the UCC.[123]

Implementing restrictions to the unilateral modification clause via judicial opinions will likely be an easier task than attempting to change state statutes although neither option would be particularly easy. Developers have already hinted at possibly bringing a class action suit against Unity.[124] While the outcome of such a suit is uncertain at best it may create a path for similar unilateral modification cases in the technology sector. In other contexts, unilateral modification has been challenged even when explicitly allowed for within the contract.[125] If a court was to issue a decision in which modification without explicit consent was deemed unconscionable due

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[121] *See Good v. Uber Technologies, Inc.*, Mass.No. 1:23-CV-03492.

[122] *See Four Fortune v. Nat'l Cash Reg. Co.*, 373 Mass. 96, 103, 364 N.E.2d 1251, 1257 (1977); See also *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 133, 316 A.2d 549, 551 (1974).

[123] *See generally* U.C.C. § 1-304 (Am. L. Inst. & Unif. L. Comm'n 2001)

[124] Stephen Totilo, *supra* at 99.

[125] *Demasse v. ITT Corp.*, 194 Ariz. 500, 506, 984 P.2d 1138, 1144 (1999) (finding that, within an employment context, an implied-in-fact contract cannot be unilaterally modified).

to a core transaction a change, that would strike an ideal balance between restricting and allowing for the flexibility of the clause.[126]

IV. CONCLUSION

There is no easy way to curtail the unilateral modification clause when the market demands continuous technological innovation. While modest restrictions on modifications are warranted right now in the software industry, that may not always be the case. It may be that a need for flexibility eventually outweighs the need for a semblance of contractual stability. For now, the balance has shifted towards large corporate entities and contract restrictions are needed. Software users are finding themselves continually blindsided by changes to tools essential to their livelihood. With the advancement and integration of specialized technologies, one cannot simply swap out one software tool for another as if they were different brands of hammers. Restrictions would not slow down innovation; rather, they would give developers, engineers, and other creatives consistency, and allow them to have faith in their tools so they can create.

When a company is dealing with millions of users at a time, making any change can be a challenging endeavor. The unilateral modification clause offers an easy way to apply changes to a large number of agreements at the same time without having to renegotiate. This advantage to the company is supposedly balanced by the user's right to leave the contract at will. Companies are thought to be restrained by the market since a harmful change would cause an exodus of the user base to a competitor. In reality, many of these software tools such as Unity's game engine are not so easy to abandon. Millions of dollars may be invested in training and developing

[126] *See* U.C.C. § 2-302 *supra* at 93 (while the UCC itself does not currently allow for the proposed expansion of unconscionability, it has stated that if a court finds such a term unconscionable it may refuse to enforce the contract).

ancillary software around these base-level tools. The game industry, akin to the broader technology sector, has become deeply intertwined with these foundational tools, resulting in a shift in power dynamics toward larger companies.

The implementation of stricter notice requirements through a defined cooling-off period would enable users to more effectively evaluate the ongoing stream of modifications to their EULAs. An expanded definition of unconscionability would offer enhanced protection to software users by shielding the original core transaction of an agreement from unilateral modification. Implementing both the cooling-off period and the expanded unconscionability definition, via judicial action, would establish a more equitable balance between the interests of large software companies and the myriad of developers who persist in innovating within the technology sector. This approach not only fosters fairness but also recognizes the profound impact these modifications have on the livelihoods and creative endeavors of software developers.