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THE NEW NEW-WORLD: VIRTUAL PROPERTY AND THE END USER LICENSE AGREEMENT

“A beginning is the time for taking the most delicate care that the balances are correct.”

— Frank Herbert, *Dune*¹

I. INTRODUCTION

David Storey is a lucky young man. In 2004, he was the highest bidder for a newly discovered landmass known today as Treasure Island.² He secured the island property, including hunting and mining rights, for *only* \$26,500.³ Mr. Storey has big plans for the island: “I intend to create a thriving, fully functional settlement for all to enjoy.”⁴ Within less than a year of his initial investment, Mr. Storey has recouped all of his costs, and now enjoys profit from his investment.⁵ While this may sound too good to be true, it is in fact true, but there is one catch: Treasure Island does not exist, at least not in the traditional sense. Treasure Island, located off the coast of a newly discovered continent on the world of Calypso, exists only on the Internet servers of Project Entropia, an online virtual world developed by MindArk.⁶ People from around the real world can go onto the Internet and collaboratively participate in the three-dimensional, persistent virtual world of Calypso.⁷ They can idly adventure around the land of Calypso, hunting wild animals, pursuing valuable objects, or simply meeting with friends.⁸ These adventurers are not limited to what some would call traditional time-wasting game activities; they can create, buy,

1. FRANK HERBERT, *DUNE* 3 (1999).

2. Robin Lettice, *Property Tycoon Buys Fantasy Island*, THE REGISTER, Dec. 17, 2004, http://www.theregister.co.uk/2004/12/17/tycoon_buys_non_existent_island/.

3. *Id.*

4. *Id.*

5. Press Release, Market Wire, *Virtual Island Purchase of \$26,500 Recoups Investment in First Year With Room for Ongoing Profit* (Nov. 8, 2005), http://www.marketwire.com/mw/release_html_b1?release_id=100596.

6. Lettice, *supra* note 2.

7. *See generally* Entropia Universe, <http://www.entropiauniverse.com/> (last visited Sept. 27, 2006).

8. *Id.*; *see also* Entropia Universe, Features, <http://www.entropiauniverse.com/en/rich/5357.html> (last visited Sept. 27, 2006).

and sell virtual property and services on Calypso.⁹ Players express their desire for virtual objects just as real-world people express their desire for real objects—by paying real-world dollars for them.¹⁰

However, Calypso is not the only such world. There are myriad virtual worlds created by many different software developers. Some developers of virtual worlds, like MindArk, foster commoditization and free market exchange in virtual property, while other developers actively discourage commoditization.¹¹ As history has shown, where there is capital, there is law to protect it.¹² For example, the market projected that virtual goods in 2006 would reach an estimated \$2.7 billion.¹³ Norrath, an unintentionally commoditized virtual world, currently has a real-world gross national product (“GNP”) larger than that of the real-world nation of Bulgaria.¹⁴

As the software and hardware technology that enables virtual worlds continues to develop,¹⁵ human involvement in those worlds will continue to develop.¹⁶ Many players spend days on end actively participating in their virtual world of choice.¹⁷ In fact, a significant number of those players consider themselves to be dual citizens: citizens of the real world and of the virtual world.¹⁸ Many earn their living in the virtual world.¹⁹ Currently,

9. Entropia Universe, Participants Guide, <http://www.entropiauniverse.com/en/rich/5094.html> (last visited Sept. 27, 2006); see also Features, *supra* note 8.

10. Entropia Universe, About, <http://www.entropiauniverse.com/en/rich/5035.html> (last visited Sept. 27, 2006).

11. See generally *Computer and High Tech Law Journal Symposium Rules & Borders—Regulating Digital Environments: Panel 3—Ownership in Online Worlds*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 807 (2005).

12. See e.g., *Morissette v. United States*, 342 U.S. 246, 260 (1952) (“Stealing, larceny, and its variants and equivalents, were among the earliest offenses known to the law that existed before legislation.”).

13. Knowledge@Wharton, <http://knowledge.wharton.upenn.edu/article.cfm?articleid=1302> (last visited Sept. 27, 2006).

14. Edward Castronova, *Virtual Worlds: A First-Hand Account of Market and Society on the Cyberian Frontier*, 2 THE GRUTER INST. WORKING PAPERS ON LAW, ECON. & EVOLUTIONARY BIOLOGY 1, 28 (2001), available at <http://www.bepress.com/cgi/viewpdf.cgi?article=1008&context=giwp>.

15. See Peter S. Menell, *Can Our Current Conception of Copyright Law Survive the Internet Age?: Envisioning Copyright Law’s Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 72–73 (2002) (stating that the amount of transistors per square inch on circuits have doubled and will continue to do so in the future).

16. Beth Simone Noveck, *Institute for Information Law and Policy Symposium State of Play: Introduction: The State of Play*, 49 N.Y.L. SCH. L. REV. 1, 2 (2004) (“Virtual worlds are the cyberspace we will ‘inhabit’ within the next ten years.”).

17. F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CAL. L. REV. 1, 9 (2004).

18. See *id.*

many virtual world participants are developing actual property interests in virtual property, much to the chagrin and delight of virtual world developers.²⁰

In Part II, this Comment will address background principles of society and law that indicate the need for a legal presence in the online virtual world game space. Part II will also address the recent historical developments that have left us at the threshold of this new world and the litigation virtual worlds will necessitate. A potential analytical framework will be proposed; this framework is derived from recent virtual-world legal scholarship, which a court will likely employ to resolve virtual property rights issues.

In Part III, this analytical framework will be applied to two different forms of End User License Agreements (“EULA”). These EULAs encompass two emerging forms of virtual property rights recognition. First, the analytical framework will be applied to Blizzard Entertainment’s World of Warcraft, a strictly non-commoditized virtual world EULA that forbids players from developing virtual property expectations. Second, the analytical framework will be applied to Sony’s EverQuest II, a hybridized approach to the virtual world EULA that grants a limited license to buy and sell virtual property, while denying participants the right to own the virtual property outright.

Part IV of this Comment will conclude that American law will soon enter the virtual world, and if courts apply this analytical framework, players’ and game developers’ reasonable expectations regarding virtual rights should be realized.

II. BACKGROUND

A. Why Virtual Property Rights Are Important

Should legal scholars and courts seriously consider virtual legal issues? These contentious issues all revolve around games and game play. People may think games are just games, and require little respect in a competitive laissez-faire capitalist environment, because the act of game play does not produce wealth in and of itself. Some people characterize game players as less valuable members of society and casually disregard

19. See *id.* at 39 (stating that some users have earned six-figure incomes in virtual worlds).

20. See generally *Regulating Digital Environments*, *supra* note 11 (discussing whether the acquisition of virtual objects can lead to personal property rights).

players' concerns about their virtual existence.²¹ How seriously can a court consider a game player's interest in a virtual item like the "Sword of Lightning+2"?

The process of developing virtual worlds can be an extremely profitable enterprise.²² Millions of people pay to play these games.²³ There is big money to be made from these marginalized gamers.²⁴ The law will definitely act to protect those moneymaking interests, which run into the billions of dollars.²⁵ But more importantly, these virtual worlds are home to millions of people.²⁶ As the world population continues to grow at an exponential rate,²⁷ and resources become ever scarce in the real world, the virtual world has become a natural place to serve as a home to all those who have been squeezed out of the real-world. In the virtual world, resources are nearly limitless.²⁸

Due to its intangible nature, analogy is a necessary tool for understanding the vast potential of the virtual world. The American New World serves as an effective analogy, because the conditions found in Europe that produced the mass migration are becoming more prevalent in the real world. Financial desperation and the search for personal freedom motivated many to make the long and dangerous trek across the Atlantic to settle in a hostile and undeveloped land.²⁹ The population of the American colonies expanded from 4,600 in 1630 to 2,780,400 by 1780.³⁰ There are similar forces now at work that drive people into the virtual world. The real world is increasingly expensive, crowded, and legislated. The only place where many people can experience personal freedom is in the virtual world, where they can manifest their fantasies and explore the wide-open expanses that were once commonly available in the real world.

21. Lastowka & Hunter, *supra* note 17, at 7.

22. *See id.* at 8.

23. *Id.*

24. *Id.*

25. Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043, 2043 n.1 (2004).

26. *See* Lastowka & Hunter, *supra* note 17, at 9.

27. *See generally* Paula Abrams, *Population Control and Sustainability: It's the Same Old Song but with a Different Name*, 27 ENVTL. L. 1111 (1997).

28. Lastowka & Hunter, *supra* note 17, at 47-48.

29. VIRGINIA DEJOHN ANDERSON, *NEW ENGLAND'S GENERATION, THE GREAT MIGRATION AND THE FORMATION OF SOCIETY AND CULTURE IN THE SEVENTEENTH CENTURY* 8-9 (1991).

30. Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations From Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405, 457-58 n.248 (2003).

Confronted by the absence of authority, the New World colonists claimed personal freedoms for themselves and expressed those freedoms in the American Constitution and the Bill of Rights to ensure their persistence.³¹ But what is the state of law and human rights in developing virtual worlds? Again, the analogy to the New World presents itself. Virtual worlds are essentially corporate colonies where the disenfranchised pay to exist free from their real-world identities.

Before entering the virtual world, users must sign a EULA and/or a Terms of Service (“ToS”), which establishes the rights and duties of the game developer and user.³² Assent to the terms of an online agreement is the basis of an enforceable contract.³³ The asymmetrical balance of bargaining power between billion-dollar corporations and disenfranchised, often youthful, individuals is striking, and the contracts between these parties reflect that asymmetry.³⁴ The element in the EULA most indicative of the power asymmetry is the corporate game developer’s ability to terminate the contract and exclude the user from the virtual world at will.³⁵

Given that the players in these virtual worlds are not merely playing but living in the virtual space, exclusion from the virtual world amounts to something between extradition and execution. With the unlimited discretion found in the EULA signed by all virtual world inhabitants, the game developers wield extreme power over virtual world inhabitants. The possible abuse of that power presents a strong invitation for real-world courts to enter the virtual world.

Examples of abuse are abundant. The Sims Online is not what is considered a traditional “game world”, where players overcome a series of challenges to achieve a predefined end.³⁶ Instead, it is a virtual world where participants essentially “hang out.”³⁷ There is no objective designed by the game developer. Instead, players seem content to earn Simoleons,³⁸ the in-world game currency that is freely exchangeable for real-world

31. See Donald Elfenbein, *The Myth of Conservatism as a Constitutional Philosophy*, 71 IOWA L. REV. 401, 407 (1986).

32. Daniel C. Miller, *Determining Ownership in Virtual Worlds: Copyright and License Agreements*, 22 REV. LITIG. 435, 460 (2003).

33. See *Compuserve v. Patterson*, 89 F.3d 1257, 1261–62, 1264 (6th Cir. 1996).

34. Lastowka & Hunter, *supra* note 17, at 50.

35. Station.com, Sony Online Entertainment, Terms of Service, Section III (10), <http://www.station.sony.com/en/termservice.vm> (last visited Sep. 29, 2005).

36. See Lastowka & Hunter, *supra* note 17, at 28.

37. See Charles Herold, *Win Friends, Influence People, or Just Aim and Fire*, N.Y. TIMES, Feb. 6, 2003, at G5 (“I played The Sims Online in much the same way that I behave in real life: hanging out, practicing the guitar and skating by.”).

38. See Lastowka & Hunter, *supra* note 17, at 28, 30.

currency.³⁹ Players can earn Simoleons through standard work-related activities,⁴⁰ and as players increase their skills at these activities, their ability to garner wealth increases.⁴¹ Common work-related skills include entertaining other inhabitants of the virtual world by playing virtual musical instruments or maintaining attractive virtual houses.⁴²

Unfortunately, a darker side has emerged in the once bucolic virtual world of The Sims Online. Allegedly, several underage participants in the virtual world began engaging in explicit online sex chats with adults in exchange for Simoleons.⁴³ This appears to be a type of virtual child prostitution.⁴⁴ Peter Ludlow, a University of Michigan philosophy professor, styled himself a virtual world reporter and published the *Alphaville Herald*, which chronicled newsworthy stories in Alphaville, The Sims Online's largest city.⁴⁵ Ludlow's reports of virtual child prostitution received some real-world press.⁴⁶ Electronic Arts ("EA"), The Sims' publisher, responded by terminating Ludlow's account in The Sims Online, thereby preventing him from existing or even accessing the virtual world.⁴⁷ The Sims product line has a long reputation of being family-friendly, with product releases that eschew traditional video game violence for more intellectual pursuits, such as city planning.⁴⁸ This goodwill is valuable to the product line, and it is clear that EA acted to protect this valuable asset. It did so under the pretext that his online character profile linked to the commercial website of the *Alphaville Herald*, in violation of The Sims' EULA.⁴⁹ This EULA was agreed upon by Ludlow and EA, and the EULA gives EA the right to terminate user accounts at its discretion.⁵⁰

This is censorship of the highest degree. Returning to the New World analogy, it would appear that a colony has expelled one of its members because he or she published information regarding child exploitation that

39. *Id.* at 38.

40. *Id.* at 28.

41. *Id.*

42. *Id.*

43. See Eric Goldman, *Symposium Review: Speech Showdowns at the Virtual Corral*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 845, 846 (2005).

44. *Id.*

45. See *id.*

46. *Id.* at 847.

47. *Id.*

48. See Mizuko Ito, *Cultural Production in a Digital Age: Mobilizing Fun in the Production and Consumption of Children's Software*, 597 ANNALS AM. ACAD. POL. & SOC. SCI 82, 86-87 (2005).

49. Goldman, *supra* note 43, at 847.

50. See *id.*

was threatening to the economic interests of the colony. The early American colonists would not tolerate this form of censorship and thus enshrine the freedom of the press in the First—and possibly most important—Amendment of the Constitution.⁵¹ In the Sims example, many real-world elements of life have been mapped into the virtual world:⁵² there is greed, exploitation, and freedom of the press.⁵³ These are real issues that affect the lives of real people. Since all those involved in the game are real and the effects that flow from their interactions are real, it is of little importance that the experience of the virtual world is mediated through computer technology and the Internet. Violations of basic American principles should invite real-world courts to decide issues of virtual rights.

B. Recent Legal Developments in Virtual Property Rights

To date, no virtual property rights case has been fully litigated in America.⁵⁴ Two interesting cases present a glimpse into the future of virtual property litigation. The first involves a “point-and-click sweatshop” started in Tijuana, Mexico, by the now defunct firm, Black Snow Interactive.⁵⁵ A “point-and-click sweatshop” is based on the disparity in labor value between first and developing nations.⁵⁶ In the virtual world of EverQuest, the value of one man-hour stands at \$3.42,⁵⁷ meaning that one hour of labor in the virtual environment will yield \$3.42 in real-world dollars.⁵⁸ Virtual labor consists of players moving in the online environment, gathering virtual raw materials, such as virtual iron ore, and then “farming” the materials into virtual chattels.⁵⁹ The virtual chattels can either be sold in-world for in-world currency that can then be exchanged for U.S. dollars, or the chattel can be sold in any real-world online auction house such as eBay.⁶⁰

51. See U.S. CONST. amend. I.

52. See generally Goldman, *supra* note 43.

53. See generally *id.*

54. See Lastowka & Hunter, *supra* note 17, at 40, 50.

55. *Id.* at 39 (explaining that Black Snow Interactive paid unskilled Mexican workers to play a videogame for long hours, and then sold the virtual assets they earned).

56. See *id.* at 38–39.

57. *Id.* at 35.

58. *Id.*

59. *Id.* at 37–38; see also David Barboza, *Ogre To Slay? Outsource It To Chinese*, N.Y. TIMES, Dec. 9, 2005, at A1, available at <http://www.iht.com/articles/2005/12/08/business/gaming.php> (discussing the term “gold farmers” in the virtual world).

60. Lastowka & Hunter, *supra* note 17, at 37–39.

Black Snow Interactive seized on this potential and found real-world labor for a lower cost than the value of one man-hour in the virtual world of *Dark Age of Camelot*.⁶¹ Mythic Interactive, the owner of *Dark Age of Camelot*, attempted to prevent the commoditization of their world by forcing eBay to remove all in-world virtual items from their auction listings based upon a theory of intellectual property infringement.⁶² Black Snow Interactive responded with a suit in federal court in California claiming unfair business practice.⁶³ Black Snow Interactive subsequently dissolved as an organization and the litigation concluded with no precedential value.⁶⁴

A second example of a near-miss in American litigation of virtual property rights arose out of Sony's desire to end EverQuest's commoditization.⁶⁵ A class action suit loomed over Sony, because of its attempt to stop the sale of virtual chattels.⁶⁶ Sony applied pressure to eBay to remove all auctions involving EverQuest virtual objects.⁶⁷ The resulting uproar and push for a class action lawsuit centered on the claim that, although Sony owns the virtual item, the users own their time and labor that procured the items. As such, the virtual items should be freely alienable by the players.⁶⁸ Apparently, the class action suit never developed and another opportunity to litigate this issue was lost.⁶⁹

Virtual worlds are highly popular in Asia.⁷⁰ One in four teenagers in South Korea currently subscribes to an online virtual world.⁷¹ Therefore, it is not surprising that the first successfully completed litigation regarding virtual property rights occurred in Asia.⁷² In 2003, a young man playing in the virtual world of Hongyue, or Red Moon, became essentially invincible

61. *Id.* at 39.

62. Julian Dibbell, *Serfing the Web*, <http://www.juliandibbell.com/texts/blacksnow.html> (last visited Oct. 2, 2006).

63. *Id.*

64. *Id.*

65. See Andrew Smith, *Everquest Class Action Threat Over Auction Spat*, THE REGISTER, Jan. 25, 2001, http://www.theregister.co.uk/2001/01/25/everquest_class_action_threat_over/.

66. *Id.*

67. *Id.*

68. *Id.*

69. See generally *id.*

70. See Balkin, *supra* note 25, at 2043 n.1; see also Thomas Crampton, *Actual Advertising in a Virtual World*, INT'L HERALD TRIB., Apr. 10, 2006, available at <http://www.iht.com/articles/2006/04/09/business/game10.php>.

71. See Balkin, *supra* note 25, at 2043 n.1.

72. *On-line Game Player Wins 1st Virtual Properties Dispute*, XINHUA ONLINE, Dec. 19, 2003, http://news.xinhuanet.com/english/2003-12/19/content_1240226.htm.

through the purchase of thousands of hours of game play⁷³ and much hard work stockpiling an overwhelming reserve of virtual biological weapons.⁷⁴ While he was not logged in, a hacker broke into his account and stole his powerful weapons.⁷⁵ He approached the developer and requested the identity of the thief, but the game developer refused his request.⁷⁶ He then approached the police, but received no help.⁷⁷ Following this, he filed suit in a Chinese court and won relief in the form of a return of the virtual objects.⁷⁸ Implicit in this ruling is that the player had a property right in the virtual object that could be recognized in a real-world court.

These two examples illustrate the full bundle of property rights normally applied to real-world property. Black Snow Interactive represents the prototypical claim to manufacture and alienate virtual property.⁷⁹ The Red Moon example demonstrates exclusive possession of virtual property.⁸⁰ American courts are likely to face these types of virtual property claims in the near future.

C. The Analytical Framework

How then are American courts likely to resolve these virtual property disputes? While there are larger issues of fundamental human rights, such as the right to privacy, liberty, and identity, implicated in the creation and administration of virtual worlds, the U.S. Constitution protects these rights from infringement only by state actors in the real-world.⁸¹ Corporations that produce these virtual worlds are not state actors; therefore, they are not subject to the limitations on action imposed by real-world constitutions.⁸² Thus, a corporation administering a virtual world can abridge many rights protected in the U.S. Constitution, such as limiting the content of speech. However, this may not be entirely true.

Professor Jack Balkin suggests that the concept of a “company town,” as described by the Supreme Court in *Marsh v. Alabama*,⁸³ may apply to

73. *Lawsuit Fires Up in Cases of Vanishing Virtual Weapons*, CHINA DAILY, Nov. 20, 2003, http://www.chinadaily.com.cn/en/doc/2003-11/20/content_283094.htm.

74. *Id.*

75. *Id.*

76. *Id.*

77. *On-line Game Player Wins 1st Virtual Properties Dispute*, *supra* note 72.

78. *Id.*

79. Lastowka & Hunter, *supra* note 17 at 37–39.

80. *Lawsuit Fires Up in Cases of Vanishing Virtual Weapons*, *supra* note 73.

81. Balkin, *supra* note 25, at 2074–75.

82. *Id.*

83. *Marsh v. Alabama*, 326 U.S. 501 (1946).

virtual worlds.⁸⁴ A company town is one in which a business privately owns all of the spaces that have been considered public since time immemorial, such as sidewalks and streets. *Marsh* establishes that private businesses are held to the same standards for the protection of constitutional rights in once-public spaces on grounds that the private actor has become a state actor by usurping the traditional role of the state.⁸⁵ Thus, a business can only restrict speech on its privately-owned sidewalks to the same extent that the state can limit speech on its public sidewalks.⁸⁶

Balkin argues that if an online virtual world owned by a for-profit corporation fulfills all of the municipal functions that are normally relegated to the state, the corporation is subject to the same constitutional requirements as a state actor.⁸⁷ Thus, the corporate developer of a virtual world would be limited to constitutional standards in its ability to limit the speech of its participants. This idea is intriguing, and some aspects of the broader argument may find a greater degree of acceptance in courts as virtual worlds become more commonplace in the lives of average citizens. However, the argument is now fairly abstract. Courts will likely follow standard contractual analysis and look to the outward manifestations of the intent of the parties involved as revealed in the material terms of the contract between them.⁸⁸

1. Suggested Court Approaches to Virtual World License Agreements

There are two virtual world legal theorists whose approaches to the resolution of virtual rights disputes are relevant and useful to real-world courts, because the underpinnings of their theories rest on accepted real-world contractual analysis. Both theories rest on the standard contractual doctrine of court deferral to the reasonable expectations of the parties as revealed in the material terms of the agreement between them.

First, Edward Castronova proposes a charter system for virtual worlds similar to the charter system for corporations.⁸⁹ Virtual worlds predicated as play spaces would be protected as such⁹⁰ under Castronova's scheme of

84. Balkin, *supra* note 25 at 2075–76.

85. *Marsh*, 326 U.S. at 508.

86. *Id.*

87. Balkin, *supra* note 25, at 2076–78.

88. *Frierson v. Delta Outdoor, Inc.*, 794 So.2d 220, 224 (Miss. 2001) (“In measuring the rights of parties to a written contract which, on its face, is unambiguous and expresses an agreement complete in all of its essential terms, the writing will control.”).

89. Edward Castronova, *The Right to Play*, 49 N.Y. L. SCH. L. REV. 185, 204 (2004).

90. *Id.* at 201.

the “Charter of Interration.”⁹¹ Castronova argues that virtual worlds deserve special legal status similar to the way in which corporations exist under the legal fiction of personhood.⁹² Corporations are allowed limited liability, because of the generally positive effects limited liability produces for society.⁹³ Castronova suggests that virtual worlds can potentially afford society unique benefits that have not yet been recognized under current socioeconomic legal structures.⁹⁴ The ultimate benefit is the ability to escape the work system paradigm established in the Industrial Revolution.⁹⁵ Because virtual worlds suggest such an enormous potential to provide a good to society, the agreements by which these virtual worlds are regulated deserve special status.⁹⁶ Game spaces should essentially have the equivalent of limited liability.

Under a “Charter of Interration,” developers of a game world would be free to make changes to the virtual world. These changes would be impossible or highly expensive if a court could interfere, since players have vested virtual property rights.⁹⁷ For example, if a player purchases a virtual sword for U.S. \$1000 because the virtual sword is dominantly powerful, the player would have the expectation that the sword would remain powerful. However, after introducing the sword into the game environment, the game developer may realize that the virtual sword is too powerful. The sword may convey too much of an advantage to players who wield it; therefore, the developer may choose to reduce the relative power of the sword. Thus, a sword purchased for U.S. \$1000 may now only be worth U.S. \$300 due to the sword’s diminished power. The player who purchased the virtual sword has now lost value because of the game developer’s decision. Under these conditions, a player might turn to a court, praying for a return of the power to the sword or reimbursement for the diminished value of the virtual object lost through the developer’s actions. Under Castronova’s theory of “Charter of Interration,” the game developer could alter the potency of a particular weapon or character in a virtual world to preserve balance in the game world’s economic or combat system, and players could not argue before a court that the developer’s alteration reduced the value of their virtual property.

91. *Id.* at 204.

92. *Id.*

93. *See id.* at 187.

94. *See id.* at 193.

95. Castronova, *supra* note 89, at 193 n.10.

96. *Id.* at 205; *see, e.g.,* Miller, *supra* note 32, at 460.

97. Lastowka & Hunter, *supra* note 17, at 72; *see also* Richard A. Bartle, *Virtual Worldlines: What the Imaginary Asks of the Real*, 49 N.Y.L. SCH. L. REV. 19, 26–30 (2004).

Virtual worlds that are not designated as play spaces by the developers would not qualify for the “Charter of Interration” because they fail to provide a unique good to society.⁹⁸ Again, the analogy to business forms presents itself. The non-game world is much like a partnership, which is not afforded limited liability for it does not produce a unique benefit to the host society.⁹⁹ Courts could enter these virtual worlds as extensions of the real-world, because this type of virtual world does not offer the potential benefit to society.¹⁰⁰ Thus, a court would be free to balance the equity between developers and virtual world participants.

The esoteric idea of “Charters of Interration” differs little from standard contractual analysis. In the EULA and ToS, the game developer sets the rights and responsibilities of the developer and the virtual world participant. Courts can look to the material terms of the agreement to discern the reasonable expectations of the parties.¹⁰¹ If the material terms of the EULA or ToS establish a game space with a narrative through which the virtual world participant can move, courts will likely read it as such, providing the developer with control to modify and alter the virtual world regardless of the professed virtual property interests of players. Alternatively, if the material terms of the EULA and ToS establish a collaborative environment where commoditized virtual objects are exchanged for virtual or real currency, the court is likely to treat those objects as it would any other object—subject to standard real-world property law.

Though there is no legislation establishing Castronova’s charter system for virtual worlds, the reasoning behind Castronova’s system likely will be appealing to a court because of the similarity to foundational contractual analysis. Therefore, each of the following two agreements between virtual world developers and virtual world participants will be analyzed under Castronova’s concept of “Charters of Interration.”

Jack Balkin shares a similar analysis with Castronova, but adds a second tier of analysis for a court to pursue in the evaluation of a virtual world EULA.¹⁰² Balkin suggests that a virtual world that is set up as a game space, but also fosters the free communication of ideas in a collaborative environment, might justify state involvement in decisions

98. Castronova, *supra* note 89, at 204–05.

99. *See id.*

100. *See id.* at 200–01.

101. CAL. CIV. CODE § 1639 (2006); *see, e.g.*, Bank of West v. Super. Ct., 2 Cal. 4th 1254 (1992).

102. *See* Balkin, *supra* note 25, at 2090.

about the appropriateness of a developer's actions in limiting speech.¹⁰³ Thus, in a virtual world where the developer is the creator of the world, but players co-create the world through mutual interactions involving speech and the interchange of virtual property, a court may be more inclined to enter the virtual world and validate a player's property interest. Conversely, in a virtual world where the developer is the author and players merely travel down narrative paths laid out by the author, the court is likely to find the virtual world a work of art subject to First Amendment speech protections.¹⁰⁴ These protections would forbid a court from forcing a change in the narrative by recognizing a player's virtual property interest.¹⁰⁵

If the material terms of the agreement between the parties reveal a reasonable expectation that the parties will be collaborating in the development of the virtual world, a court will be apt to intervene in balancing the virtual property interests of the parties. On the other hand, if the material terms of the agreement reveal the intent of the developer that it is the creator of the experience in the virtual world and the participant is merely a passenger on narrative trails laid out by the developer, the court will most likely not intervene to balance the virtual property interests of the parties; instead, a court will likely defer to the authority of the EULA.

2. The Spectrum of Virtual World License Agreements

Players in large corporate online collaborative virtual worlds must agree to a EULA and/or a ToS.¹⁰⁶ These contracts govern the duties and responsibilities of the signing parties. Courts are likely to defer to the will of the parties as expressed in the terms of the contract as much as they would in any other contractual analysis, including the implicit limitations regarding contracts, such as adhesion and the doctrine of unconscionability.¹⁰⁷ Thus, the specific provisions in these contracts take on significant weight when analyzing how courts will approach property and other virtual rights disputes. As is common in virtual world legal analysis, the EULA is often assumed inapplicable so as to allow a deeper analysis of the nature of virtual property and virtual rights.¹⁰⁸ Although the process of assuming the unenforceability of the EULA is necessary to

103. *Id.*

104. *See id.*

105. *See id.*

106. *See Miller, supra note 32, at 460.*

107. *See Balkin, supra note 25, at 2071–72.*

108. *See Regulating Digital Environments, supra note 11, at 808.*

analyze the many different possible permutations that virtual rights might take in the virtual space, the controlling effects of EULAs cannot ultimately be ignored. The EULA is the framework and the lens through which courts will look to judge the interests of the developers and participants.¹⁰⁹

Currently, different approaches are emerging in the way game developers address virtual property rights through the EULA. The first type of agreement strictly forbids the formation of any expectation of virtual property rights.¹¹⁰ A prominent example of this approach can be found in Blizzard Entertainment's Terms of Use Agreement ("ToU") governing the highly profitable virtual world, World of Warcraft ("WoW").¹¹¹ The second type of contract form is a hybridized approach employed in EverQuest II by Sony,¹¹² in their increasingly popular incarnation of their strictly anti-commoditized game EverQuest.¹¹³ EverQuest II's approach has been to strictly forbid the commoditization of virtual goods through outside channels, while allowing commoditization internally on Sony's service called "Station Exchange."¹¹⁴ Thus, players can create powerful in-world characters and goods which can then be sold for real-world money on Station Exchange. What then are the rights of players playing under these varied agreements?

III. ANALYSIS

A. World of Warcraft

World of Warcraft is a Tolkienesque fantasy online virtual environment.¹¹⁵ This is a clear example of what would typically be called a "game world." Game play centers on a player's avatar¹¹⁶ moving about a three-dimensional virtual environment, acquiring skills in magic and

109. See generally *id.* at 807 (stating that the EULA generally defines the property rights).

110. See World of Warcraft Terms of Use Agreement, section 8, <https://signup.worldofwarcraft.com/agreement.html> (last visited Nov. 14, 2006).

111. *Id.*

112. See Sony Online Entertainment, EQ II UASL, http://eq2players.station.sony.com/en/support_article.vm?label=EQIIEULA (last visited Sept. 28, 2006).

113. See EverQuest II—News, <http://eq2players.station.sony.com/en/faq.vm> (last visited Sept. 28, 2006).

114. Station Exchange FAQ, What is Station Exchange?, <http://stationexchange.station.sony.com/faq.vm#WhatIsStationExchange> (last visited Nov. 21, 2006).

115. See Lastowka & Hunter, *supra* note 17, at 15–20.

116. An avatar is the virtual representation of the player's body in the virtual world. Players spend a great deal of time augmenting and refining their avatar. See *id.* at 6.

combat and using those skills to defeat increasingly powerful adversaries.¹¹⁷ The virtual world of WoW is what is known as a “leveling world.” In leveling worlds, the object is to increase an avatar’s abilities through experience gained by fighting opponents.¹¹⁸ Blizzard’s use of a leveling system allows it to create an engaging, persistent world that users will continue to play, thus allowing Blizzard to reap profits from monthly flat rate subscription fees.¹¹⁹ Under this business model, Blizzard is the sole provider of content for this virtual world.¹²⁰ The creation of that content is increasingly expensive: “The primary business challenge we face with art is that the costs for first-class art continue to rise faster than our market is expanding, and the [Massively Multiplayer Online Game]s require tremendously more art assets than the vast majority of standalone games.”¹²¹

For WoW to retain monthly subscribers it must allow players of different ability levels to move slowly, though pleasurably, through content it creates at great expense.¹²² If high-level avatars were available on the black market, players could bypass the drudgery of game play and purchase the high-level character.¹²³ Blizzard reasons that low-level content would not be used by players who could bypass it by purchasing a high-level character, and would thus be less valuable because of external third party virtual object transactions.¹²⁴ Further, more high-level content would need to be created to keep high-level players interested and paying the monthly subscription fee.¹²⁵

There is, of course, a logical contradiction here. If people pay monthly subscriptions to play the game, why would they purchase high-level characters or weapons that would essentially result in avoiding game play for which they are paying? While this seems to facially contradict Blizzard’s understanding of player motivations, Richard Bartle suggests two relevant reasons why players would choose to skip what they are

117. *Id.* at 26–28.

118. *See id.* at 26–27.

119. *See* Bartle, *supra* note 97, at 32.

120. *See id.* at 27.

121. Gordon Walton, *Online Worlds Roundtable #8, Part 1*, IGN.COM, Oct. 22, 2003, <http://rpgvault.ign.com/articles/455/455832p2.html>.

122. *See* Bartle, *supra* note 97, at 32 (suggesting that Blizzard develops leveled content to maintain prolonged involvement with the virtual world, all the while collecting monthly subscriptions).

123. *Id.* at 39–40.

124. *Regulating Digital Environments*, *supra* note 11, at 824–25.

125. *Id.*

paying for.¹²⁶

The first reason is rational. Players purchase high-level characters so that they may adventure successfully with friends who have been playing within the game world for a longer amount of time, and thus have more powerful, higher-level characters.¹²⁷ This may be reasonable, but it is doubtful that this is a major motivating force behind the massive market for advanced avatars and weapons.

The second reason, while less rational, is more likely the driving force. Lower-level players buy higher-level avatars and weapons to appear as if they are higher-level players.¹²⁸ This is understandable in a competitive environment. It is further understandable that this behavior would lead to a feedback loop, where players seeking an edge are incentivized to go outside of the game to acquire that edge in a race for excellence. Although there may be valid reasons for these motivations, many players bypass game experiences through the out-of-world acquisition of virtual objects.¹²⁹

In an attempt to protect their investment in the content that they have developed, and to create a virtual environment that will continue to appeal to players, WoW strictly forbids the buying and selling of virtual items outside of the virtual game world.¹³⁰ In section 8 of WoW's ToU, Blizzard sets forth their policy on outside transactions:

Note that Blizzard Entertainment either owns, or has exclusively licensed, all of the content which appears in World of Warcraft. Therefore, no one has the right to "sell" Blizzard Entertainments [sic] content, except Blizzard Entertainment! So Blizzard Entertainment does not recognize any property claims outside of World of Warcraft or the purported sale, gift or trade in the "real world" of anything related to World of Warcraft. Accordingly, you may not sell items for "real" money or exchange items outside of World of Warcraft.¹³¹

Section 8, in conjunction with section 12 (regarding Termination), deals a mighty blow to would-be virtual salespersons. "Blizzard Entertainment reserves the right to terminate this Agreement without notice, if, in Blizzard Entertainments [sic] sole and absolute discretion, you fail to comply with any terms contained in these Terms of Use. . . ."¹³²

126. See Bartle, *supra* note 97, at 39.

127. *Id.* at 39–40.

128. *Id.*

129. *Id.* at 39.

130. World of Warcraft Terms of Use Agreement, *supra* note 110.

131. *Id.*

132. *Id.* at section 12.

Given that the ToU strictly disclaims a player's ability to sell WoW property, it will likely be difficult to argue that players in this type of game world could reasonably form the expectation that their labor in the development of a high-level avatar could be alienable in any way.¹³³

If enough players within the virtual world desire outside alienability of virtual property, two opportunities to fulfill that desire easily present themselves. First, players can organize en masse and force the game developer to recognize their property rights.¹³⁴ The historical parallel to King John and the forced signing of Magna Carta is readily apparent.¹³⁵ This approach is possible, though less likely, because virtual worlds are fractious places.¹³⁶ It is doubtful a sufficiently broad consensus could be formed to force a significant change in a corporation's business model for a game.¹³⁷ Further, it could be difficult to organize such a movement within an environment where communication between players is explicitly monitored.¹³⁸ Organizers of such a movement could easily be removed from the world via Blizzard's termination clause, found in section 12 of their ToU.¹³⁹

Section 12 is broad enough to easily chill discussions that might subject a player to termination. If players do not have recognized property rights and they have not invested thousands of real-world dollars in a particular world, they are more likely to forego the hassle of revolution and simply leave the virtual world for another that better satisfies the players' desires.¹⁴⁰ Blizzard is a for-profit corporation, and any serious threat to the bottom line in the form of dwindling monthly subscriptions is likely to produce a change in their expectations and business model. Thus, through

133. *Id.* at section 8.

134. See James Grimmelmann, *The State of Play: On the Second Life Tax Revolt* (Sept. 21, 2003), <http://research.yale.edu/lawmeme/modules.php?name=News&file=article&sid=1222> (detailing an organized tax revolt inside of a virtual world, which although successful, produced only a modification to the preexisting structure of virtual land taxation and did not force LindenLabs to reorganize their business model for Second Life).

135. See BERNARD H. SIEGAN, *PROPERTY RIGHTS FROM MAGNA CARTA TO THE FOURTEENTH AMENDMENT*, 7 (Transaction Publishers 2001).

136. See, e.g., Noveck, *supra* note 16, at 1 n.19.

137. See *id.* at n.18 ("[T]he so-called tax revolt [is] much ado about nothing").

138. See *World of Warcraft Terms of Use Agreement*, *supra* note 110, at section 3(B) (forbidding communication in Leetspeak, a web inspired textual dialect which thwarts mechanized text filters employed by Blizzard to monitor in-world textual communication).

139. *Id.* at section 12.

140. See Posting of Justin to Control and Property in Play-Based Online Worlds, http://www.gamegirladvance.com/mmog/archives/2002/10/21/stripping_the_dark_from_dark_elf_in_eq.html (Oct. 21, 2002) (detailing players leaving EverQuest after Sony banned a player for writing fan fiction on a private non-affiliated web site (excerpting Sandy Brundage, *Stripping the "Dark" from "Dark Elf" in EQ*, GAMERS.COM, Oct. 9, 2000)).

market forces, Blizzard will remain responsive to players' desires and expectations.¹⁴¹

As it stands, however, will WoW qualify for Castronova's Charter of Interration? The answer is likely yes—through Blizzard's use of specific language such as:

[N]o one has the right to "sell" Blizzard Entertainment content, except Blizzard Entertainment! So Blizzard Entertainment does not recognize any property claims outside of World of Warcraft or the purported sale, gift or trade in the "real-world" of anything related to World of Warcraft. Accordingly, you may not sell items for "real" money or exchange items outside of World of Warcraft.¹⁴²

Accordingly, the rules that govern game play in World of Warcraft are taken very seriously by Blizzard Entertainment."¹⁴³ By disallowing any real world transfers of WoW items, Blizzard has defined its world as a non-commoditized game world. The specificity of the language will define for a court the reasonable expectations of both Blizzard Entertainment and its customers.¹⁴⁴ The virtual world is explicitly defined as a game world and would convey Castronova's special benefit to society. Therefore, a court will likely not intervene in a virtual property dispute based solely on Castronova's Charter of Interration analysis.

Is WoW then the type of virtual world that still may necessitate real-world court involvement based on Balkin's theory of collaborative virtual environment? It is doubtful that a court would find WoW to be collaborative. In section 3 of the ToU, Blizzard sets out the rules of conduct for those existing within its virtual world.¹⁴⁵

As with all things, [WoW] is governed by certain rules of conduct that must be adhered to by all users of [WoW]. . . Blizzard Entertainment reserves the right to determine which conduct it considers to be outside the spirit of the game and to take such disciplinary measures as it sees fit up to and including termination and deletion of the Account.¹⁴⁶

Following this blanket statement are rules regarding players' names

141. *See id.*

142. World of Warcraft Terms of Use Agreement, *supra* note 110, at section 8.

143. *Id.* at section 3(C).

144. It is questionable that any significant portion of WoW's user base actually agrees to the terms of the contract. This line of argument goes more to the impeachment of the reasoning of *Compuserve v. Patterson* and its progeny. *See Compuserve v. Patterson*, 89 F.3d 1257 (6th Cir. 1996).

145. World of Warcraft Terms of Use Agreement, *supra* note 110, at section 3.

146. *Id.*

with a high degree of specificity. A player may not incorporate in their name terms that are “offensive,”¹⁴⁷ related to “cultural figure[s]”¹⁴⁸ and “pop culture icons”¹⁴⁹ belong to “religious figure[s] or deit[ies]”¹⁵⁰ or are derived from “character names from the Warcraft series of novels,”¹⁵¹ or that relate to “drugs, sex, alcohol,”¹⁵² or are comprised of “gibberish,”¹⁵³ utilize, “‘Leet’ or ‘Dudespeak’,”¹⁵⁴ or incorporate, “without limitation rank titles . . . monarchistic or fantasy titles . . . and religious titles.”¹⁵⁵ Further, a player may not misspell their name, or combine first and last names so as to circumvent any of the above listed prohibitions.¹⁵⁶ Clearly, Blizzard seeks to control the naming of characters in WoW. This is the first example of Blizzard’s attempt to retain control over every minute aspect of the virtual world.

In section 3(B), Blizzard attempts to control all speech between players in the virtual world: “Your Chat sessions may be subject to review, modification, and/or deletion by Blizzard Entertainment without notice to you.”¹⁵⁷ When communicating, players may not use any “offensive,”¹⁵⁸ language, not limited to, anything that is “sexually, explicit, racially or, ethnically . . . objectionable.”¹⁵⁹ Blizzard has made it clear that they retain the right to monitor and limit all language and communication in the virtual world. Through this high degree of control of the dialog between players, the players appear to be less like active participants and more like characters subject to the control of the author (Blizzard) of the piece.

In section 8, Blizzard expresses its desire to retain all rights to WoW’s virtual property: “you may not sell items for ‘real’ money or exchange items outside of [WoW].”¹⁶⁰ Through this statement, it should be clear to a player and court alike that Blizzard, through the ToU, intends to retain control of its virtual property. Further, a player has no right to use the virtual object, in any manner, outside of the WoW virtual world.

147. *Id.* at section 3(A)(2).

148. *Id.* at section 3(A)(4).

149. *Id.* at section 3(A)(11).

150. *Id.* at section 3(A)(6).

151. World of Warcraft Terms of Use Agreement, *supra* note 110, at section 3(A)(7).

152. *Id.* at section 3(A)(8).

153. *Id.* at section 3(A)(10).

154. *Id.* at section 3(A)(12).

155. *Id.* at section 3(A)(13).

156. *Id.* at section 3.

157. World of Warcraft Terms of Use Agreement, *supra* note 110, at section 3(B).

158. *Id.* at section 3(B)(i).

159. *Id.*

160. *Id.* at section 8.

Finally, in section 3(C) of its user agreement, Blizzard details the furthestmost bounds of its control of behavior in WoW:

Game play is what [WoW] is all about. Accordingly, the rules that govern game play in [WoW] are taken very seriously by Blizzard Entertainment. Note that Blizzard Entertainment considers all *valid play styles* in [WoW] to be part of the game. . . .¹⁶¹

What, though, are valid play styles? Section 3(C)(v) answers in the negative: “[a]nything that Blizzard Entertainment considers contrary to the ‘essence’ of [WoW],” is not a valid play style.¹⁶² Thus, Blizzard retains absolute discretion over all virtual activity within WoW. Blizzard recognizes that it must control the virtual world exclusively as an author to maintain its revenue stream.

It is clear that WoW is not a collaborative environment. Blizzard retains control over the forms of language used, names employed and physical movement in the virtual space. A player in the world of WoW is a passive participant, much like a movie viewer. Thus, under Balkin’s analysis, a court would be less likely to enter the virtual world because Blizzard retains authorship and players have little recourse to argue that they are co-creating the virtual world.

Thus, under Castronova’s Charter of Interration, decisions by Blizzard about the virtual rights of players within WoW should not be reviewed by real-world courts because WoW qualifies as a play space. Further, through Blizzard’s usage of clear and consistent terms that manifest its intent to control every aspect, including the names, objects, language, and actions within the virtual world, it is clear to all parties that Blizzard is the sole author of the work. Hence, WoW would not be seen as a collaborative virtual environment. As such, it would not be subject to Balkin’s imposition of real-world scrutiny by courts.

Finally, at the level of basic contractual analysis, the clear intent of the parties is manifested and easily discernable by the court. There can be little doubt about the roles of the parties in the agreement. Players have agreed not to buy or sell virtual objects outside of the virtual world of WoW. They have agreed to allow Blizzard to monitor and control their names, language, and movement. A court would, therefore, defer to the express terms of the agreement and give Blizzard total control over the virtual world of World of Warcraft.

161. *Id.* at section 3(C) (emphasis added).

162. *Id.* at section 3(C)(v).

A. EverQuest II and the Introduction of Station Exchange

Sony—as a very large multinational corporation and owner of one of the West’s most popular and profitable Massively Multiplayer Online Role Playing Games (“MMORPGs”), EverQuest and its recent reincarnation, EverQuest II—shares many of Blizzard’s concerns. If Sony was found to be liable for any change to the game environment that negatively affected a player’s virtual property interest, such as making a powerful virtual sword less so, Sony would be forced to balance the value of the player’s individual virtual property right against the value added to the game world. Such computations would invariably favor stasis in the game environment because the cost of changes that decrease the value of players’ virtual objects would be greater than the value added to the game world.¹⁶³ Therefore, Sony would unquestionably like to retain control of the game world so that it can continue to develop a narrative that is balanced, persistent, and compelling enough to retain high rates of monthly subscriptions. Sony, however, has not taken the same course that Blizzard has. Instead, Sony has adopted a hybrid approach to players’ virtual property interests. Sony recognizes players’ virtual property interests, but requires all commoditized virtual property exchanges to take place exclusively on Sony’s Station Exchange servers.¹⁶⁴

Why would Sony recognize players’ virtual property rights, and even facilitate the exchange of virtual chattels, if it could stand to lose the legal authority to control its creation? The first reason is to protect Sony’s good will through continued customer satisfaction. Sony claims that it is unable to track virtual property transactions that originate outside of the virtual world.¹⁶⁵ When disputes arise from a transacting party’s failure to perform, Sony faces “an enormous customer service nightmare”¹⁶⁶ determining who is entitled to what virtual property. Sony argues that if all transactions in virtual EverQuest II property transpire on its Station Exchange servers, Sony can track and verify all transactions. This way, Sony can ensure performance on all contracts, thus eliminating fraud and thereby generating heightened customer satisfaction.¹⁶⁷

163. *Regulating Digital Environments*, *supra* note 11, at 807, 826.

164. Station Exchange FAQ, What Is Station Exchange?, <http://stationexchange.station.sony.com/faq.vm>.

165. *See Regulating Digital Environments*, *supra* note 11, at 807, 822.

166. *Id.*

167. *See* Station Exchange FAQ, Why Are You Offering This Service?, <http://stationexchange.station.sony.com/faq.vm>.

Further, Sony recognizes that a significant portion of their users desires commoditized game environments.¹⁶⁸ Players' insistence on trading virtual goods, even with the looming threat of being expelled from the virtual world, reveals the extent of players' desire for commoditized virtual goods. Past efforts to restrict the practice of commoditized exchanges of virtual property have resulted in rumblings of class-action lawsuits, marginalized players, and, at worst, extirpated paying customers.¹⁶⁹

Sony seems to have reached a compromise position. Players who object to commoditized game environments can play in worlds without the intrusion of real-world economic forces, while those who wish to bypass disagreeable game content can exist in a separate, commoditized virtual world where virtual goods and characters are freely available for purchase on Sony's Station Exchange servers.¹⁷⁰ This broad appeal to diametrically-opposed factions of players ensures Sony's ability to increase customer satisfaction and market share. Wholly non-commoditized game worlds such as WoW can only directly appeal to the non-commoditized faction of players, while those who desire virtual property exchanges remain marginalized, conducting virtual goods transactions in out-of-world, fraud-prone black markets, constantly subject to expulsion if detected.

There is a second reason, beyond customer satisfaction, that likely motivated Sony's decision to commoditize EverQuest II—the profitability of virtual trade.¹⁷¹ Sony charges a one dollar listing fee for every item listed, and collects ten percent of every transaction.¹⁷² While Sony previously condemned the third-party market in virtual property exchange, it has now internalized this market in order to reap the profit.

Has Sony then acted in accordance with Castronova's theory of Interration and allowed the law into its once pure, now commoditized game world? By acknowledging the existence of saleable virtual property and directly profiting from its existence, Sony has opened itself to equitable arguments that players can develop a stake in the fruits of their labor by developing virtual goods. In an attempt to avoid liability for harm to players' virtual property, Sony strictly disclaims any right of a player to

168. *See id.*

169. *EverQuest Class Action Threat Over Auction Spat*, THE REGISTER, Jan. 25, 2001, http://www.theregister.co.uk/2001/01/25/everquest_class_action_threat_over/.

170. *See* What Is Station Exchange?, *supra* note 164.

171. *See* Alexs Krotoski, *Life: Online: Real Profits from Play Money: Julian Dibbell Set Out to Make a Mint Selling Virtual Goods—and He Succeeded*, THE GUARDIAN (LONDON), Apr. 15, 2004, at 21.

172. What Is Station Exchange?, *supra* note 164.

establish a virtual property interest:

YOU PROMISE, THEREFORE, THAT YOU WILL NEVER ASSERT OR BRING ANY CLAIM OR SUIT AGAINST SOE [Sony Online Entertainment], ITS LICENSOR(S), ANY SONY COMPANY, OR ANY EMPLOYEES OF ANY OF THE ABOVE, WHICH IS RELATED TO OR BASED ON (I) A CLAIM THAT YOU “OWN” ANY VIRTUAL GOODS IN ANY GAME, (II) A CLAIM FOR THE “VALUE” OF VIRTUAL GOODS IF SOE DELETES THEM (AND/OR TERMINATES YOUR ACCOUNT(S) . . . (III) A CLAIM FOR THE “VALUE” OF VIRTUAL GOODS THAT YOU MAY LOSE IF SOE DOES ANYTHING THAT IT IS ENTITLED TO DO PURSUANT TO ANY PROVISION OF THE EXCHANGE AGREEMENT, THIS AGREEMENT, THE GAME’S RULES OF CONDUCT, SOE’S TERMS OF SERVICE AND/OR (IV) A CLAIM THAT THE “VALUE” OF ANY VIRTUAL GOODS HAS INCREASED OR DECREASED BY VIRTUE OF ANY GAME MODIFICATION THAT SOE HAS MADE OR WILL MAKE. ALL OF THE ABOVE APPLIES WHETHER ON AN EXCHANGE ENABLED SERVER OR ON A NON-EXCHANGE ENABLED SERVER.¹⁷³

Here, Sony is attempting to have it both ways. Sony seeks to retain control of the game narrative by explicitly retaining the ability to delete or modify virtual property at any time, while profiting from the exchange of virtual goods on its servers.¹⁷⁴ Sony seems to rely exclusively on the protection it hopes is afforded by the EULA.¹⁷⁵

In Section (I), the EULA attempts to prevent a player from forming the expectation of “owning” virtual property by expressly denying a player’s ability to do so.¹⁷⁶ Ownership of property implies the standard bundle of ownership rights, such as “the right to possess, to enjoy the income from, to alienate, or to recover ownership from one who has

173. EQ II UASL, *supra* note 112.

174. *Id.* (“You agree that SOE retains the unfettered right to modify its games and all aspect of characters, items and coin (collectively, ‘Virtual Goods’) therein. . . . You further acknowledge that SOE can and will, in its discretion, modify features, functions or abilities of any element of the game or any Virtual Goods (which may, among other things, make the Virtual Goods substantially more effective or functional, or less effective or function, more common or less common, or eliminated entirely).”).

175. SOE refers to its EULA as UASL, or “User Agreement and Software License.”

176. EQ II UASL, *supra* note 112.

improperly obtained title. . . .”¹⁷⁷ Players who exist and purchase virtual objects on Sony’s Station Exchange servers have the ability to use, possess, and enjoy the income provided by the virtual object.¹⁷⁸

The final right in the bundle—the ability to exclude others or to recover ownership if improperly taken—is more complex. In the virtual property context, the right to exclude has two possible implications. The first implication refers to virtual objects taken by players inside the game world. Looting corpses is a common practice in the game world.¹⁷⁹ Players seek out weaker players and kill them in the game environment for the experience awarded in the combat and to acquire the player’s virtual objects.¹⁸⁰ If this activity were performed in the real world, it would likely be punishable by death, but within the game world, this practice is common.¹⁸¹ The extent of a player’s ability to exclude others is determined by the player’s power within the game world.¹⁸² Therefore, it is reasonable for a player to expect that a virtual object purchased through Sony’s Station Exchange may be lost through ordinary game play. In this case, a court would not likely order the return of the virtual object because the object was lost through game mechanics.¹⁸³

The second implication of the ability to exclude refers to actions taken outside of the mechanics of game play. A player may lose a purchased virtual object through the real-world efforts of hackers.¹⁸⁴ If a hacker breaches Sony’s security and transfers a virtual object into another account, a player’s reasonable expectation of ownership would be violated. Basic common law principles suggest that Sony would be responsible for the return of the virtual object to the rightful owner.¹⁸⁵ This is the scenario seen in the first successfully litigated virtual property case in China.¹⁸⁶ A court would be more inclined to order the return of the virtual object because the object was lost outside of the game world or beyond game mechanics. Accordingly, Sony recognizes all of the essential elements of property ownership, but still disclaims a player’s ability to form the

177. 63C AM. JUR. 2D *Property* § 3 (1997).

178. What Is Station Exchange?, *supra* note 164.

179. See generally Lastowka & Hunter, *supra* note 17, at 33.

180. See *id.* at 18–19.

181. *Id.*

182. EQ II UASL, *supra* note 112.

183. See generally Tim Guest, *Just a Game?*, NEW SCIENTIST, May 20, 2006, at 38.

184. See John Steinbachs, *Virtual Theft Causes Real Pain; On-Line Gamer Calls Cops After Hacker Steals Character*, THE OTTAWA SUN, Apr. 28, 2002, at 20; Karen Dearne, *Hackers Plunder Games Booty*, THE AUSTRALIAN, Jun. 6, 2006, at 36.

185. Joshua A.T. Fairfield, *Virtual Property*, 85 B.U.L REV. 1047, 1084–85 (2005).

186. See *On-line Game Player Wins 1st Virtual Properties Dispute*, *supra* note 72.

ownership interest.

Section (II) of the EULA prevents a player from forming the expectation of owning the value of the virtual good. “YOU PROMISE, THEREFORE, THAT YOU WILL NEVER ASSERT... ANY CLAIM... AGAINST SOE... BASED ON... THE ‘VALUE’ OF VIRTUAL GOODS IF SOE DELETES THEM”¹⁸⁷

Section (III) of the EULA attempts to prevent the player from forming the expectation that the purchased virtual good will retain its value and seeks to ensure that Sony has the latitude to adjust the virtual item and virtual world as it sees fit in order to maintain a profitable game experience for its users: “YOU PROMISE, THEREFORE, THAT YOU WILL NEVER ASSERT... ANY CLAIM... AGAINST SOE... BASED ON... A CLAIM... FOR THE ‘VALUE’ OF VIRTUAL GOODS THAT YOU MAY LOSE IF SOE DOES ANYTHING THAT IT IS ENTITLED TO DO”¹⁸⁸

Lastly, in Section (IV), Sony disclaims the player’s ability to claim the value of virtual goods through game modification: “YOU PROMISE, THEREFORE, THAT YOU WILL NEVER ASSERT... ANY CLAIM... AGAINST SOE... BASED ON... A CLAIM... THAT THE ‘VALUE’ OF ANY VIRTUAL GOODS HAS INCREASED OR DECREASED BY VIRTUE OF ANY GAME MODIFICATION THAT SOE HAS MADE OR WILL MAKE.”¹⁸⁹

Under Castronova’s scheme of Interration, it seems that Sony has invited the intrusion of real-world courts.¹⁹⁰ Since Sony profits from the exchange of virtual goods and essentially recognizes virtual goods as an exchangeable commodity,¹⁹¹ a real-world court is likely to apply more scrutiny to Sony’s EULA. The game space is not a pure game space, but a hybrid, and as a result, the virtual world is likely to receive only limited protection from the intrusion of real-world courts.

Assuming, *arguendo*, that EverQuest II is ineligible for Castronova’s Charter of Interration, there are still material terms within the contract that a court will examine when deciding whether to enter the virtual space. From the above-quoted EULA sections, it is clear that virtual objects have real-world value. Sony disclaims, however, players’ ability to form an expectation in that value, and players must agree that they will not expect

187. EQ II UASL, *supra* note 112.

188. *Id.*

189. *Id.*

190. See Castronova, *supra* note 89, at 204.

191. What Is Station Exchange?, *supra* note 164.

to retain the value of virtual objects.¹⁹² Therefore, when changes are made by Sony to the virtual world that affect the value of a player's virtual objects, the court will likely be unwilling to award damages to a player because of the material terms of the contract. Further, if a player loses a valuable virtual object through game play, the court is also unlikely to award damages due to deference to the contract and to the reasonable expectation of the parties.

As the mechanism that decreases the value of the virtual object moves away from the game space, the court will be increasingly likely to enter the virtual space and restore the value lost by players. The Red Moon example from China is the representative scenario. There, the court ordered the return of virtual objects because an external force from outside of the game space, a hacker, depleted the value of the virtual objects within the virtual space.¹⁹³ In such a case, a court is likely to look beyond the contract, because such interference likely does not meet the player's reasonable expectation that their account is secure from outside intrusion. In this case, Sony may be liable for lost value to virtual objects.

Given that Sony employs a hybrid approach, the application of Castronova's Charter of Interration is indeterminate. In a subset of scenarios, a court may enter the virtual space to balance the equities of players and developers. Balkin's collaborative game environment analysis will arguably apply because Sony's EULA does not manifest the necessity to control the game environment to the same extent that Blizzard did in the WoW example noted above. Section 12 of Sony's EULA states: "[Y]ou have no expectation of privacy in any such communications and expressly consent to such monitoring of communications you send and receive."¹⁹⁴ Here, it seems Sony's desire to monitor communication is not centered on creating an immersive experience or controlling the game narrative. Sony does not attempt to control the language, naming, or virtual physical behavior in the virtual world. Consequently, a court is more likely to see EverQuest II as a collaborative game environment where the game developer and the players co-create the narrative. Due to this entangled involvement, a player may develop a degree of equity in the virtual world. At a minimum, this may weigh slightly in favor of a court peering into the virtual world to balance the equities of the players and developers.

Sony's hybrid approach frustrates the use of Castronova's Charter of Interration analysis because some elements of the game world are pure

192. EQ II UASL, *supra* note 112.

193. See *On-line Game Player Wins 1st Virtual Properties Dispute*, *supra* note 72.

194. EQ II UASL, *supra* note 112.

game play, while other elements are commoditized. This approach is likely to be unpersuasive to a court. Further, Balkin's approach of a collaborative environment is also largely indeterminate, though it may weigh slightly in favor of court involvement in the virtual world. The controlling analysis that a real-world court is likely to use in *EverQuest II*'s virtual world is traditional contract analysis. This analysis is likely to conclude that in a majority of situations, Sony should not be liable for loss in value of virtual objects, with the caveat that, as the mechanism that decreases value moves away from the game space and game mechanics, the court will be increasingly willing to enter the game space and possibly award damages for the loss in value to virtual objects.

IV. CONCLUSION

Virtual worlds are becoming more important in the lives of average citizens. These virtual worlds produce real effects in the real world. As the financial impact of these virtual worlds continues to increase, the impetus for real-world courts to involve themselves with virtual matters will grow. Game developers are trying different approaches to modulate the effect that real-world courts will have on their virtual spaces. Some completely forbid an expectation of virtual property interests in the game environment. Others, like Sony, attempt to accommodate players' interest in commoditization without losing control over the virtual space they have created. While it is unclear exactly how courts will tackle these issues, it is certain courts will have to address them in the near future. The burgeoning legal and economic analysis of virtual worlds provides a hope that when a court in America does actually delve into these uncharted territories, it will not be without the guidance of many great thinkers.

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