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Cover Page Footnote

J.D. Candidate, Fordham University School of Law, 2012. I would like to thank Professors Olivier Sylvain, Ron Lazebnik, Joel Reidenberg, and Ethan J. Leib for their insight, feedback and mentoring on this quest, Jackie McMahon, Emily Chepiga, and the team at IPLJ, Kara Baquizal, Anna Willmann, and my friends and family.

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INTRODUCTION

Leonard: What's going on?

Sheldon: They stole everything, Leonard. Everything.

Officer: Are you the roommate?

Leonard: Yeah, Leonard Hofstadter. What happened?

Officer: Your friend here called 9-1-1 to report a robbery.

Leonard: Oh my God. What did they get?

Sheldon: What didn't they get? They got my enchanted weapons, my vicious gladiator armor, my wand of untainted power, and all my gold!

Leonard: You called the police because someone hacked your World of Warcraft account?

Sheldon: What choice did I have? The mighty Sheldor, level 85 Blood Elf, hero of the Eastern Kingdoms has been picked clean like a carcass in the desert sun. Plus, the FBI hung up on me. . .

Officer: Good luck fellas.

Leonard: Thank you, officer.

> Sheldon: Wait a minute. You're not going to do anything? . . .
>
> Officer: Dr. Cooper, I'm sorry for your loss, but the Pasadena police department doesn't have jurisdiction in Pandora.[1]

If the Pasadena police department doesn't have jurisdiction in Pandora, then who does? In virtual worlds, individuals from around the world interact with each other with no conception of real-world location, transcending physical boundaries such that it raises questions about the validity of the law of any specific jurisdiction. The marketplaces in virtual worlds, where users transact in currency that has real-world value, are causing disputes that spill outside of the virtual world and into courtrooms.[2] The creation of online environments to support fantasy via role-play and anonymity raises issues for real-world dispute resolution. The problem is whether an individual who harms another in the virtual world is causing harm solely to an avatar in the virtual world, or is actually harming an individual in a real-world location—a location where that individual has sufficient ties to support bringing suit in that forum.

Before virtual worlds like Second Life and Entropia Universe had millions of subscribers,[3] John Perry Barlow[4] and David R. Johnson and David Post[5] argued that cyberspace was a separate jurisdiction, providing a lawless, Wild West-like terrain. Today,

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1 *The Big Bang Theory: The Zarnecki Incursion* (CBS television broadcast Mar. 31, 2011).

2 First Amended Complaint, Amaretto Ranch Breedables, LLC v. Ozimals, Inc., No. CV10-05696 (N.D. Cal. Feb. 9, 2011).

3 Enigmax, *Entropia Universe Will Disappear and Come Back with BitTorrent*, TORRENTFREAK (Aug. 15, 2009), http://torrentfreak.com/entropia-universe-will-disappear-and-come-back-with-bittorrent-090815 (noting that Entropia Universe has 11.5+ million subscribers).

4 John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELEC. FRONTIER FOUND. (Feb. 8, 1996), https://projects.eff.org/~barlow/Declaration-Final.html (arguing that "Cyberspace does not lie within [government] borders").

5 David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1367 (1996) (arguing that cyberspace should be a separate jurisdiction).

virtual worlds provide landscapes closer to the Wild West than Barlow, Johnson, and Post envisioned. Virtual world interactions are anonymous, taking place through avatars representing what the user chooses to be represented as in the virtual world. Because of this anonymity and ability to connect instantaneously with the entire world, interactions in virtual worlds have no ties to physical geography.

But while these interactions only take place in cyberspace, disputes arising in virtual worlds present real-world legal issues. Is the current statutory framework structured to protect U.S. citizens? In the 1990s, legal thinkers began to raise questions of proper jurisdiction and whether there could ever be a suitable forum for disputes arising in cyberspace.[6] While courts today often resolve the jurisdictional issue by applying the tests articulated in either *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*[7] or *Calder v. Jones*[8] the recent rise of elaborate virtual worlds presents a more complex question: where can we sue people when our transactions don't really take place anywhere, and no one knows who or where we are?

In Part I, this Note will give a background of the evolution of the reach of jurisdiction from physical territory-based jurisdiction to the jurisdiction over Internet disputes. Part I will also provide a primer on virtual worlds and virtual world-based disputes,

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[6] *See* CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1262 (6th Cir. 1996) (contemplating personal jurisdiction in an Internet-based trademark claim); Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345, 1380–81 (2001) (arguing for a "targeting approach" to determine jurisdiction over Internet contacts); Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199, 1250 (1998) (arguing that there can be a jurisdiction for cyber-transactions as for any other transactions); Johnson & Post, *supra* note 5, at 1367; Joel R. Reidenberg, *Yahoo and Democracy on the Internet*, 42 JURIMETRICS J. 261, 280 (2002) (arguing that cyberactors should adhere to international law); Barlow, *supra* note 5.

[7] 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (holding that personal jurisdiction for websites should be based on a "sliding scale" representing the "nature and quality of commercial activity that an entity conducts over the Internet.").

[8] 465 U.S. 783, 789–91 (1984) (holding that personal jurisdiction existed where the defendant expressly aimed his conduct at the forum state, knowingly causing injury in that state). *See, e.g.*, Tamburo v. Dworkin, 601 F.3d 693, 697 (7th Cir. 2010) (applying the test from *Calder*); Toys "R" Us, Inc. v. Step Two S.A., 318 F.3d 446, 452 (3d Cir. 2003) (applying the test from *Zippo*).

concluding with a discussion of *Amaretto Ranch Breedables v. Ozimals*,[9] a pending case espousing the significant jurisdictional issues inherent in virtual world-based disputes. In Part II, this Note will discuss the different problems of jurisdiction for virtual world-based disputes, ranging from *in personam* jurisdiction and substantive law to minimum contacts and personal jurisdiction. In Part III, this Note will discuss how the virtual world sovereigns are in the best position to resolve virtual world-based disputes through End User License Agreements ("EULA") fixing set jurisdictions and relevant parameters for dispute resolution. Part III will also argue that while EULA provisions may resolve questions of jurisdiction for any particular virtual world, absent such provisions, only a theory of worldwide purposeful availment will protect citizen-players.

I. BACKGROUND

A. The Evolution of Jurisdiction from Pennoyer to Zippo

Before virtual worlds existed, and long before Al Gore invented the Internet,[10] jurisdictions had physical boundaries.[11] The paradigmatic civil procedure case for all first-year law students, *Pennoyer v. Neff*, noted two principles of public law regarding jurisdiction: (1) "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory"; and (2) "no State can exercise jurisdiction over persons or property without its territory."[12]

Since the 1877 case, the Supreme Court has reevaluated jurisdictional boundaries.[13] Post-*Pennoyer* advances in technology

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9 First Amended Complaint, Amaretto Ranch Breedables, LLC v. Ozimals, Inc., Case No. CV10-05696 (N.D. Cal. Feb. 9, 2011).

10 *See Late Edition with Wolf Blitzer: Interview of Al Gore* (CNN television broadcast Mar. 9, 1999).

11 *See* Pennoyer v. Neff, 95 U.S. 714, 722 (1877).

12 *Id.*

13 *See e.g.*, Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 415–16 (1984) (declining to find general personal jurisdiction for a Colombia-based company because of a lack of "continuous and systematic" contacts with the forum state); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 295–99 (1980) (finding that a New York car dealership did not have sufficient minimum contacts with Oklahoma even

minimized the importance of territorial-based boundaries.[14] With technological advances over the years continuing to blur the physical boundaries, states needed to protect their residents from harms; jurisdiction boundaries based on territory were insufficient in the increasingly mobilized age.[15]

Today, personal jurisdiction comes in one of two forms: general jurisdiction and specific jurisdiction.[16] General jurisdiction applies to any type of claim in a given state where the defendant has "continuous and systematic" contacts with the forum state.[17] "Continuous and systematic" contacts may be reflected by residing in the state or having a place of business in the state.[18] Specific jurisdiction applies where the defendant does not have a residence or place of business in the state, but has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."[19] To be a sufficient basis for jurisdiction, these minimum contacts must

though it was foreseeable that one may drive a car purchased at the dealership to Oklahoma); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447–48 (1952) (holding that a foreign corporation could be subject to the forum state's jurisdiction under the Fourteenth Amendment because the company's president had an office in the forum state); Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (overturning *Pennoyer*'s requirement that due process under the Fourteenth Amendment could only be satisfied by presence within the forum and holding that, without presence in the forum, one must have "certain minimum contacts with [the forum state] such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'").

14 *See* Hanson v. Denckla, 357 U.S. 235, 250–51 (1958) ("As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase.").

15 *See id.*

16 Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136–37, 1144–45 (1966) (articulating the parameters of general and specific personal jurisdiction); *see also Helicopteros*, 466 U.S. at 414 nn.8–9 (discussing general and personal jurisdiction).

17 *Helicopteros*, 466 U.S. at 415–16 (citing Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 438 (1952)).

18 *See id.*

19 Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (internal quotation marks omitted). *See also* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 487 (1985) (holding that a franchisee contracting with a corporation in the forum state had sufficient minimum contacts with the forum state to warrant personal jurisdiction, and that it was reasonably foreseeable the defendants would be haled into the forum state).

make it foreseeable that a defendant could be haled to litigate in the forum state.[20]

In the 1990s, as Internet usage and litigation related to that use increased, the problems of defining jurisdiction and applying "minimum contacts" to Internet-based cases became much more prevalent.[21] Although the Internet enabled users in any state to create websites viewable by any person around the country (and the world), it raised questions as to when a website operator could be sued in any given state.[22] In *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, the Pennsylvania-based Zippo lighter manufacturer brought suit against Zippo Dot Com, a California-based Internet newsgroup,[23] in the Western District of Pennsylvania.[24] The lighter manufacturer sued for trademark dilution, among other things; Zippo Mfg. claimed that the Zippo Usenet infringed on its trademark via its domain name.[25] Wrestling with the concept of personal jurisdiction in cyberspace, the court determined that a slightly tailored version of *International Shoe Co. v. Washington*'s minimum contacts test should apply to websites.[26] The court held that minimum contacts should be decided based upon a sliding scale representing the "nature and quality of commercial activity" in the forum state.[27] While passive websites that merely provide

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[20] *Burger King*, 471 U.S. at 474.

[21] *See, e.g.*, CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1262, 1268–69 (6th Cir. 1996) (noting that contacts with a forum in an almost-entirely electronic context provided a question of first impression for personal jurisdiction, but ultimately finding the defendant had sufficient minimum contacts); Zippo Mfg. Co.v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1123–24 (W.D. Pa. 1997) (creating a "sliding scale" to address Internet-based communications because of the novel problems presented by personal jurisdiction on the Internet).

[22] *See* Joel R. Reidenberg, *Technology and Internet Jurisdiction*, 153 U. PA. L. REV. 1951, 1951 (2005) (noting that "current Internet technology creates ambiguity for sovereign territory because network boundaries intersect and transcend national borders."); *see also* Geist, *supra* note 6, at 1354–60.

[23] A newsgroup is an online discussion board where members may post messages, view and download content. *Newsgroup Definition*, PC MAGAZINE ENCYCLOPEDIA (Oct. 20, 2011, 6:22 PM), http://www.pcmag.com/encyclopedia_term/0,2542,t=newsgroup&i=47953,00.asp#fbid=vWCN-7-XsZY.

[24] *Zippo*, 952 F. Supp. at 1119.

[25] *Id.* at 1121.

[26] *See id.* at 1124 & n.5 (looking to several published articles on personal jurisdiction and the Internet to determine how *International Shoe* may apply).

[27] *Id.* at 1124.

information to viewers would not satisfy minimum contacts, websites that solicit business over the Internet in the forum state may be sufficient for personal jurisdiction.[28]

Since *Zippo*, many courts have chosen to use the sliding scale test to determine jurisdiction for websites.[29] However, some jurisdictions have resisted the *Zippo* Court's reasoning.[30] The Seventh Circuit, in particular, has elected not to apply *Zippo*.[31] In *Tamburo v. Dworkin*, the Seventh Circuit rejected *Zippo*, choosing instead to analyze minimum contacts following the Supreme Court's decision in *Calder v. Jones*.[32] In *Calder*, the Supreme Court found that the defendant purposefully directed activity into the forum state by committing an intentional act expressly aimed at the forum state, which caused harm that the defendant knew was likely to be suffered in the forum state.[33] Applying *Calder*'s

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[28] *Id.*

[29] *E.g.*, Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 452 (3d Cir. 2003) (calling *Zippo* the "seminal authority regarding personal jurisdiction based upon the operation of an Internet web site"); *see also* Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 418 (9th Cir. 1997) (analyzing minimum contacts based on *Zippo's* sliding scale); Jagex, Ltd. v. Impulse Software, No. 10-10216-NMG, 2010 U.S. Dist. LEXIS 84201, at *7–8 (D. Mass. Aug. 16, 2010); Chloe v. Queen Bee of Beverly Hills, LLC, 571 F. Supp. 2d 518, 526 (S.D.N.Y. 2008) (characterizing the website at issue in the case according to *Zippo's* "sliding scale of interactivity.").

[30] *E.g.*, Tamburo v. Dworkin, 601 F.3d 693, 703 (7th Cir. 2010) ("Some circuits have followed *Zippo* when 'electronic contacts' over the Internet are at issue . . . . We have not specifically done so."); Best Van Lines, Inc. v. Walker, 490 F.3d 239, 252 (2d Cir. 2007) ("We think that a website's interactivity may be useful for analyzing personal jurisdiction . . . but only insofar as it helps to decide whether the defendant 'transacts any business' in [the forum State] . . . .").

[31] *E.g.*, uBID, Inc. v. GoDaddy Group, Inc., 623 F.3d 421, 434–35 (7th Cir. 2010) (applying the test articulated in *Calder* in lieu of *Zippo*); Illinois v. Hemi Group LLC., 622 F.3d 754, 759 (7th Cir. 2010); *Tamburo*, 601 F.3d at 703 n.7.

[32] *Tamburo*, 601 F.3d at 703 ("As a more general matter, we hesitate to fashion a special jurisdictional test for Internet-based cases. *Calder* speaks directly to personal jurisdiction in intentional-tort cases; the principles articulated there can be applied to cases involving tortious conduct committed over the Internet."). *See also generally* Calder v. Jones, 465 U.S. 783 (1984).

[33] *Calder*, 465 U.S. at 788–89. In *Calder*, a California-based actress brought suit against a Florida-based tabloid publisher in California, alleging libel, invasion of privacy, and intentional infliction of emotional harm. *Id.* at 785. The Supreme Court held that although the tabloid was based in Florida, the intentional torts allegedly committed were expressly aimed at the forum state because the tabloid knew the publication would harm the plaintiff's reputation as an actress in California. *Id.* at 789–90. Therefore, it was

holding, the court in *Tamburo* acknowledged that activity "expressly aimed" at the forum state is sufficient for jurisdiction.[34]

Whether courts follow the *Zippo* test or the *Tamburo* approach, personal jurisdiction analysis in Internet cases is rooted in "minimum contacts."[35] The sliding scale in *Zippo* uses a "minimum contacts" analysis to determine a website's level of interactivity, and thus determine whether the court has jurisdiction.[36] Therefore, the concept of "minimum contacts" will bear upon the relationship of people participating in virtual worlds because of their technological, and not geographical, connectivity.

B. Virtual Worlds

> Penny: I was just dropping off a cheesecake to Sheldon. He was robbed of a bunch of imaginary crap that's useful in a make believe place.[37]

Generally virtual worlds are populated by users who create identities different from their own.[38] In the virtual world one is an avatar, a representation of who one chooses to be, whether it be

completely foreseeable that the Florida-based tabloid would be haled to California to litigate the matter. *Id.* at 790.

[34] *Tamburo*, 601 F.3d at 704. Following *Tamburo*, the court in *Hemi Group LLC* noted, "Although several other circuits have explicitly adopted the sliding scale approach, our court has expressly declined to do so. . . . [T]he traditional due process inquiry . . . is not so difficult to apply to cases involving Internet contacts that courts need some sort of easier-to-apply categorical test." 622 F.3d at 758–59 (citation omitted). In *Howard v. Missouri Bone and Joint Ctr., Inc.*, the court disagreed with the "arbitrary 'sliding scale' approach" in *Zippo*. 869 N.E.2d 207, 212 (Ill. App. 5 Dist., 2007). The court reasoned that the level of interactivity on a webpage was irrelevant. *Id.* An interactive website, the court reasoned, is more akin to telephone or mail communications, whereas a passive website is more akin to a static advertisement. *Id.* Thus, the court chose to analyze the webpage at issue not by examining its level of interactivity, but by comparing it to offline advertisements. *Id.* at 213.

[35] *See, e.g.*, *uBID*, 623 F.3d at 425; Toys "R" Us, Inc. v. Step Two, S.A., 318 F.3d 446, 452 (3d Cir. 2003).

[36] *See Hemi Group LLC.*, 622 F.3d at 759.

[37] *The Big Bang Theory*, *supra* note 1.

[38] *See* GREG LASTOWKA, VIRTUAL JUSTICE: THE NEW LAWS OF ONLINE WORLDS 1, 45–47 (2010), *available at* http://www.chaihana.com/virtualjustice.pdf (discussing avatars as a representation of the user).

male, female, troll, knight or orc.[39] The interactions one has in a virtual world affect the avatars and the virtual space.[40] Users may invest in their avatars using real-world currency to purchase items, open a virtual shop, or buy a virtual island.[41] Some entrepreneurial avatars have made their fortunes in virtual worlds. In May 2006, Second Life avatar Anshe Chung graced the cover of Businessweek.[42] Ms. Chung, a land developer in Second Life, employed 17 people to help her grow her business, which, at the time of the article, had virtual holdings worth about $250,000 real-world U.S. dollars.[43] In Entropia Universe, avatar Neverdie purchased a virtual asteroid for $100,000 real-world U.S. dollars by taking out a mortgage on his real-world house.[44] In 2010, Neverdie sold the asteroid for $635,000.[45]

Virtual worlds are becoming increasingly important in society as their burgeoning real-world-valued economies put them on par with sovereign nations.[46] Moreover, countries like the Malta and

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39 *Id.*

40 *See id.* at 31 ("A virtual world . . . [S]hould be an *interactive simulation*, meaning that it offers an imitation of reality and allows users to affect the reality represented.").

41 *Id.* at 15. Although a virtual sword will never enter the real world to become a real, tangible sword, disputes regarding virtual property have spilled into the real world. Qiu Chengwei, a forty-one-year-old man from China, loaned his dragon sabre from the online game, Legend of Mir 3, to his friend, Zuo Caoyuan. Zuo then sold the sabre for 7,200 yuan (approximately $872 USD). The police, like the officer in the Big Bang Theory episode, said that the sword was not real and that they would not prosecute Zuo for the theft. So, Qui obtained a real-world knife and repeatedly stabbed Zuo in the chest. Mike Slocombe, *Legend of Mir Gamer Killed After Selling Virtual Sword*, DIGITAL LIFESTYLES (Mar. 31, 2005, 4:33 P.M.), http://digital-lifestyles.info/2005/03/31/legend-of-mir-3-gamer-killed-after-selling-virtual-sword/; *'Game Theft' Led to Fatal Attack*, BBC NEWS (Mar. 31, 2005, 3:52 P.M.), http://news.bbc.co.uk/2/hi/technology/4397159.stm.

42 Robert D. Hof, *My Virtual Life*, BUSINESWEEK (May 1, 2006), *available at* http://www.businessweek.com/magazine/content/06_18/b3982001.htm.

43 *Id.*

44 Daniel Bates, *Internet Estate Agent Sells Virtual Nightclub on an Asteroid in Online Game for £400,000*, DAILY MAIL (Nov. 18, 2010), http://www.dailymail.co.uk/sciencetech/article-1330552/Jon-Jacobs-sells-virtual-nightclub-Club-Neverdie-online-Entropia-game-400k.html; *Gamer Buys Virtual Space Station*, BBC NEWS (Oct. 25, 2005), http://news.bbc.co.uk/2/hi/technology/4374610.stm.

45 Bates, *supra* note 44.

46 *See* Dean Takahashi, *Second Life's Economy Grows 65% to $567M*, VENTURE BEAT (Jan. 19, 2010), http://venturebeat.com/2010/01/19/second-lifes-economy-grows-65-to-567m/ (noting that Second Life's GDP grew by 65% in 2009 to $567 million USD); *GDP*

Macedonia are creating virtual embassies in Second Life.[47] Yet, virtual worlds exist entirely on computer servers and software, and do not provide sovereign territory.[48]

The laws governing conduct in virtual worlds exist largely in contract and in code.[49] If a virtual world operator does not want users to act in a certain way, violation of the rules would allow a breach of contract suit in a forum favored by the virtual world operator.[50] To further ensure compliance with the rules of the virtual world, the operator can program the virtual world to prevent the user from committing wrongs.[51] In this way, disputes arising in virtual worlds can be adjudicated internally,[52] facilitated by creators of virtual worlds who have omnipotent sovereign ability to

(current US$), THE WORLD BANK, http://data.worldbank.org/indicator/NY.GDP.MKTP.CD (last visited Aug. 14, 2011).

47 *See* Jeremy Page, *Tiny Island Nation Opens the First Real Embassy in a Virtual World*, LONDON TIMES, May 24, 2007, at 47, *available at* http://technology.timesonline.co.uk/tol/news/tech_and_web/article1832158.ece.

48 *See* LASTOWKA, *supra* note 38, at 49 ("World of Warcraft is set in the world of Azeroth, a virtual environment that currently spans three virtual continents. At the same time, the virtual world of Azeroth spans the non-virtual globe, with over ten million players in Asia, North America, and Europe.").

49 *See, e.g.*, LASTOWKA, *supra* note 38, at 135 ("[B]oth domain names and virtual property use computer code to mimic real world properties. . . . One person's use of virtual property precludes or interferes with another person's use simply because this is how the simulation is coded."); *Terms of Service*, SECOND LIFE, at § 12.2, http://secondlife.com/corporate/tos.php (last visited Mar. 20, 2011) (creating a Terms of Service governing virtual world participant conduct).

50 Assuming, of course, that the operator has a valid contract with the user that includes a choice of forum clause. *See, e.g.*, *Terms of Service*, *supra* note 49, at § 12.2 (noting California as the applicable law and venue for any dispute).

51 *See* LAWRENCE LESSIG, CODE 2.0 6 (2006) ("We can build, or architect, or *code* cyberspace to protect values that we believe are fundamental. Or we can build, architect, or code cyberspace to allow those values to disappear."); Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553, 577–78 (1998).

52 Stephen Totilo, *A New and Maybe Better Way to Stop People From Being Jerks Online*, KOTAKU, http://kotaku.com/#!5733206/a-new-and-maybe-better-way-to-stop-people-from-being-jerks-online (last visited Mar. 20, 2011) (creating a user-based virtual tribunal for dispute resolution). Online dispute resolution and arbitration are not native to virtual worlds. *See* Amy J. Schmitz, *"Drive-Thru" Arbitration in the Digital Age: Empower Consumers Through Binding ODR*, 62 BAYLOR L. REV. 178, 182 (2010). For a further discussion of online dispute resolution and arbitration, see *infra* Part I.B.4.

affect users and virtual possessions.[53] Participating in virtual worlds is contingent upon signing a EULA, which grants the virtual world operator sovereign authority over the user. Therefore, causing harm to another user in violation of the terms may result in the sovereign unilaterally taking action against a user.[54]

Even without formal laws or EULA provisions, community rules often exist in virtual worlds to promote certain user behavior.[55] Virtual worlds like Club Penguin, Second Life, and World of Warcraft all have rules prohibiting conduct like harassment or revealing personal information.[56]

In an online game, League of Legends ("LoL"), the operators found a different way to settle player disputes and address player misconduct: create a player-supported virtual tribunal.[57] Players on LoL review cases against other players who use offensive language, bully, or commit "any other sort of imaginable or unimaginable infraction."[58] These "judges" have the power to rule on cases against their fellow players.[59] While this system is interesting in its community-centered model of justice, the tribunal does not deal with disputes arising from the in-game currency that users can purchase with real-world currency.[60]

In a Second Life community,[61] Chilbo, the Chilbo Community Building Project ("CCBP") organization defines community

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[53] Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593, 597 (E.D. Pa. 2007). In *Bragg*, Second Life unilaterally froze Bragg's account for what it believed to be a violation of Second Life's Terms of Service, effectively confiscating all of his virtual property. *Id.*

[54] *See Terms of Service*, *supra* note 49, at § 8.2 ("Any violation by you of the terms of this Section may result in immediate suspension or termination of your Accounts without any refund or other compensation").

[55] LASTOWKA, *supra* note 38, at 96–99.

[56] LASTOWKA, *supra* note 38, at 97–98.

[57] ByronicHero, *Griefers Beware! The Tribunal is Coming . . .* , LEAGUE OF LEGENDS CMTY. (Jan. 14, 2011, 9:54 AM), http://www.leagueoflegends.com/board/showthread.php?t=447220; Totilo, *supra* note 52; *Tribunal FAQ*, LEAGUE OF LEGENDS (May 4, 2011, 9:29 AM), https://support.leagueoflegends.com/entries/20075032-tribunal-faq.

[58] Totilo, *supra* note 52.

[59] *Id.*

[60] *See Riot Points*, LEAGUE OF LEGENDS WIKI, http://leagueoflegends.wikia.com/wiki/Riot_Points (last visited Oct. 29, 2011).

[61] In Second Life, the virtual world consists of many different virtual islands owned by different individuals and organizations. Users can freely travel around the Second Life

standards for the territory.[62] Chilbo operates as a "benevolent dictatorship" within Second Life.[63] CCBP holds the land and it makes determinations whether users can work on or improve the land.[64] Chilbo residents must abide by the community standards and any disputes that arise are resolved by the community.[65]

In LambdaMOO, an early virtual world, an avatar going by the name Mr. Bungle "raped" two avatars.[66] In the LambdaMoo multi-user dungeon ("MUD"),[67] Mr. Bungle used a voodoo doll to force two avatars to perform sexual acts on him.[68] The LambdaMOO community was outraged.[69] They called for Mr. Bungle to be "toaded"—essentially rendered powerless.[70] A few wanted the university Mr. Bungle attended in the real-world to reprimand him for sexual harassment.[71] Others cried out for Mr. Bungle to be charged criminally.[72] Some felt this was an issue that took place in the virtual space and should be resolved in the virtual space.[73] The only way to punish another user, however, was through a wizard—one of the architects of the MUD who had programmer-level powers.[74] In LambdaMOO, the wizards chose

terrain to visit any community. Many of the communities are themed (i.e. pirate-themed or wizard-themed or Japanese language-themed) and request that users visiting their communities abide by community rules (i.e. wearing pirate attire). *See What is Second Life?*, SECOND LIFE, http://secondlife.com/whatis/?lang=en-US#Welcome (last visited Oct. 29, 2011); *see also Chilbo Basics*, CHILBO ROAD PRESS, http://www.chilbo.org/blog/chilbo-basics/ (last visited Oct. 29, 2011).

62 *Chilbo Basics*, *supra* note 61.

63 *See id.*

64 *Id.*

65 *Id.*

66 Julian Dibbel, *A Rape in Cyberspace: How an Evil Clown, a Haitian Trickster Spirit, Two Wizards, and a Cast of Dozens Turned a Database Into a Society*, VILLAGE VOICE, Dec. 23, 1993, at 1, *available at* http://www.villagevoice.com/2005-10-18/specials/a-rape-in-cyberspace/1/.

67 MUDs, or multi-user-dungeons, are multiplayer real-time text-based virtual worlds, popularized in the early 1990s. They traditionally have been role-playing games set in fantasy worlds. Lastowka, *supra* note 38, at 39–40.

68 Dibbel, *supra* note 66.

69 *Id.*

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

not to preside over disputes and would only effectuate changes agreed upon by the community.[75] Prior to the Bungle incident, the community had never dealt with a serious dispute.[76]

In the virtual community meeting to determine Mr. Bungle's fate, the room filled with users of all persuasions—"the anarchists, the libertarians, the legalists, [and] the wizardists"—converging to debate the fate of Mr. Bungle.[77] Mr. Bungle even made a brief appearance to defend himself, claiming that his actions had no impact in the real world.[78] At the end of the meeting, although there was no general consensus, a wizard chose to banish Mr. Bungle from LambdaMoo.[79] In the Bungle incident, the victims received the justice they sought out: Mr. Bungle harmed them in the virtual world, so Mr. Bungle was punished in the virtual world.[80] The Bungle incident demonstrates that a virtual world can, at least in certain disputes, self-adjudicate legal matters.[81]

Unfortunately, virtual worlds do not always take such internal action.[82] When large sums of money are involved, participants opt to litigate in real-world courts to protect their investments as opposed to dealing with a virtual world tribunal that may not provide the remedy sought.[83] When the motive is profit and not community integrity, the path of recourse for the participants involved changes; the wall dividing the virtual world from the real world is torn down.[84]

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75 *Id.*

76 *Id.*

77 *Id.*

78 *Id.*

79 *Id.*

80 *See id.*

81 *See id.*

82 *See, e.g.*, First Amended Complaint for Declaratory Judgment at ¶ 1, Amaretto Ranch Breedables, LLC v. Ozimals, Inc., Case No. CV10-05696 (N.D.Cal. Feb. 9, 2011) (complaint alleging copyright infringement of virtual pets in Second Life); Amended Complaint of Trademark Infringement and Dilution, Contributory Infringement and Dilution, Tortious Interference and Fraud at ¶ 1, Minsky v. Linden Research, Inc., No. 08-CV-819 (N.D.N.Y. Aug. 14, 2008), *available at* http://virtuallyblind.com/files/slart/2008-08-14-amended_complaint.pdf (last visited Mar. 20, 2011) (complaint alleging trademark infringement in Second Life).

83 *See, e.g.*, *infra* Part I.C. (discussing virtual world transactions spilling into real-world courtrooms due to the large sums of money involved).

84 *See, e.g.*, *id.*

C. Virtual Worlds and Real-World Courts

The issue of jurisdiction arises when a virtual world sovereign fails to take the action an injured party desires.[85] In July 2007, Eros LLC, a seller of virtual adult products in Second Life, filed suit against a fictitious defendant alleging copyright infringement[86] and subpoenaed Linden Research, the owner and operator of Second Life, to obtain the identity of the virtual bed counterfeiter.[87] Then, in October 2007, Eros and five other Second Life entrepreneurs brought suit against a Queens man for unlawfully copying their products.[88] In September 2009, Eros and Shannon Grei, a resident of Second Life, filed a class action against Linden, alleging trademark infringement and copyright infringement claiming that Linden ignored other Second Life users' infringing actions.[89] The complaint alleged that users were

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[85] *See, e.g.*, Amended Complaint of Trademark Infringement and Dilution, Contributory Infringement and Dilution, Tortious Interference and Fraud at ¶ 24–37, Minsky v. Linden Research, Inc., No. 08-CV-819 (N.D.N.Y. Aug. 14, 2008), *available at* http://virtuallyblind.com/files/slart/2008-08-14-amended_complaint.pdf.

[86] Complaint, Eros, LLC v. John Doe, No. 8:07-cv-01158 (M.D. Fl. Jul. 3, 2007), http://www.citmedialaw.org/
sites/citmedialaw.org/files/Eros%20v%20Doe%20Complaint.pdf;
Eros LLC v. Doe, CITIZEN MEDIA LAW PROJECT (Sept. 10, 2007), http://www.citmedialaw.org/threats/eros-llc-v-doe. http://www.citmedialaw.org/threats/eros-llc-v-doe.

[87] Plaintiff's *Ex Parte* Motion for Leave to Issue Subpoenas and Conduct Related Discovery and Incorporated Memorandum of Law, Eros, LLC v. John Doe, No. 8:07-cv-01158 (M.D. Fl. Jul. 3, 2007), *available at* http://www.citmedialaw.org/sites/citmedialaw.org/files/Eros%20v%20Doe%20Complaint.pdf (last visited Jan. 28, 2012).

[88] Kathianne Boniello, *Unreality Byte$: Online Dwellers Sue Qns. 'Cheater' for Virtual Theft*, N.Y. POST (Oct. 28, 2007, 5:00 AM), http://www.nypost.com/p/news/regional/item_Ao7sPpJuhR7aTK3TL6R57H;jsessionid=54E56422EC3DB043F33EF81166BD31B9.

[89] Complaint at ¶¶ 4, 7, Eros, LLC. v. Linden Research, Inc., Case No. CV 09 4269 (N.D. Cal. Sep. 15, 2009), *available at* http://www.3dinternetlaw.com/Trademark/Trademark/Eros_v_Linden_files/Eros%20v.%20Linden%20Complaint.pdf. *See also Eros v. Linden Research*, 3D INTERNET LAW, http://www.3dinternetlaw.com/Blog/files/tag-eros-v.-linden-research.html (last visited Aug. 15, 2011). Eros alleged that the trademark infringement occurring in the virtual world rivals that of the real world. *Id.* at ¶ 53. ("Plaintiff Eros's virtual erotic SexGen products sold for use in Second Life have been counterfeited, cloned, and ripped off countless times by a multitude of Second Life Residents. The manner in which this has occurred is akin to the knockoff handbags and purses sold near Canal Street in New York City. Some of the bags are stolen, but actual brand-name handbags sold at deep discounts, while many others are knockoffs that

able to copy unique assets in Second Life by using programs like "CopyBot" which could make duplicates of copyrighted and trademarked items owned by the plaintiff, and that Linden Research "conduct[ed] little supervision or enforcement to insure that such content copying [was] eliminated, minimized, or detected."[90] One pivotal feature in the dispute was the fact that sellers on Second Life are completely anonymous (appearing only as their avatars in Second Life) and enjoy their anonymity.[91] With Digital Millennium Copyright Act ("DMCA") takedown notices utilized by copyright-holders to have their pirated content removed from Second Life, the plaintiff's identity and the identities of the alleged copiers would have been released to the public.[92] In March 2011, the parties settled and the case closed without a court hearing the issues.[93]

In 2008, Richard Minsky, an artist with an avatar and business in Second Life named "ArtWorld Market" brought suit against Linden Research, its CEO, and a John Doe (avatar Victor Vezina), among others, in the Northern District of New York, alleging trademark infringement.[94] Minsky had trademarked the phrase

merely use the brand-name makers' designs and trademarks. The same is true of the knockoff SexGen products sold within Second Life.").

90 Complaint at ¶ 28, Eros, LLC. v. Linden Research, Inc., Case No. CV 09 4269 (N.D. Cal. Sep. 15, 2009).

91 *Id.* at ¶ 31.

92 *Id.* The DMCA takedown notice acts as a disincentive for sellers of goods who wish to continue to remain anonymous in Second Life. *Id.* ("Because many content creators in Second Life choose to remain anonymous, this aspect of the DMCA has an intimidating and chilling effect on those content creators who do not wish to jeopardize their privacy and anonymity.").

93 Stipulation of Dismissal, Eros, LLC v. Linden Research, Inc., Case No. CV 09 4269 (N.D. Cal. Mar. 16, 2011), *available at* http://docs.justia.com/cases/federal/district-courts/california/candce/4:2009cv04269/219418/42/; *Eros v. Linden–Case Closed*, 3D INTERNET LAW, http://3dinternetlaw.com/Blog/files/f49a5fa3217c979ea810532150487eb5-62.html (last visited Aug. 15, 2011).

94 Amended Complaint at ¶¶ 48–50, Minsky v. Linden Research, Inc., No. 08-CV-819 (N.D.N.Y. Aug. 14, 2008) (dismissed Jan. 22, 2009), *available at* http://virtuallyblind.com/files/slart/2008-08-14-amended_complaint.pdf. *See generally* Benjamin Duranske, *Linden Lab, Avatar 'Victor Vezina,' Philip Rosedale, and Mitch Kapor Sued Over SLART Trademark*, VIRTUALLY BLIND (Sep. 2, 2008), http://virtuallyblind.com/2008/09/02/minsky-linden-lab-complaint; Victor Keegan, *How an Avatar on Second Life Sparked a Real-Life Court Case*, GUARDIAN (Nov. 25, 2008), http://www.guardian.co.uk/technology/2008/nov/25/second-life-internet.

"SLART" to describe his Second Life art.[95] He made a demand for Linden Research to remove what he deemed to be infringements on his federally registered trademark.[96] Linden Research failed to comply and Minsky sued.[97] The court granted Minsky a temporary restraining order preventing Linden Labs from having any other Second Life resident use the SLART trademark.[98] Ultimately, Minsky never served Victor Vezina with a summons and the remaining parties settled.[99] As of April 7, 2009, Minsky's trademark had been cancelled.[100]

In *Bragg v. Linden Research, Inc.*,[101] a user brought suit in a Pennsylvania state court against Linden, a California-based corporation, and its CEO, Philip Rosedale, for suspending Bragg's account after Linden believed Bragg improperly purchased a parcel of land using an "exploit."[102] Upon joining Second Life, Bragg agreed to the Second Life Terms of Service ("ToS"), which provided that all disputes between users and Linden would be settled in arbitration in San Francisco.[103] However, the Eastern

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95 SLART, Registration No. 3399258 (mark is currently "Dead," cancelled on April 7, 2009); Amended Complaint at ¶ 15, Minsky v. Linden Research, Inc., No. 08-CV-819 (N.D.N.Y. Aug. 14, 2008) (dismissed Jan. 22, 2009), *available at* http://virtuallyblind.com/files/slart/2008-08-14-amended_complaint.pdf.

96 Amended Complaint at ¶¶ 24–25, Minsky v. Linden Research, Inc., No. 08-CV-819 (N.D.N.Y. Aug. 14, 2008) (dismissed Jan. 22, 2009), *available at* http://virtuallyblind.com/files/slart/2008-08-14-amended_complaint.pdf.

97 *Id*. at ¶¶ 28–36, 37.

98 Memorandum-Decision and Order at 2, Minsky v. Linden Research, Inc., No. 08-CV-819, (N.D.N.Y. Dec. 8, 2008), *available at* http://3dinternetlaw.com/Trademark/Trademark/Minsky_files/Appeal%20of%20Order%20re%20TRO.pdf.

99 Notice of Dismissal of Defendant "Victor Vezina," Minsky v. Linden Research, Inc., No. 08-CV-819 (N.D.N.Y.), *available at* http://3dinternetlaw.com/Trademark/Trademark/Minsky_files/Order%20Granting%20Request%20to%20Dismiss%20Victor%20Vezina.pdf; Judgment Dismissing Action by Reason of Settlement, Minsky v. Linden Research, Inc., No. 08-CV-819 (N.D.N.Y. Jan. 22, 2009), *available at* http://3dinternetlaw.com/Trademark/Trademark/Minsky_files/Order%20Dismissing%20Action%20by%20Settlement.pdf.

100 SLART, Registration No. 3399258.

101 487 F. Supp. 2d 593 (E.D. Pa. 2007).

102 *See id*. at 567. An "exploit" is a bug or design flaw in a game used to a player's advantage in a manner not intended by the game developers. *See, e.g.*, James Grimmelmann, *Virtual World Law*, *in* BUSINESS AND LEGAL PRIMER FOR GAME DEVELOPMENT 311, 328–29 (S. Gregory Boyd & Brian Green eds., 2006), *available at* http://james.grimmelmann.net/files/VirtualWorldLaw.pdf.

103 *Bragg*, 487 F. Supp. 2d 603–04..

District of Pennsylvania[104] court found the ToS arbitration clause to be both procedurally and substantively unconscionable where the agreement was an adhesion contract, the user had no bargaining power and the terms were one-sided and hidden.[105] The Court therefore found that the Second Life ToS were unenforceable and Bragg could file suit in Pennsylvania.[106] While the parties ultimately settled,[107] the court extensively discussed whether Rosedale had sufficient minimum contacts to remain a party in the suit.[108] The court found minimum contacts via Rosedale's real-world nationwide campaign to induce users to visit Second Life.[109] Once inside Second Life, the court noted, "participants could even interact with Rosedale's avatar on Second Life during town hall meetings that he held on the topic of virtual property."[110] While the court found personal jurisdiction over Rosedale based on a combination of real-world and potentially virtual-world contacts, the opinion sets the stage for a pure virtual world-based discussion of whether there may be personal jurisdiction over a user.[111]

In *Evans v. Linden Research, Inc.*,[112] a case markedly similar to *Bragg*, the Eastern District of Pennsylvania upheld Linden's forum selection clause.[113] In the lawsuit, Evans alleged that Linden unlawfully confiscated his property.[114] He further alleged that

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104 Linden and Rosedale removed the case from state to federal court. *Id.* at 597.

105 *Id.* at 605–11.

106 *Id.* at 611.

107 Benjamin Duranske, Bragg v. Linden Lab—*Confidential Settlement Reached; 'Marc Woebegone' Back in Second Life*, VIRTUALLY BLIND (Oct. 4, 2007), http://virtuallyblind.com/2007/10/04/bragg-linden-lab-settlement/.

108 *Bragg*, 487 F. Supp. 2d 597–602.

109 *Id.* at 600.

110 *Id.*

111 *See id.*

112 763 F. Supp. 2d 735 (E.D. Pa., 2011).

113 *Id.* at 742. The case was even filed in the same district as *Bragg*. *See Bragg*, 487 F. Supp. 2d at 593. After *Bragg*, Linden remodeled its forum selection clause based on eBay's. Eric Goldman, *Second Life Forum Selection Clause Upheld*—Evans v. Linden, TECH. & MKTG LAW BLOG (Feb. 9, 2011), http://blog.ericgoldman.org/archives/2011/02/second_life_for.htm.

114 *Evans*, 763 F. Supp. 2d at 738; *see also Bragg*, 487 F. Supp. 2d at 597; Complaint at ¶¶ 121–23, Evans v. Linden Research, Inc., Civ. No. 10-CV-01679 (E.D. Pa. June 15, 2010), *available at* http://www.box.net/shared/sm62gz1byh.

Linden's forum selection clause providing for mandatory jurisdiction and venue in Second Life's home court[115] was unconscionable due to the court's prior ruling in *Bragg*, thus permitting him to file in Pennsylvania as opposed to California.[116] However, the court noted that since *Bragg*, Linden improved its ToS,[117] making the terms fair to all Second Life users.[118] Since *Bragg*, the Second Life ToS removed the provision requiring arbitration in San Francisco for all claims, replacing it with optional arbitration for disputes under $10,000 that could take place by "telephone, on-line, or by written submission, without having to appear in San Francisco."[119] Additionally, for claims over $10,000, the updated Second Life ToS permitted claimants to proceed in court as opposed to compelled arbitration as was required in *Bragg*.[120] The court then transferred the case to the Northern District of California as per the forum selection clause.[121]

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[115] Excluding permissive virtual arbitration for low-dollar-value disputes. Goldman, *supra* note 117.

[116] Complaint at ¶¶ 7–9, Evans v. Linden Research, Inc., Civ. No. 10-CV-1679, (E.D. Pa. Apr. 15, 2010), *available at* http://www.box.net/shared/sm62gz1byh. *See also Bragg*, 487 F. Supp. 2d at 611.

[117] Some virtual world sovereigns call their agreements "terms of service" ("ToS"), while others use "end-user license agreement" ("EULAs") or "terms of use" ("ToU"). *See, e.g.*, GRIMMELMANN, *supra* note 102, at 312–18; *World of Warcraft Terms of Use*, BLIZZARD ENTM'T, http://us.blizzard.com/en-us/company/legal/wow_tou.html (last updated Dec. 9, 2010); *Terms of Service*, SECOND LIFE, http://secondlife.com/corporate/tos.php (last updated Dec. 15, 2010); *Entropia Universe Account Terms of Use (ToU)*, ENTROPIA UNIVERSE, http://legal.entropiauniverse.com/legal/terms-of-use.xml (last updated Sept. 13, 2011); *IMVU, Inc. ("IMVU", "WE" or "US") Internet Web Site Terms of Use*, IMVU, http://www.imvu.com/catalog/web_info.php?topic=terms_of_service (last visited Oct. 25, 2011).

[118] *Evans*, 763 F. Supp. 2d at 741–42 ("In *Bragg*, where the Court found the arbitration clause unconscionable, the arbitration clause was mandatory no matter the size of the claim and required the claimant to appear in San Francisco for a hearing on the claim. By contrast, the arbitration clause in Linden's current TOS gives the claimant the option for claims under $10,000 to proceed to arbitration and to have the claim heard by telephone, on-line, or by written submission, without having to appear in San Francisco. Also under the current TOS, for any claim of $10,000 or more, the claimant retains the right to proceed in Court and is not compelled to go to arbitration as in Bragg.").

[119] *Id.* at 741.

[120] *Id.* at 741 & n.4

> In Bragg, the arbitration clause of the TOS at issue provided: Any dispute or claim arising out of or in connection with this Agreement or the performance, breach or termination thereof, shall be finally settled by binding arbitration in San Francisco, California under the

Another Second Life dispute, currently pending in the Northern District of California, illustrates the difficulty of finding a real-world jurisdiction to settle disputes arising in virtual worlds.[122] *Amaretto Ranch Breedables v. Ozimals, Inc.*, involves two virtual animal breeding businesses in Second Life.[123] Amaretto Breedables is located in northern California; Ozimals is based in Alabama.[124] Ozimals claimed Amaretto was infringing on its concept and function of a breedable virtual pet.[125] Ozimals then sent a DMCA takedown notice to Linden Labs, demanding that they remove Amaretto's virtual pets.[126] In response, Amaretto sought a declaratory judgment in California that Amaretto did not violate Ozimals's copyright.[127] Seemingly to avoid the possibility of being haled to Alabama courts, Amaretto pre-empted Ozimals by filing suit first.[128] Ozimals responded by filing in federal court in Alabama alleging copyright infringement.[129]

> Rules of Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with said rules.

Id. (citing *Bragg*, 487 F. Supp. 2d at 604).

121 *Id.* at 742.

122 *See* First Amended Complaint for Declaratory Judgment, Amaretto Ranch Breedables, LLC v. Ozimals, Inc., Case No. C 10-5696 (N.D. Cal. Feb. 9, 2011), 2011 WL 921280. Unfortunately, because no party filed a motion to dismiss for lack of personal jurisdiction, see Fed. R. Civ. P. 12(b)(2), the opportunity for this court to provide guidance on virtual world jurisdictional issues has passed. *See* Order Granting in Part and Denying in Part Motion to Dismiss at 2, Amaretto Ranch Breedables, LLC v. Ozimals, Inc., Case No. C 10-05696 (N.D. Cal. Apr. 22, 2011), *available at* http://www.scribd.com/doc/54069663/Amaretto-v-Ozimals-MTD-Ruling-April-22. Although Ozimals filed a motion to dismiss, it did not seek to have the case dismissed for lack of personal jurisdiction. *See id.*

123 First Amended Complaint for Declaratory Judgment at ¶ 11, Amaretto Ranch Breedables, LLC v. Ozimals, Inc., Case No. C 10-05696 (N.D. Cal. Feb. 9, 2011), 2011 WL 921280.

124 *Id.* at ¶¶ 6–9.

125 *Id.* at ¶ 11. The complaint alleges that Amaretto violated Ozimals's copyright based on virtual pet breeding software created by many individuals in Second Life among Amaretto and Ozimals. *Id.*

126 *Id.* at ¶ 12.

127 *Id.* at ¶ 1.

128 *See id.*

129 *Id.* at ¶ 13. While Ozimals made a motion to dismiss unfair competition and DMCA claims, it did not challenge personal jurisdiction. Order Granting in Part and Denying in Part Motion to Dismiss, Amaretto Ranch Breedables, LLC v. Ozimals, Inc., Case No. C 10-05696 (N.D. Cal. Apr. 22, 2011), *available at* http://www.scribd.com/doc/

II. FINDING A COURT FOR VIRTUAL WORLD-BASED DISPUTES

A. Issues Unique to Virtual Worlds

Virtual world-based disputes create several new problems for jurisdiction, problems that do not exist in the realms of Internet-based or real world-based disputes. Virtual disputes give rise to questions about whether the quality of contacts between a defendant and the plaintiff's jurisdiction is sufficient to hale a defendant to the plaintiff's forum, and whether a plaintiff may choose any forum and substantive law that he or she desires. In addition, another unique question arises concerning whether virtual world sovereigns are in a better position to solve these problems. The easiest way to examine the complexities of virtual world-based disputes is to compare them to real-world and online disputes.

1. Comparing Real World, Online and Virtual World Disputes

Disputes giving rise to lawsuits in the real world are markedly different from disputes arising from online transactions or disputes arising in the virtual world. The problem generally lies in the blindness to the real world that exists when one interacts in the virtual world.[130] The following is a set of scenarios that illustrate the differences between real-world, Internet, and virtual transactions.

First, in the real-world, Al wants to sell Bowser a widget. Al from State A meets Bowser from State B in State B. Bowser pays Al for the widget and Al gives Bowser the widget. Bowser feels the widget is not as described and Al refuses to accept a return. Bowser sues Al in State B. Al can be sued in State B because he has sufficient minimum contacts with State B, having entered into and transacted business within the state.[131] Al was in the forum

54069663/Amaretto-v-Ozimals-MTD-Ruling-April-22; Memorandum and Order Granting in Part and Denying in Part Motion to Dismiss, Amaretto Ranch Breedables, LLC v. Ozimals, Inc., Case No. C 10-05696 (N.D. Cal. July 8, 2011).

130 *See* LASTOWKA, *supra* note 38, at 45–47.

131 *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). Even if Al was not within the State, because he entered into a business transaction in the State he had sufficient minimum contacts with the forum. This exemplifies specific personal

during the business transaction and dispute, so he can reasonably expect to be sued in State B.[132]

Second, Al and Bowser conduct business online. Al sells a widget on his website from his home computer in State A. Bowser, on his computer in State B, purchases the widget in State B. Al ships the widget from State A to State B. Bowser is unhappy with the widget and Al refuses to accept a return. Bowser sues Al in State B. Because Al knowingly conducted business across state lines with an individual in State B, despite the fact that he did not travel to or have a physical presence in State B, he *may* have satisfied the minimum contacts requirement to be sued in State B.[133] While it may be unfair to Al to have to litigate in State B, transacting business outside one's home state carries the risk of being haled into another forum.[134] Al could have refused to sell a widget to someone in State B, but because he made his website available to residents of State B and knowingly sold a product to a consumer located in State B, he "purposefully availed" himself of State B's jurisdiction and therefore it should have been foreseeable that he could be sued there.[135]

Third, Al and Bowser conduct business online, dealing with an informational product that can be used in the real world. Al, who happens to be a musician, sells MP3s of his band's music on his website from his home computer in State A.[136] Bowser hears Al's

jurisdiction. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472–73 & 473 n. 15 (1985) (noting that a forum may assert specific personal jurisdiction over an out-of-state defendant who has "purposefully directed" activities at a resident of the forum and the litigation results from an injury arising out of those activities).

132 *See, e.g.*, *Int'l Shoe*, 326 U.S. at 317 ("'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given.").

133 Dedvukaj v. Maloney, 447 F. Supp. 2d 813, 823 (E.D. Mich. 2006) (finding personal jurisdiction in the forum for a single eBay transaction). *But see* Boschetto v. Hansing, 539 F.3d 1011, 1017–18 (9th Cir. 2008) (noting that one item being sold on eBay was insufficient for minimum contacts); Great Notions, Inc. v. Danyeur, No. 3:06-CV-0656-G, 2007 WL 944407, at *3–4 (N.D. Tex. 2007) (finding no personal jurisdiction for a single item sold on eBay).

134 *See generally* First Amended Compl., *supra* note 122.

135 *See Int'l Shoe Co.*, 326 U.S. at 316.

136 For this example, Al's music will presumably also be hosted on a computer server located in State A.

music from a 30-second sample on Al's website. Bowser purchases one of Al's songs from his computer in State B and downloads the song. Bowser then syncs his computer's music library with his phone so he can listen to Al's song while jogging in the park, bringing the computer-based transaction into the real world. Bowser realizes that the song he purchased was not the same song as the 30-second sample Al provided and wants a refund. Al denies the request and Bowser sues Al in State B. Here, Al did not have any direct contact with Bowser. Al may have been aware that an individual purchased his music via his website, but it is unlikely that Al would have known who Bowser was or where he was located.[137] Al had general awareness that users with Internet access could purchase his music and put it on MP3 players in any state. As in the previous example, Al *may* have satisfied the minimum contacts requirement to be sued in State B.[138] It may be unfair to Al to have to litigate in State B, but by making his content available to users around the world, he knew that these users could have purchased his content. It is possible therefore that he "purposefully availed" himself of State B's jurisdiction by making his website and content available to individuals in State B in addition to profiting from MP3 sales generated in State B.[139]

Finally, Al and Bowser conduct business in the virtual world. Al, from his computer in State A and through his avatar, ManBearPig, sells a virtual widget to Bowser through Bowser's avatar, DestroyMario, in the virtual world, Third Life. Third Life's servers that maintain the virtual world are located in State C. Bowser, at his computer in State B, purchases the virtual widget in

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[137] This also assumes that Al used a third-party payment processing service so he could not access Bragg's credit card information.

[138] *Cf.* Tamburo v. Dworkin, 601 F.3d 693, 706 (7th Cir. 2010) (holding that out-of-state defendants using websites to defame the plaintiff, knowing the plaintiff resided in the forum state and would be injured there, had sufficient minimum contacts with the forum state for specific personal jurisdiction).

[139] *See* Geist, *supra* note 6, at 1380 (arguing for a targeting test that "would seek to identify the intentions of the parties and to assess the steps taken to either enter or avoid a particular jurisdiction."); Reidenberg, *supra* note 22, at 1956 (implying that service providers who do not use geolocation filtering "purposefully avail" themselves of the rights and protections of the laws of all of the forums where they can be accessed). *Cf. Tamburo*, 601 F.3d at 706.

virtual world currency. Al and Bowser, who are represented by avatars in Third Life, have no idea where the other person lives. Bowser, unhappy with his purchase, files suit against Al in State B. Since he does not know who Al is, he subpoenas Al's IP address and account information from Third Life, obtains the information and serves Al with a summons and complaint to appear in court in State B.[140] Al, having no idea who Bowser is in the real-world or where he is from, is stunned, and now has to find a lawyer in State B.[141]

One can see how applying the traditional notion of minimum contacts to the virtual space is problematic. To truly purposefully avail oneself of a particular forum, one must "expressly aim" activity towards the forum.[142] Anyone around the world in Third Life may buy Al's virtual goods. Therefore, Al can possibly be sued in any forum around the world.[143]

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[140] *See, e.g.*, Plaintiff's *Ex Parte* Motion for Leave to Issue Subpoenas and Conduct Related Discovery and Incorporated Memorandum of Law, Eros, LLC v. John Doe, No. 8:07-cv-01158 (M.D. Fl. Jul. 3, 2007), *available at* http://www.citmedialaw.org/sites/citmedialaw.org/files/Eros%20v%20Doe%20Complaint.pdf.

[141] *See, e.g.*, First Amended Complaint, *supra* note 122.

[142] Calder v. Jones, 465 U.S. 783, 789–90 (1984) (holding that a Florida tabloid publisher could be sued in the defendant's home state of California because, in committing the intentional tort at issue, the tabloid expressly aimed its activity at the defendant's state, knowing that the publication would affect the defendant in the forum state).

[143] *See, e.g.*, First Amended Complaint, *supra* note 122; *see also* Geist, *supra* note 6, at 1380–81 (advocating for a "targeting" test for personal jurisdiction regarding Internet-based contacts through a three-factor test of: 1) contract between the parties; 2) technical measures used to either target or avoid a jurisdiction; and 3) actual or implied knowledge of reaching into a jurisdiction); Reidenberg, *supra* note 22, at 1956 (implying that service providers who do not use geolocation filtering "purposefully avail" themselves of the rights and protections of the laws of all of the forums where they can be accessed). Geist's "targeting" test for jurisdiction may suggest that parties entering the virtual world 1) contract with the virtual world operator via EULA and agree to the virtual world sovereign's rules; 2) understand that the virtual world's technology will allow users to interact with individuals from around the world; and 3) either through actual virtual world interactions or implicitly, know there are users in a given virtual world from around the world with whom the user may buy and sell goods and services. Therefore, under Geist's test all virtual world users may purposefully avail themselves of all jurisdictions. *But see Calder*, 465 U.S. at 789–90 (finding jurisdiction over a party that has expressly aimed activity at the forum). *Calder* may suggest that in the virtual world once cannot expressly aim contact at another. *See infra* I.A.2.

Virtual world jurisdictional issues are more complex than Internet jurisdictional issues in that avatars in a virtual world may be unable to discover the location of the avatars with whom they do business.[144] As a result, it may be neither reasonable nor foreseeable for them to be haled to a foreign court. Internet retailers and service providers, by contrast, receive real-world currency for their transactions and often ship physical goods to buyers in foreign states. In the virtual world, a key element of the experience is a community-enforced ignorance of the avatar's actual location in the real-world. Avatars are virtual world representations chosen by the user, representations that can be from any species or background.[145] Thus, the closed universe of the virtual world may be more like a separate jurisdiction analogous to what Barlow, Johnson and Post believed the Internet could be[146] or perhaps the closed universe may imply acceptance of all possible jurisdictions.[147]

2. Quality of Contacts

Looking back to the example of Al and Bowser transacting in Third Life, it is not clear whether Al directed activity at the forum to satisfy minimum contacts.[148] After all, the virtual currency he received in Third Life did not indicate from where Bowser purchased the virtual widget. There was also no shipping address to which Al could mail the widget. In *Calder v. Jones*, the Supreme Court recognized that to purposefully direct activity into the forum state, "the defendant allegedly must have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm the defendant knows is likely to be suffered in the

144 *See supra* notes 83–84 and accompanying text (discussing the anonymity created and fostered in Second Life).

145 *See* LASTOWKA, *supra* note 38, at 9–10.

146 Barlow, *supra* note 4; Johnson & Post, *supra* note 5, at 1367; LASTOWKA, *supra* note 38, at ch. 5 (discussing jurisdictional issues in virtual worlds, concluding that virtual worlds require separate jurisdictions); *infra* I.B.3.

147 *Cf.* Reidenberg, *supra* note 22, at 1956.

148 *See Calder*, 465 U.S. at 789.

forum state."[149] Based on the Supreme Court's holding, it is uncertain whether Al could have satisfied the *Calder* test.[150]

Applying the "sliding scale" test articulated in *Zippo*, user participation in virtual worlds could possibly be considered active as sellers in virtual worlds know that purchasers can come from any forum.[151] But, the problem of reaching into the forum state still exists.[152] Even applying *Zippo*, there is no clear availment of a particular forum.[153]

Moreover, a retailer in a virtual world has no way of determining how much contact they have with a given forum or how much contact with a given forum will be sufficient to purposefully avail themselves of a particular forum. While the courts are split on whether one eBay transaction will satisfy minimum contacts,[154] it will likely be more difficult for courts to determine whether one virtual world transaction will satisfy minimum contacts.[155] It is also quite possible that a court may find that contacts with a given jurisdiction are insufficient based on the lack of purposeful direction into any particular forum, making specific jurisdiction impossible for any case arising out of a virtual dispute between two parties located in separate jurisdictions.

The issue of quality of contacts brings up the more essential question of whether harm can even exist in the virtual world. If not, the question of jurisdiction is irrelevant. Some people may

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149 *Id.* at 789–90. *See also* Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199, 1206 (9th Cir. 2006) (en banc).

150 *See Calder*, 465 U.S. at 789–90.

151 *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124–25 (W.D. Pa. 1997).

152 *See id.*

153 *See id.*

154 Dedvukaj v. Maloney, 447 F. Supp. 2d 813, 823 (E.D. Mich. 2006) (finding personal jurisdiction in the forum for a single eBay transaction). *But see* Boschetto v. Hansing, 539 F.3d 1011, 1017–18 (9th Cir. 2008) (noting that one item being sold on eBay was insufficient for "minimum contacts"); Great Notions, Inc. v. Danyeur, No. 3:06-CV-0656-G, 2007 WL 944407, at *3–4 (N.D. Tex. 2007) (finding no personal jurisdiction for a single item sold on eBay).

155 Case law appears to be extremely divided on this in the realm of Internet cases, so finding sufficient contacts with any real-world forum in virtual spaces seems extremely difficult to justify. *See infra* Part II.b.1. To date, no case exists discussing personal jurisdiction for virtual world-based disputes between two virtual world users.

believe that virtual worlds are games people spend money on, knowing full well that they cannot derive any pecuniary benefit from the virtual worlds. Moreover, one may believe that a harm caused in the virtual world only affects an avatar, not an actual person.[156] However, many virtual worlds allow for a form of in-world property rights where users can buy and sell items with each other for in-world currency that may be cashed in for real-world currency.[157] Thus, if Al infringes on Bowser's copyrighted work in Third Life, even though the harm is in a virtual world currency, there is still a cognizable harm.

3. In Personam Jurisdiction

In personam[158] jurisdiction issues can be illustrated by looking back at our example of a virtual world dispute. By operating in a virtual world that exists in every forum, Al may have injured Bowser in every forum where Al sold his virtual wares.[159] Bowser may then be able to bring suit for copyright infringement in the forum of his choosing.

One could assume that once an individual enters and conducts business in a virtual world, the individual automatically avails himself of all jurisdictions.[160] Under this theory of worldwide availment, interacting and transacting business in a virtual world should give one the reasonable impression that he or she may be sued in any jurisdiction, assuming the virtual world is accessible to anyone. Business owners and operators should know that the

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156 The "Mr. Bungle" philosophy: even though an individual clearly suffered significant emotional harm, the distance between the avatar and the individual is the focus. *See* Dibbel, *supra* note 74 (noting that at his "hearing," Mr. Bungle opined that none of his actions in LambdaMoo had any effect on the real world).

157 *See Terms of Service*, *supra* note 49, at § 7.

158 Latin for "against a person," BLACK'S LAW DICTIONARY (9th ed., 2009), *In Personam, in personam* jurisdiction involves "jurisdiction over a defendant's personal rights, rather than merely over property interests." BLACK'S LAW DICTIONARY (9th ed., 2009), *Jurisdiction*.

159 *See* Reidenberg, *supra* note 22, at 1954–58 (discussing personal jurisdiction and applying substantive law regarding individuals violating the laws of different jurisdictions).

160 *See* First Amended Complaint, *supra* note 122, at ¶ 1 (plaintiff's virtual world business brought suit against a virtual world business based in a different state in the plaintiff's home state).

people they interact with may come from anywhere in the world, and thus they should accept the consequences of their business dealings. The business owner would have to view the potential for being sued in any foreign state as a cost of doing business. Although business owners may be blind to the location of the people they interact with, they are willfully blind.

The worldwide availment approach penalizes the virtual world business owner. If Al sells virtual widgets in a virtual world to other avatars, he would have to ascertain beforehand the state in which the purchaser resides before completing the transaction if he wants to avoid being sued in an inconvenient forum. In virtual worlds that are predicated on fantasy, breaking out of character would disrupt the fantasy.[161] Further complicating the issue is the use of virtual currency.[162] Because transactions in a virtual space may use the virtual world's currency as opposed to credit cards, it may be impossible for a virtual business owner to know the location of customers. The business owner then has the take-it or leave-it option of doing business in a virtual world and potentially being sued in any country, or not participating at all. Worldwide availment would therefore create an economic disincentive for business owners.

Furthermore, worldwide availment may be incompatible with minimum contacts under *Calder*.[163] Looking to the Seventh Circuit, *Tamburo* noted that some jurisdictions have read *Calder*

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[161] *See* LASTOWKA, *supra* note 38, at 45–47 (discussing avatars as a representation of the user). Club Penguin, a virtual world geared towards children, actually prohibits revealing personal information. *See id.* at 97. While this is likely to protect Club Penguin's operators from violating the Child Online Privacy Protection Act ("COPPA"), it nonetheless exists, preventing users from revealing their identities and locations. 15 U.S.C. §§ 6501–06 (2006).

[162] *Id.* at 15 (discussing Linden $, the currency of Second Life). Linden dollars or "Lindens" can be bought in the Linden Dollar Exchange ("LindeX") with United States Dollars. *English Knowledge Base: Buying Linden Dollars*, SECOND LIFE, http://community.secondlife.com/t5/English-Knowledge-Base/Buying-Linden-dollars/ta-p/700107 (last visited Aug. 14, 2011). The Linden has a fluctuating real-world value, currently around 250 L$ per USD. Matthew R. Farley, *Making Virtual Copyright Work*, 41 GOLDEN GATE U. L. REV. 1, 6–7 (2010); Paul Riley, *Litigating Second Life Land Disputes: A Consumer Protection Approach*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 877, 883 n.27 (2009).

[163] *See* Calder v. Jones, 465 U.S. 783, 789 (1984).

narrowly, applying only where the defendant has "*expressly aimed* its tortious conduct at the forum, and thereby made the forum the focal point of the tortious activity."[164] Even read more broadly, courts have found *Calder's* "express aiming" requirement to target "a plaintiff whom the defendant knows to be a resident of the forum state."[165] The activity in a virtual world hardly seems to be expressly aimed at any particular forum, but rather more consciously open to possibly any forum. Satisfying the *Calder* test will depend on a court's view of whether entering a virtual world expressly aims contact at the entire world, and whether an avatar, acting with such willful blindness toward that fact, accepts his fate.

4. Applicable Law

An expansive view of *in personam* jurisdiction, as discussed above, necessitates an expansive view of which country's law should apply in settling the dispute. If Al sells virtual art in Third Life from his computer in Vancouver, Canada and Bowser thinks the art violates his IP rights, Al has potentially violated the copyright laws of many different countries because of the globally-present nature of the Internet. Therefore, if Al violated a foreign copyright, there is a conflict of laws issue.[166] In *Twentieth Century Fox Film Corp. v. iCrave TV*, a film studio successfully brought suit against a Canadian video streaming service (with its computer servers located in Canada) in a U.S. court, applying U.S. law, for violating U.S. copyright law.[167] The streaming service based in Canada claimed to be targeting Canadian users,[168] arguing that iCrave did not violate Canadian law.[169] Because users could access it in the United States, iCrave violated U.S. copyright law

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[164] Tamburo v. Dworkin, 601 F.3d 693, 704 (7th Cir. 2010) (citing ESAB Group, Inc. v. Centricut, Inc., 126 F.3d 617, 625 (4th Cir. 2005)).

[165] *Id.* (citing Bancroft & Masters, Inc. v. Augusta Nat'l Inc., 223 F.3d 1082, 1087 (9th Cir. 2000)).

[166] *See* Reidenberg, *supra* note 22, at 1956–57 (discussing Twentieth Century Fox Film Corp. v. iCrave TV, Nos. Civ.A. 00-121, Civ.A. 00-120, 2000 WL 255989, at *3 (W.D. Pa. Feb. 8, 2000), noting that sovereign authorities assert themselves against Internet activists trying to subvert national law in arguing for "Internet separatism," referred to in this Note as Cyberspace Jurisdiction).

[167] *iCrave TV*, Nos. Civ.A. 00-121, Civ.A. 00-120, 2000 WL 255989, at *3.

[168] *Id.*

[169] *Id.* at *8.

and could be subject to personal jurisdiction in the United States.[170] Therefore, if Al, acting in the virtual world from his home computer in Vancouver, Canada violated U.S. copyright law, one could argue that he could potentially be sued in the United States.[171] Even if Al only dealt with a minority of users coming from the United States, because he violated United States copyright law in addition, possibly, to other country's copyright laws, Bowser could choose to bring suit in the forum that is both more convenient to him and provides better remedies and protections for copyright holders. Thus, someone in Al's position would have to comply with the strictest international laws to ensure that no other country or individual within a foreign country will file suit.

5. EULAs

EULAs have choice of law and forum provisions to address disputes between sovereigns and users.[172] The sovereigns certainly have an interest in maintaining stability in their community, and a EULA provision calling for a single forum for adjudication may be helpful in providing guidance to users.

Contracts concerning domestic disputes are shown great deference by courts, and they can be used to create a single forum for dispute resolution and set binding terms for the dispute-resolution process.[173] In *AT&T Mobility, LLC v. Concepcion*,[174]

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[170] *Id.* at *3–4. The Court asserted personal jurisdiction over two defendant founders of iCrave because they resided in the forum state, but had to go through a more lengthy analysis of whether iCrave could be subject to personal jurisdiction there. *Id.*

[171] *See, e.g., id.* at *3 (in discussing subject-matter jurisdiction the court noted that, "although the streaming of the plaintiffs' programming originated in Canada, acts of infringement were committed within the United States when United States citizens received and viewed defendants' streaming of the copyrighted materials."); *see also id.* at *4–5 (holding that the forum state had both general and specific personal jurisdiction over the defendants because they had an office in a state and because their activities within the forum gave rise to the cause of action).

[172] *See, e.g.*, *Terms of Service*, *supra* note 49, at §12.

[173] *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1752–53 (2011) (5-4 majority opinion) (holding that arbitration agreements are binding); Carnival Cruise Lines v. Shute, 499 U.S. 585, 589, 596 (1991) (upholding a choice of forum provision regarding a cruise line ticket).

[174] 131 S. Ct. 1740 (2011).

the Supreme Court held that a telephone subscription contract provision compelling arbitration and essentially preventing class actions was conscionable under the Federal Arbitration Act ("FAA").[175] In *Concepcion*, cell phone subscribers brought a class action against their service provider.[176] However, all AT&T subscribers in the litigation had agreed in their subscription contracts to individually-brought binding arbitration, effectively preventing any type of class action lawsuit or arbitration.[177] A California judicial rule previously articulated in *Discover Bank v. Superior Court*[178] suggested that a class arbitration waiver was unconscionable.[179] However, the *Concepcion* Court held that the FAA, which makes agreements to arbitrate "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract,"[180] pre-empted *Discover Bank*.[181]

After *Concepcion*, Sony Entertainment Network, the online service provider for content on the Playstation 3 platform,[182] updated its EULA to provide for binding arbitration.[183] The terms of service explicitly state in bold, capital letters:

> This agreement contains a binding individual arbitration and class action waiver provision in section 15 that affects your rights under this agreement and with repect to any "dispute" (as defined below) between you and [all Sony]

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175 *Id.* at 1753.

176 *Id.* at 1742, 1744.

177 *Id.* at 1744.

178 113 P.3d 1100 (9th Cir. 2005).

179 *Concepcion*, 131 S. Ct. at 1745.

180 9 U.S.C. § 2 (2006).

181 *Concepcion*, 131 S. Ct.. at 1753.

182 *See PlayStation Home*, PLAYSTATION.COM, http://us.playstation.com/psn/playstation-home/ (last visited Oct. 16, 2011) (referring to Sony Computer Entertainment America LLC as the holder of the copyright for PlayStation Home, a virtual world on the PlayStation 3 gaming console), *Outline of Principle Operations*, SONY CORP. OF AM., http://www.sony.com/SCA/outline/computer.shtml (last visited Oct. 16, 2011) (regarding the relationship between Sony Computer Entertainment America LLC and Sony).

183 *See* Mark Milian, *Sony: Supreme Court Ruling Spurred Changes to Playstation Terms*, CNN (Sept. 21, 2011), http://edition.cnn.com/2011/09/21/tech/gaming-gadgets/sony-psn-terms/; *Terms of Service and User Agreement*, *Version 12*, SONY ENTMT. NETWORK (Sept. 15, 2011), http://www.sonyentertainmentnetwork.com/tosua [hereinafter *Sony ToS, Version 12*].

> affiliates, parents, or subsidiaries . . . referred to below as "Sony entities" []. You have a right to opt out of the binding arbitration and class action waiver provisions as further described in section 15.[184]

The agreement further includes an individual binding arbitration clause requiring the American Arbitration Association ("AAA") or JAMS[185] to preside over dispute resolution. While the terms of the EULA may make it seem like a contract of adhesion,[186] *Concepcion* provided for a presumption that individual arbitration agreements are valid.[187]

In November 2011, Microsoft, the manufacturer of the Xbox 360 game console, followed Sony's lead by updating its EULA to provide for binding arbitration as well.[188]

B. How to Proceed with Virtual World Disputes: Some Useful Guidance from Scholars and Parallels to Other Areas of Law

To aid in the resolution of real-world conflict of laws, venue and jurisdiction issues in virtual world-based disputes one can seek guidance from analogies to other online disputes and patent cases and scholarly discussion of a cyber-jurisdiction. Internet-based disputes, the creation of the Federal Circuit, and the idea proposed in the 1990s of a separate Cyberspace Jurisdiction all shed light on the current status of virtual world disputes as well as its potential future.

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184 *Sony ToS, Version 12*, *supra* note 183.

185 *Id.* at §15.

186 *See* Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593, 597 (E.D. Pa. 2007) (holding a EULA arbitration clause to be both procedurally and substantively unconscionable where the agreement was an adhesion contract, the user had no bargaining power and the terms were one-sided and hidden from the user).

187 AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011).

188 *Xbox LIVE Terms of Use*, MICROSOFT (Nov. 2011), http://www.xbox.com/en-US/legal/livetou. *See also* Chloe Albanesius, *Xbox Terms Update Bans Class-Action Lawsuits*, PC MAG, (Dec. 7, 2011), http://www.pcmag.com/article2/0,2817,2397334,00.asp; Luke Plunkett, *Now Microsoft Wants to Stop You Taking Them to Court*, KOTAKU, (Dec. 7, 2011), http://kotaku.com/5865797/now-microsoft-wants-to-stop-you-taking-them-to-court.

1. Online Disputes

The closest relative we have to the virtual world is the Internet and cases relating to Internet-based transactions provide the closest analogy. Cases arising out of Internet-based disputes can help provide insight into how a court may find personal jurisdiction in virtual worlds.

As noted above, courts have either applied the *Zippo* sliding scale or rejected it in favor of a traditional minimum contacts analysis.[189] In *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*,[190] the Ninth Circuit heard a case arising out of a dispute in France.[191] In France, Yahoo! users were able to view websites that auctioned Nazi memorabilia, in violation of a French penal law prohibiting the display of images of Nazi objects.[192] Yahoo! also displayed advertisements in French targeted at French users.[193] The French organizations, La Ligue Contre Le Racisme et L'Antisimitisme ("LICRA") and L'Union Des Etudiants Jurifs de France ("UJEF"), brought suit in France,[194] alleging violation of

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189 *See supra* Part I.A.

190 433 F.3d 1199 (9th Cir. 2006) (en banc).

191 *See id.* at 1201.

192 Tribunal de Grande Instance [T.G.I.][trial court of original jurisdiction] Paris, May. 20, 2000, Ordonnance de référé, UEJF, Licra v. Yahoo! Inc., *available at* http://www.foruminternet.org/telechargement/documents/tgi-par20000522.pdf, *translated in* Richard Salis, *Yahoo! Case: Tribunal de Grande Instance de Paris*, JURISCOM, http://www.juriscom.net/txt/jurisfr/cti/yauctions 20000522.htm (last visited Jan. 28, 2011).

193 Tribunal de Grande Instance [T.G.I.][trial court of original jurisdiction] Paris, Nov. 20, 2000, Ordonnance de référé, UEJF, Licra v. Yahoo! Inc., *available at* http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm, translated in Salis, *supra* note 193., *See also* Reidenberg, *supra* note 5, at 267.

194 LICRA and UJEF brought an *action civile* (civil action) against Yahoo! for violating a French criminal law. Christopher D. Van Blarcum, Note, *Internet Hate Speech: The European Framework and the Emerging American Haven*, 62 WASH. LEE. L. REV. 781, 798–99 (2005). French law allows individuals to bring suit against parties for violating criminal statutes, generally, if the individuals have "personally suffered the harm directly caused by the offence." CHRISTIAN DADOMO & SUSAN FARRAN, THE FRENCH LEGAL SYSTEM 202 (2d ed. 1996) (citing CODE DE PROCÉDURE PÉNALE [C.C.P.] art. 2 (Fr.) *available at* http://www.legifrance.gouv.fr/affichCode.do;jsessionid=788FEF29FC288D30BBDAFB44010FC163.tpdjo02v_1?idSectionTA=LEGISCTA000024458641&cidTexte=LEGITEXT000006071154&dateTexte=20111201.

the French penal law.[195] Despite Yahoo!'s objections that 1) France could not exercise personal jurisdiction over a United States-based company with servers located in the United States and 2) there was no technological solution which would enable it to fully comply with the terms of the order, the Court ruled in favor of LICRA.[196]

Yahoo! then sought a declaratory judgment in the Northern District of California that the French judgment would not be enforceable in the United States.[197] The Ninth Circuit declined to issue the declaratory judgment enjoining the enforcement of the French decree.[198] This case demonstrated that service providers cannot forum shop to try to escape personal jurisdiction and the substantive law of the jurisdictions in which they operate.[199] Technology enables users to communicate with the world, and with worldwide communication, users may need to be prepared to litigate in a foreign jurisdiction regardless of where the host servers are physically located. The issue in virtual worlds is what level of contact is necessary and what level of contact exists.[200] Specifically, the question arises: Are contacts in the virtual world incidental to actions taking place in the forum, or can the awareness of the global-reaching nature of the Internet support worldwide jurisdiction for virtual world participants?[201]

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[195] Tribunal de Grande Instance [T.G.I.][trial court of original jurisdiction] Paris, May. 20, 2000, Ordonnance de référé, UEJF, Licra v. Yahoo! Inc., *available at* http://www.foruminternet.org/telechargement/documents/tgi-par20000522.pdf, *translated in* Salis, *supra* note 193.

[196] Tribunal de Grande Instance [T.G.I.][trial court of original jurisdiction] Paris, Nov. 20, 2000, Ordonnance de référé, UEJF, Licra v. Yahoo! Inc., *available at* http://www.juriscom.net/txt/jurisfr/cti/tgiparis20000522.htm, *translated in* Salis, *supra* note 193. *See also* Reidenberg, *supra* note 22, at 1952.

[197] Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199 (9th Cir. 2006) (en banc). The practice of choosing a more favorable forum is known as "forum shopping." *See* Reidenberg, *supra* note 22, at 1953.

[198] *Yahoo!*, 433 F.3d at 1224; Reidenberg, *supra* note 22, at 1952.

[199] Reidenberg, *supra* note 22, at 1956 (implying that service providers who do not use geolocation filtering "purposefully avail" themselves of the rights and protections of the laws of all of the forums where they can be accessed).

[200] *See supra* I.A.2.

[201] Cf. *supra* note 154 (comparing cases regarding personal jurisdiction derived from single eBay transactions with conflicting results).

In *People v. World Interactive Gaming Corp.*,[202] a New York state court convicted an Antigua-based Internet casino of illegal gambling within the state.[203] The defendant argued that it had not violated New York law because the site operated from Antigua. Moreover, users were asked to include a permanent address upon registering to use the website and if the address entered was not in a state that permitted gambling, World Interactive Gaming Corp. ("WIGC") would not let the user play.[204] However, the court noted that any user could easily circumvent this by entering a false address.[205] Thus, even though WIGC had attempted to prevent users from New York from using its service, the court enjoined the website's operation because of the ease of circumvention of these measures.[206]

Since *World Interactive Gaming Corp.*, the United States government has taken more extreme measures to prevent Internet gambling websites from reaching U.S. computer screens by seizing their domain names with arrest warrants.[207] On April 15, 2011, the U.S. government took over the domain names of three of the largest poker websites, displaying a search warrant graphic on the main pages of these sites in place of their typical welcome screens.[208] When the arrest warrant was issued, a federal grand

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202 714 N.Y.S.2d 844 (N.Y. Sup. Ct. 1999).

203 *Id.* at 851.

204 *Id.* at 847, 850–51.

205 *Id.* at 847, 851.

206 *Id.* at 854. Recently, the New York Attorney General indicted several foreign online gambling websites for allowing users in the United States to gamble online and circumvent United States online gambling laws. Press Release, United States Attorney for the Southern District of New York, Manhattan U.S. Attorney Charges Principals of Three Largest Internet Poker Companies with Bank Fraud, Illegal Gambling Offenses and Laundering Billions in Illegal Gambling Proceeds (Apr. 15, 2011), *available at* http://www.virtualworldlaw.com/scheinbergetalindictmentpr.pdf (stating "[f]oreign firms that choose to operate in the United States are not free to flout the laws they don't like simply because they can't bear to be parted from their profits"). Michael A. Geist argues that the court in *WIGC* used the "targeting" approach to determine personal jurisdiction, providing support for eliminating the *Zippo* test. *See* Geist, *supra* note 6, at 1381.

207 *See* Nathaniel Popper & Tiffany Hsu, *Feds Call Poker Sites' Bet; Major Online Venues are Shut Down and Their Founders Charged with Bank Fraud.*, L.A. TIMES, Apr. 16, 2011, at A1; *see also* POKERSTARS.COM, *http://www.pokerstars.com* (last visited Sept. 14, 2011) (showing Poker Star's statement on the blocking of players from the U.S. due to FBI's domain name seizure, pursuant to arrest warrant).

208 *See* Popper & Hsu, *supra* note 208; *see, e.g.*, POKERSTARS.COM, *supra* note 207.

jury charged eleven individuals with bank fraud, money laundering, and violating gambling laws.[209] After a 2006 law was passed barring websites from taking payments for "unlawful" online gambling, without defining the term "unlawful," several sites shut down or moved abroad, likely hoping that the United States could not prosecute them if they were operating from another jurisdiction.[210] However, the FBI and the United States Attorney's Office for the Southern District of New York have been working to prosecute the operators of the gambling websites in New York.[211] With the help of Interpol, the FBI is trying to bring these international defendants to face trial in the United States.[212]

In *Chloe v. Queen Bee of Beverly Hills, LLC*,[213] a French handbag manufacturer brought suit for trademark infringement in New York against an Alabama and California-based counterfeiter.[214] The Second Circuit found that Queen Bee purposefully availed itself of New York law when it shipped a single counterfeit Chloe bag into New York.[215] The Second Circuit reasoned that even though there was no evidence that any more counterfeit Chloe bags were sold in New York, Queen Bee availed itself of New York law by merely offering the counterfeit Chloe bags for sale there.[216] Since more Chloe bags easily could have been sold in New York, there were sufficient minimum contacts to confer specific personal jurisdiction in New York.[217]

These cases illustrate that sometimes technological contact with individuals can be sufficient to warrant jurisdiction in a plaintiff's home forum under the law of a plaintiff's home forum.[218] But the analogy of Internet-based disputes to the virtual

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209 Popper & Hsu, *supra* note 208.

210 *Id.*

211 *Id.*

212 *Id.*

213 616 F.3d 158 (2d Cir. 2010).

214 *See id.* at 162.

215 *Id.* at 167.

216 *Id.*

217 *Id.*

218 *See generally, e.g., id.*; Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199 (9th Cir. 2006) (en banc); People v. World Interactive Gaming Corp., 714 N.Y.S.2d 844 (N.Y. Sup. Ct. 1999); Popper & Hsu, *supra* note 207.

world is not perfect and concerns—both about the practical effect of reusing existing jurisdictional tests for a fictional world and, more generally, fairness and justice—remain.

2. The Federal Circuit

In virtual disputes, the risk of being haled into a court in any forum in the real world is contrary to the notion of virtual world participation, and perhaps Internet usage generally. Similar issues have arisen in the context of patent disputes.

Prior to the Federal Court Improvement Act of 1982 ("FCIA"), the number of appeals of patent cases increased dramatically during the 1960s and 1970s.[219] Some argued that this rise in appeals brought inconsistent judgments.[220] To remedy the caseload crisis, court observers suggested creating new judgeships.[221] Others proposed the creation of specialty courts for tax and patent cases and national courts of appeal.[222] It was clear that the courts required some modifications to handle appellate patent cases.[223]

In 1982, Congress took action, creating the Court of Appeals for the Federal Circuit—a central locale for settling patent and government claims disputes.[224] This court has exclusive jurisdiction over appeals from all district courts in patent litigation and hears cases arising from claims against the federal government, including intellectual property claims and patent claims.[225] Congress created this circuit to provide uniformity in the law, centralize patent appeals, and better organize government claims cases.[226] According to Richard Seamon, since its

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219 *Id.* at 555.

220 *Id.* at 555–56.

221 *Id.* at 556. This potential solution, however, could have created more inconsistency.

222 *Id.* at 556–57.

223 *Id.* at 554–55.

224 28 U.S.C. §§ 1292, 1295 (1982). *See also* Richard H. Seamon, *The Provenance of the Federal Courts Improvement Act of 1982*, 71 GEO. WASH. L. REV. 543, 545 (2003).

225 28 U.S.C. § 1295. *See also* Cardinal Chem. Co. v. Morton Int'l, Inc., 508 U.S. 83, 89 (1993); UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, http://www.cafc.uscourts.gov/the-court/court-jurisdiction.html (last visited October 25, 2011).

226 S. Rep No. 97-275, at 12 (1981).

establishment, the Federal Circuit "has clarified many aspects of patent law and made it more coherent as a whole."[227]

While the Federal Circuit has alleviated many problems, it has not done so without difficulty. Courts initially struggled to define the limits of the Federal Circuit's jurisdiction.[228] In *C.R. Bard, Inc. v. Schwarz*, [229] the Court of Appeals for the Federal Circuit held that it has inherent jurisdiction to determine its own jurisdiction. To hold otherwise would have allowed any lower court to determine the Federal Circuit's jurisdiction.[230]

The analogy to the Federal Circuit illustrates that the legal system has addressed jurisdictional issues before and has successfully resolved those issues through the courts. Essentially, by creating a single location wherein these problematic issues involving parties and parts from different jurisdictions across the globe could be settled, the jurisdictional questions was taken off of the table. A similar action may be called for in the case of virtual world disputes.

3. Cyberspace Jurisdiction

Scholars have also provided some helpful suggestions in how to deal with virtual world disputes. As the Internet gained popularity during the 1990s, academics and enthusiasts espoused the idea of cyberspace as a separate jurisdiction.[231] There were two models for rules concerning personal jurisdiction in cyberspace—one theoretical and one traditional.[232] The theoretical

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227 Seamon, *supra* note 224, at 545.

228 *E.g.*, Kidde, Inc. v. E.F. Bavis & Assocs., Inc., 735 F.2d 1085, 1086 (4th Cir. 1984) (transferring a Fourth Circuit appeal to the Federal Circuit), C.R. Bard, Inc. v. Schwarz, 716 F.2d 874, 877 (Fed. Cir. 1983).

229 716 F.2d at 877.

230 *Id.* ("As the arbiter of our own jurisdiction, we necessarily have the power to decide the threshold question whether the district court has jurisdiction . . . independent of the conclusion reached by the district court.").

231 *See* William S. Byassee, *Jurisdiction of Cyberspace: Applying Real World Precedent to the Virtual Community*, 30 WAKE FOREST L. REV. 197, 199 (1995) ("In a very relevant sense, cyberspace is a new, and separate, jurisdiction.").

232 *See* Michael S. Rothman, Comment, *It's a Small World After All: Personal Jurisdiction, the Internet, and the Global Marketplace*, 23 MD. J. INT'L L. & TRADE 127, 127 (1999) (creating the "theoretical" and "traditional" labels for models concerning personal jurisdiction in cyberspace).

camp argued that because there is no contact with the physical world, traditional notions of personal jurisdiction are inapplicable online.[233] Meanwhile, traditionalists urged that cyberspace exists in a jurisdiction just as much as any telephony system.[234] Traditionalists believe that because "cyberspace is really interconnected lines and hardware based in fixed locations around the world, courts have the power to exercise personal jurisdiction over a cyberspace-based action in the same manner as it would any other case."[235]

The theoretical model has failed to gain traction.[236] Greg Lastowka and Dan Hunter argue that the Internet-as-a-jurisdiction concept never took off because the Internet had not become an independent self-regulating community, but merely became another vehicle for communicating.[237] Michael A. Geist, a traditionalist, noted that with the evolution of theories on the boundaries of the Internet, it became clear that the Internet could not self-regulate.[238] National sovereignty could not be undermined by the notion of a borderless Internet.[239]

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[233] *Id.* at 127–28. *See also* Johnston & Post, *supra* note 6, at 1370–71 (1996) ("Cyberspace has no territorially based boundaries, because the cost and speed of message transmission on the Net is almost entirely independent of physical location. Messages can be transmitted from one physical location to any other location . . . without any physical cues or barriers that might otherwise keep certain geographically remote places and people separate from one another.").

[234] *See* Byassee, *supra* note 233, at 197; Rothman, *supra* note 231, at 128.

[235] Rothman, *supra* note 231, at 128. *See also* Byassee, *supra* note 231, at 198 n.5 ("As commonly used today, cyberspace is the conceptual 'location' of the electronic interactivity available using one's computer.").

[236] Rothman, *supra* note 231, at 128.

[237] F. Gregory Lastowka & Dan Hunter, *The Laws of Virtual Worlds*, 92 CAL. L. REV. 1, 69 (2004). *See also* Allen R. Stein, *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, 98 NW. U. L. REV. 411, 411 (2004) ("[T]he Internet does not pose unique jurisdictional challenges. People have been inflicting injury on each other from afar for a long time.").

[238] Michael A. Geist, *Cyberlaw 2.0*, 44 B.C. L. REV. 323, 357 (2003) ("The existence of a borderless Internet and bordered laws implies that governments lacked the moral authority to apply their rules to people who had not elected them sovereign.").

[239] *Id.* Geist also acknowledged, however, that with a need for enforcing laws against local effects, this has brought extra-territorial statutes that can make it more difficult to enforce national laws and policies. *Id.* at 332–33 ("Version 1.0 of cyberlaw was highlighted by the inability to enforce national laws against activities with local effects occurring outside the jurisdiction, which served as the primary threat to national

Greg Lastowka built upon the model proposed by the theoretical camp in the 1990s, arguing more narrowly that the virtual world—but not cyberspace generally—should be a separate jurisdiction.[240] Lastowka argued that virtual worlds are truly separate spaces because they are boundless communities and they self-regulate. [241] Therefore, virtual world sovereigns are in the best place to regulate their users' activity and, in fact, want to create the best possible environment for them, similar to how Disney World has rules in its parks to improve the visitor experience.[242] But, Lastowka conceded: "It seems doubtful that existing territorial governments will spontaneously recognize virtual jurisdictions as zones of legal autonomy merely because such autonomy might be deemed legitimate as a matter of political philosophy by legal commentators."[243]

Lastowka's critics in the traditionalist camp might argue that a participant in a virtual world, that can be accessed by any computer in any jurisdiction, simultaneously accepts and agrees to comply with the laws of any jurisdiction he or she accesses.[244] Thus, one should be as wary of violating foreign laws in the virtual world as on the Internet.[245] Providing support for the traditionalists' argument is the fact that virtual worlds are identical to the Internet in structure.[246] However, analyzing jurisdiction by examining physical construction may be too simple a response to a more complex problem. Nevertheless, scholars and theoretical debate have constructed and deconstructed methods of securing proper jurisdiction for virtual world disputes that may be useful in determining the best solution.

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sovereignty. In version 2.0, the greater challenge is proving to be aggressive extra-territorial statutes that hamper states' ability to enforce national law and policy inside the jurisdiction.").

240 LASTOWKA, *supra* note 38, at 88 (discussing jurisdictional issues in virtual worlds, arguing that the importance of a separate jurisdiction of virtual worlds should not be overlooked).

241 *Id.*

242 *See id.* at 89.

243 *Id.*

244 *Cf.* Stein, *supra* note 234, at 411 (discussing the possibility of Internet users subjecting themselves to the laws of numerous jurisdictions).

245 *Cf.* Reidenberg, *supra* note 31, at 1969.

246 *See* Byassee, *supra* note 230, at 200–03.

4. Online Dispute Resolution

As online disputes became more commonplace, academics and entrepreneurs sought remedies to facilitate dispute resolution between parties.[247] Susan Nauss Exon advocated for an international Cybercourt that would address disputes arising from Internet communications and transactions.[248] It would derive authority from consenting countries pursuant to a treaty or convention, similar to the creation of the European Court of Justice, European Court of Human Rights or International Court of Justice.[249] While it would be located in one physical location, participants from around the world could appear from remote locations using courtroom technology.[250]

Cybersettle.com provides an innovative online dispute resolution service.[251] Users wishing to resolve a dispute create an account on Cybersettle.com and provide basic information about the claim.[252] The user then lists three acceptable settlement amounts, which Cybersettle keeps hidden from the opposing party.[253] Cybersettle contacts the other party to access the claim and allows them to provide a blind settlement offer.[254] If the offer is not equal to or less than the amount that the other party is willing

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[247] *See* Ethan Katsh, *Dispute Resolution in Cyberspace*, 28 CONN. L. REV. 956, 964 (1996) (discussing the Virtual Magistrate Project, an early online arbitration service designed for use by Internet system operators like America Online or Compuserve); Susan Nauss Exon, *The Internet Meets Obi-Wan Kenobi in the Court of Next Resort*, 8 B.U. J, SCI. & TECH. L. 1, 9–10 (2004) (hereinafter Nauss Exon, *Obi-Wan Kenobi*) (arguing for a cyberspace court); Susan Nauss Exon, *The Next Generation of Dispute Resolution: The Significance of Holography to Enhance and Transform Dispute Resolution*, 12 CARDOZO J. CONFLICT RESOL. 19, 41–43 (2010) (hereinafter Nauss Exon, *Dispute Resolution*) (arguing for International Cybercourt Central, "a separate international court established to resolve disputes involving individual parties and nation states," utilizing holographic technology to allow parties to litigate remotely); *About Cybersettle*, CYBERSETTLE, http://www.cybersettle.com/pub/home/about.aspx (last visited Dec. 1, 2011) (providing an Internet dispute resolution service).

[248] Nauss Exon, *Obi-Wan Kenobi*, *supra* note 249, at 10.

[249] *Id.*

[250] *Id.*

[251] *See About Cybersettle*, *supra* note 247.

[252] *How Cybersettle Works*, CYBERSETTLE, www.cybersettle.com/pub/home/demo.aspx (last visited Dec 1, 2011).

[253] *Id.*

[254] *Id.*

to pay, the party may submit up to two more settlement offers.[255] If an additional offer is equal to or less than the complainant's offer, the case settles.[256] If not, the case is over and the complainant will have to initiate a new claim.[257]

Another service, ODR World, offers online assisted negotiation, mediation and arbitration services.[258] ODR World uses chat rooms and message boards to connect the parties in a dispute with a third-party mediator or arbitrator.[259] The process for resolving a dispute via online mediation and arbitration are similar to the procedures used by Cybersettle: a user files a claim and the second party is notified via e-mail.[260] If the second party agrees to settle via mediation/arbitration, the parties utilize message boards and chat rooms to resolve the dispute.[261] In the case of arbitration, the arbitrator ultimately delivers an opinion.[262]

In addition to online mediation and arbitration services, iCourthouse provides an Internet courtroom service.[263] People using iCourthouse file a complaint, serving it on a defendant via email.[264] The parties then agree to be bound to a user agreement and rules of procedure.[265] The parties provide opening statements, evidence and closing arguments.[266] Other iCourthouse users can sign up to be jurors on a case, allowing them to pose questions to the parties, review the evidence, and reach a verdict.[267]

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255 *Id.*

256 *Id.*

257 *Id.*

258 *About Us*, ODR WORLD, http://www.odrworld.com (last visited Dec. 1, 2011).

259 *Id.*

260 *Arbitration*, ODR WORLD, http://odrworld.com/case4.php (last visited Dec. 1, 2011); *Mediation*, ODR WORLD, http://odrworld.com/case4.php (last visited Dec. 1, 2011).

261 *Arbitration*, *supra* note 260; *Mediation*, *supra* note 260.

262 *Arbitration*, *supra* note 260.

263 *About iCourthouse*, ICOURTHOUSE, http://www.i-courthouse.com/main.taf?area 1_id=about (last visited Dec. 1, 2011).

264 *File a Claim*, ICOURTHOUSE, http://www.i-courthouse.com/main.taf?area1_id= claims (last visited Dec. 1, 2011).

265 *Id.*

266 *Id.*

267 *Be a Juror*, ICOURTHOUSE, http://www.i-courthouse.com/main.taf?area1_ id=jurors (last visited Dec. 1, 2011).

Other websites have their own internal dispute resolution procedures.[268] eBay's Resolution Center allows buyers and sellers in the eBay online marketplace to settle disputes internally through eBay's website.[269] Buyers and sellers with eBay user accounts can file a claim against another user.[270] eBay then contacts the other party and attempts to resolve the issue.[271] Occasionally, eBay gets involved;[272] eBay controls user accounts, so it can issue refunds for users in the event sellers are nonresponsive.[273]

Online dispute resolution services have origins in the theoretical model of Cyberspace Jurisdiction.[274] David Post, a proponent of creating a separate cyberspace jurisdiction,[275] founded the Virtual Magistrate Project, an early online dispute resolution service.[276] Moreover, Susan Nauss Exon's discussion of the creation of a virtual court suggests that the Internet is inherently borderless and that a virtual court is the only fair way to resolve online disputes.[277]

C. Potential Solutions

The lack of certainty surrounding a physical jurisdiction for virtual world dispute resolution creates a lack of uniformity as real-world litigation derived from virtual world interactions increases. As mentioned above, courts may not know whether a country's substantive law may apply[278] or whether they can exert personal jurisdiction over a defendant.[279] Substantive law and personal

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[268] *See, e.g.*, *Resolution Center*, EBAY, http://resolutioncenter.ebay.com/ (last visited Dec. 1, 2011) (providing a dispute resolution service for eBay marketplace users).

[269] *Resolution Center*, *supra* note 268.

[270] *See What To Do If You Don't Receive an Item or It Doesn't Match the Seller's Description*, EBAY, http://pages.ebay.com/help/buy/item-not-received.html (last visited Dec. 1, 2011).

[271] *Id.*

[272] *Id.*

[273] *See id.*

[274] *See* Katsh, *supra* note 247; Nauss Exon, *Obi-Wan Kenobi*, *supra* note 249, at 3; *see also supra* I.B.3 (discussing Cyberspace Jurisdiction models).

[275] *See generally* Johnson & Post, *supra* note 5.

[276] Katsh, *supra* note 247.

[277] *See* Nauss Exon, *Obi-Wan Kenobi*, *supra* note 249, at 3 (discussing the borderless context of the Internet).

[278] *See supra* II.A.4.

[279] *See supra* I.A.3.

jurisdiction issues across different forums necessitate a uniform approach to provide clear guidance to virtual world users.

1. No Solution: Worldwide Availment

As discussed above, worldwide availment harms the virtual business owner in allowing plaintiffs to bring lawsuits in any forum even though the defendant may not have purposefully directed activity to the forum, beyond participation in a globally-accessible virtual world.[280] A court may not find a defendant's willful blindness of the location of a plaintiff-avatar compelling enough to avoid personal jurisdiction.[281] After all, it is abundantly clear that the defendant may be engaging in business activity with buyers located around the world.[282] Worldwide availment is a foreseeable and reasonable solution for virtual world businesses.[283] There is a strong argument for considering worldwide availment a cost of doing business.[284] Moreover, given the relatively small number of virtual world-based disputes currently in the courts, the virtual world business owner may not need to raise prices of virtual goods when factoring in worldwide availment as a cost of doing business.

Worldwide availment seems favorable under the traditionalist approach to cyber-jurisdiction.[285] Because virtual world participants utilize the Internet architecture that reaches all jurisdictions, it should be understood that they could violate and be subject to foreign laws.[286] Shielding a virtual world user from the laws of another jurisdiction, when that user has violated the jurisdiction's laws, would encourage forum shopping, like that

280 *See supra* II.A.3.
281 *See id.*
282 *See id.*
283 *See* Dedvukaj v. Maloney, 447 F. Supp. 2d 813, 823 (E.D. Mich. 2006) (holding that an eBay seller's Internet activities resulted in purposeful availment).
284 *See supra* Part II.a.3.
285 *See* LASTOWKA *supra* note 38, at 78.
286 *See supra* Part II.A.3.

which Yahoo! attempted to engage in to avoid complying with a valid French judgment against the company.[287]

2. Creating a Virtual Court

The idea of a Virtual Court is more analogous to the roots of the Cyberspace Jurisdiction and the Internet court proposed by Susan Nauss Exon than it is to the Federal Circuit.[288] Cyberspace Jurisdiction has not gained traction because the Internet has not yet been recognized as a separate community,[289] but it seems the Virtual Court concept provides the ideal solution to the jurisdictional problem. Virtual worlds are "independent and self-governing."[290] They have millions of participants worldwide.[291] With the growing gross domestic prodcut of virtual worlds,[292] the stakes involved have been raised. A group named Ginko Financial created a virtual bank in Second Life that accepted user deposits, promising an interest rate of 40%.[293] After it became clear that Ginko could not pay every user who withdrew their funds, Ginko imposed a L$1,000,000[294] per day cap on withdrawals.[295] At the end of the day, Ginko lost about $750,000 real-world USD.[296] In the virtual world EVE Online, one player opened a bank and walked away with close to $120,000 USD in user deposits.[297] The

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[287] *See* Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199, 1204 (9th Cir. 2006) (en banc) (seeking to invalidate a judgment in a foreign court in a more favorable jurisdiction). *See also supra* Part II.B.1.

[288] *Compare supra* Part I.B.3 *with* Part I.B.2. *See also supra* notes 248–250 and accompanying text (discussing Nauss Exon's virtual court proposition).

[289] *See* Lastowka & Hunter, *supra* note 233, at 31.

[290] LASTOWKA, *supra* note 38, at 88.

[291] Alan Sipress, *Does Virtual Reality Need a Sheriff?*, WASH. POST (June 2, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/06/01/AR2007060102671.html.

[292] *See* Takahashi, *supra* note 52.

[293] Jeremy Hsu, *Second Life Bank Crash Foretold Financial Crisis*, MSNBC.COM (Nov. 21, 2008, 6:33 PM), http://www.msnbc.msn.com/id/27846252/ns/technology_and_science-science/.

[294] "L$" are Linden Dollars, the currency in Second Life. 250 Linden dollars are roughly equivalent to one U.S. dollar. *Id.*

[295] Pixeleen Mistral, *Ginko Financial's End-Game*, ALPHAVILLE HERALD (June 8, 2007, 12:46 AM), http://alphavilleherald.com/2007/08/ginko-financial-2.html.

[296] Hsu, *supra* note 256.

[297] *Id.*

individual who stole Qiu Chengwei's dragon sabre in Legend of Mir 3 sold it for approximately $870.[298] Virtual financial transactions can have serious real world consequences.

As the stakes get higher, the need for an adjudicating body increases. While virtual world interactions may be dismissed as "games" where the sovereigns must deal with disputes, the real-world implications exist, creating greater potential for virtual world disputes to spill over into real-world courtrooms. The problem may be fixed with a single forum for resolving virtual world-based disputes.

The Virtual Court would be limited in its authority. It would deal exclusively with settling disputes arising from transactions occurring in the virtual world. However, the exact limits of that authority would need to be defined. First, the Court will need to know which cases it may hear; it needs parameters to determine what is and is not a virtual world dispute.[299] This may be the most difficult part of establishing the Virtual Court. At the 2010 NMC[300] Conference, "there was some disagreement about what constitutes a virtual world."[301] Some participants thought that a definition including anything with a game engine, like World of Warcraft, would be too broad.[302] Would eBay or Facebook or LinkedIn be considered virtual worlds? Facebook and eBay both provide semi-contained environments where avatars can interact.[303] Facebook allows avatars[304] to interact with each other in virtual spaces, play games, and use in-world currency to purchase and sell goods.[305] eBay allows avatars to buy and sell

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298 *See supra* note 51 and accompanying text.

299 *See, e.g.*, 28 U.S.C. § 1295 (providing for the creation of the Federal Circuit and what cases it hears).

300 NEW MEDIA CONSORTIUM, http://www.nmc.org/ (last visited Jan. 16, 2012).

301 Chris Clark, *What is a Virtual World?* NSPIRED^2 (June 10, 2010), http://ltlatnd.wordpress.com/2010/06/10/what-is-a-virtual-world/.

302 *Id.*

303 *See generally* EBAY, http://ebay.com (last visited Dec. 1, 2011); FACEBOOK, http://facebook.com (last visited Dec. 1, 2011).

304 The Facebook avatar, unlike traditional virtual worlds, is supposed to be the individual's real identity, as part of the cultural norm created by the environment. *See* FACEBOOK, *supra* note 303.

305 *Id.*; *About Facebook Credits*, FACEBOOK, http://www.facebook.com/help/?page=132013533539778 (last visited Dec. 1, 2011).

goods in an online marketplace using an in-world payment system,[306] in addition to providing discussion forums, groups and chat rooms for users to interact.[307]

Furthermore, including Massively Multiplayer Online games ("MMOs") in the virtual world definition creates a problem because it then invites the comparison with other online games, turning virtually any online game into a virtual world. If World of Warcraft is a virtual world, Madden could also be a virtual world. Some may not have difficulty finding that the online play in Madden constitutes a virtual world, but if it is included in the definition then the breadth of potential suits the Virtual Court would deal with is incredible, potentially usurping cases from existing courts that adjudicate online disputes.[308] Once a framework is established, the Virtual Court may need to require virtual world start-ups to register with it. The judges then may determine whether each applying virtual world is in fact a virtual world and whether the court may exert jurisdiction over cases arising from disputes in that virtual world. However, this Note is not meant to provide a thorough discussion of what will constitute a virtual world, but merely acknowledges the hurdle to drafting a law calling for the creation of a court that will preside over virtual world appellate cases.

The Virtual Court could be structured similarly to the Cybercourt idea supported by Susan Nauss Exon.[309] It would hear disputes arising between avatar and avatar, avatar and sovereign, avatar and third-party, or sovereign and third-party in the virtual world. Proceedings could take place in a virtual courtroom established by the United States government or an international adjudicatory body.[310] This would enable users to litigate from

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306 *See Sell Your Stuff on eBay and Anywhere Else Online*, PAYPAL https://personal.paypal.com/us/cgi-bin/?&cmd=_render-content&content_ID=marketing_us/sell_on_ebay (last visited Dec. 1, 2011).

307 *See* EBAY, *supra* note 303.

308 It would then seem like the Virtual Court would preside over all online disputes, effectively creating a cyberspace jurisdiction.

309 *See supra* notes 247–53 and accompanying text.

310 Judge Richard Posner, who has lectured in Second Life, could be in support of this concept. *See* Roger Parloff, *Judge Posner Takes Book Tour to Virtual World*, FORTUNE

their home states—indeed from their actual home computers—and avoid traveling to another forum.

3. Limiting Jurisdiction Options

Under the "systematic and continuous" test, the home state of a defendant will always be sufficient for personal jurisdiction.[311] This demonstrates that there is at least this one jurisdiction for virtual world litigation even if no other jurisdiction would meet sufficient minimum contacts under *International Shoe*.[312] Potentially, this will also extend to the forum state of the virtual world operator's principal place of business.[313] Because a sovereign operates a virtual world from his headquarter forum state, it would also likely be a suitable forum for personal jurisdiction.

This does not suggest, however, that the state wherein the virtual world's hosting servers are located should also be a suitable forum. To speed up gameplay, virtual worlds exist on many computer servers located around the world. If a plaintiff could bring suit in any forum where a virtual world server is located, a plaintiff could bring suit in many possible countries, ending up with an equivalent to worldwide availment. The purpose of limiting the potential jurisdictions is to ensure stability of the virtual world's integrity and to be fairer to virtual world participants who might otherwise have to anticipate litigation in any forum around the world.

Statutory recognition of the forum state of the virtual world operator or defendants as the only two options for jurisdiction for all sovereign-avatar and avatar-avatar disputes would eliminate some of the uncertainty, and would supplement EULA forum selection and arbitration clauses, which often select one of these

(Dec. 9, 2006), http://features.blogs.fortune.cnn.com/2006/12/09/judge-posner-takes-book-tour-to-virtual-world/.

311 *See* Helicopteros Nacionales de Colombia S.A. v. Hall, 466 U.S. 408, 415–16 (1984); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447–48 (1952) (holding that a Philippine corporation had continuous and systematic contacts with the forum state because the company president had an office and conducted business in the forum state).

312 *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

313 *See Perkins*, 342 U.S. at 447–48.

two jurisdictions anyway for sovereign-avatar disputes.[314] The justification for these limited jurisdiction options is clear: every user makes sufficient contacts with the jurisdiction by signing up for the virtual world; every user constantly interacts with the virtual world maintained by the sovereigns; any dispute happens on computer servers in the sovereigns' possession. While not the fairest for all plaintiffs or defendants, it is the simplest solution and the fairest for the sovereigns.

However, this may not be the fairest solution for virtual world users in foreign jurisdictions who allege injuries. In such a case, users living in a foreign country may be dissuaded from litigation because of the trouble caused by going to court in the operator's jurisdiction. Potential plaintiffs may not be able to bring suit due to the significant expense of finding a lawyer and filing a lawsuit in a distant forum. Exclusive jurisdiction in these fora may therefore encourage virtual world business operators to act with less concern for their customers due to the unlikelihood of being sued.

Limiting the potential jurisdiction for settling disputes arising from virtual world transactions may also threaten the sovereignty of a particular state.[315] Personal jurisdiction allows states to protect their citizens from harms committed against them and affecting them in the state by allowing them to bring suit in the state.[316] To not allow for specific personal jurisdiction where a defendant has minimum contacts would effectively undermine state sovereignty.[317]

The practical result of the limiting jurisdiction solution is that the virtual world sovereign may elect to operate in a state likely to be more favorable to a virtual world operator in any sovereign-

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[314] *See e.g.*, *Sony ToS, Version 12*, *supra* note 185; *Xbox LIVE Terms of Use*, *supra* note 188.

[315] *Cf. supra* note 239 (noting that overreaching extra-territorial statutes threaten national sovereignty).

[316] *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 487 (1985) (holding that a franchisee contracting with a corporation in the forum state had sufficient minimum contacts with the forum state to warrant specific personal jurisdiction, and that it was reasonably foreseeable that the defendants would be haled into the forum state).

[317] *Cf. supra* note 242.

avatar dispute. However, this is no different than the common practice of corporations choosing to incorporate in Delaware for its favorable laws. The end result may be a particular favorable-law forum becoming the new Delaware for virtual worlds.

4. Separate Virtual Spaces Based on Territory

To avoid any potential litigation in a foreign jurisdiction or any substantive law problems with foreign states, virtual worlds may consider a self-help remedy: developing separate virtual spaces based on real-world locations. For example, virtual worlds like Entropia Universe or Second Life could have a planet or island accessible only by users located in New Jersey. Virtual world operators would need to verify user IP addresses to ensure that avatars in the New Jersey virtual space are actually in New Jersey. While this would solve the problems of worldwide jurisdiction and would allow sovereigns to avoid defending suits brought in far away lands, this solution would undermine the goals of the Internet and participation in virtual world communities. Ignoring for a moment the ease with which users can circumvent the IP address verification system,[318] and the complications that arise when a user on vacation out-of-state wants to use the virtual world service, if virtual worlds have to segment by location, the fundamental idea of a separate virtual community is destroyed.

5. Contract: EULAs and Arbitration

The virtual world sovereigns seem well-situated to address user disputes provided they can do so effectively. Avatar-avatar or avatar-sovereign disputes could be settled by a EULA provision providing for virtual arbitration with choice of law provisions.[319] While virtual courts may not seem like a viable option to lawmakers at present, EULA virtual arbitration clauses could be

[318] Each Internet user has a unique IP address traceable to the user's location. Internet Service Providers can examine IP addresses to determine what state a user is in. Users can circumvent this by using proxy servers. Proxy servers are computer servers that sit between the user and destination server. They give the destination server the impression that the user is the IP address of the proxy server. *Proxy server*, PCMAG.COM, http://www.pcmag.com/encyclopedia_term/0,2542,t=proxy+server&i=49892,00.asp#fbid=8uqRzYUHYRT (last visited Oct. 24, 2011).

[319] *See* 9 U.S.C. § 2 (2006).

binding on virtual world participants provided the provisions are conscionable.[320]

Although it may not initially seem like the sovereign can bind two avatars to settle their virtual world-based disputes because of a lack of privity between avatars in the EULA, several real-world examples suggest the contrary. Cardholder agreements for credit cards require that any dispute over a transaction with a merchant shall require following the cardholder's dispute resolution procedures.[321] Both the cardholder and the merchant are in privity with the issuing bank in their separate agreements, but not with each other.[322] Moreover, in franchise agreements, franchisees may agree to settle any dispute arising from their agreement with the franchisor, including potentially any dispute with a fellow franchisee, in arbitration.[323] While non-binding, PayPal's user agreements allow their users to use internal dispute resolution mechanisms.[324] eBay requires that all sellers adhere to its

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320 *See* Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593, 606–10 (E.D. Pa. 2007).

321 *See, e.g.*, *Credit Card Agreement for Visa Signature and World MasterCard in Capital One Bank (USA), N.A. Chase*, CAPITAL ONE, at 4, http://www.capitalone.com/creditcards/pdfs/058_VisaSig_WorldMC_Cards_CapitalOneBank.pdf (last visited Jan. 28, 2012) (credit card issuer contract between cardholder and issuer listing procedures for dispute resolution between a merchant and cardholder) (last visited Jan. 28, 2012); *Merchant Agreement*, REDWOOD MERCHANT SERVS., http://www.emerchant.com/cms-assets/documents/7548-398194.rms-merchant-agreement.pdf (last visited Feb. 6, 2012) (credit card issuer contract between merchant and issuer listing procedures for dispute resolution between a merchant and cardholder); *Chargebacks and Dispute Resolution*, VISA, http://usa.visa.com/merchants/operations/chargebacks_dispute_resolution/index.html (credit card website listing procedures for dispute resolution between a merchant and cardholder).

322 *See, e.g.*, *Credit Card Agreement for Visa Signature and World MasterCard in Capital One Bank (USA), N.A. Chase*, *supra* note 321; *Merchant Agreement*, *supra* note 321.

323 *See, e.g.*, *Wetzel's Pretzels Franchise Agreement*, FREE FRANCHISE DOCS, http://www.freefranchisedocs.com/wetzels-pretzels-Franchise-Agreement.php (last visited Jan. 25., 2012) ("Any dispute arising out of or in connection with this Agreement, if not resolved by the negotiation and mediation procedures described above, must be determined in Los Angeles County, California, by the AAA."). This may suggest that because franchisees all agree individually to be bound by the franchise agreement, any dispute arising out of the agreement between franchisees could be referred to arbitration.

324 *PayPal User Agreement*, PAYPAL, (Jan. 24, 2012), at § 13.5, https://cms.paypal.com/us/cgi-bin/?cmd=_render-content&content_ID=ua/UserAgreement_full&locale.x=en_US.

resolution process.[325] eBay also encourages buyers to use its internal mechanisms, although it is not required that buyers use eBay's Resolution Center.[326]

Today, arbitration is being used effectively to solve disputes relating to international commercial transactions, and could also provide a remedy for virtual world transaction disputes.[327] A body like the World Intellectual Property Organization's Arbitration and Mediation Center,[328] could preside over virtual world cases with the consent of the sovereigns using contract law.[329] This quasi-judicial body could be sponsored by an organization like the American Arbitration Association or the International Centre for Dispute Resolution—organizations that provide for alternative dispute resolutions.[330] Currently, the World Intellectual Property Organization ("WIPO") provides a forum for settling intellectual property disputes between parties who have contractually agreed to settle disputes.[331] Modeling an arbitration forum after that of WIPO (or even adopting WIPO as the arbitration forum) would be beneficial to both virtual world sovereigns and users. This is especially true given that today's virtual world disputes generally encompass intellectual property issues.[332]

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[325] *Your User Agreement*, EBAY, (Sept. 7, 2010), http://pages.ebay.com/help/policies/user-agreement.html.

[326] *See eBay Buyer Protection*, EBAY, (June 20, 2011), http://pages.ebay.com/help/policies/buyer-protection.html; *Resolution Center*, *supra* note 268.

[327] *See id.*

[328] WIPO, WIPO ARBITRATION AND MEDIATION RULES 2 (2009), *available at* http://www.wipo.int/freepublications/en/arbitration/446/wipo_pub_446.pdf.

[329] 9 U.S.C. § 2 (2006). *See also* Southland Corp. v. Keating, 465 U.S 1, 7 (1984) (noting that the Court previously determined that the contractual fixing of a particular forum for dispute resolution "should be honored by the parties and enforced by the courts," when "made in an arm's-length negotiation by experienced and sophisticated businessmen") (citing M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 12 (1972)).

[330] *See Dispute Resolution Services*, AM. ARBITRATION ASS'N, http://www.adr.org/drs (last visited Oct. 24, 2011).

[331] *See* WIPO, *supra* note 331, at 2.

[332] First Amended Complaint,,*supra* note 122; Complaint, Eros, LLC. v. Linden Research, Inc., No. CV 09 4269 (N.D. Cal. Sept. 15, 2009), *available at* http://www.3dinternetlaw.com/Trademark/Trademark/Eros_v_Linden_files/Eros%20v.%20Linden%20Complaint.pdf.

Another option for EULA-provided dispute resolution could be an internal cyber-tribunal system.[333] The EULA could stipulate that in the event of a dispute between avatars, they must use an internal arbitration or mediation service akin to eBay's Resolution Center[334] or the player-supported tribunal in League of Legends.[335] This would obviate the need for an outside mediator or court, keeping the community integrity of the virtual world intact, and would demonstrate the true abilities of the virtual world to exist as a separate community.

Alternatively, in lieu of arbitration clauses, EULA-provided choice of law and forum selection clauses may eliminate any uncertainty.[336] *Carnival Cruise Lines, Inc. v. Shute* demonstrates how a forum-selection clause may be in the best interest of all parties. In *Carnival*, tickets for a Carnival cruise contained a forum-selection clause requiring all disputes with Carnival to be resolved in Florida.[337] Eulala Shute boarded a Carnival ship in California and then traveled to Mexico.[338] Shute slipped on a deck mat while the ship was in international waters off the coast of Mexico.[339] Shute brought suit in Washington.[340] The Court held that forum-selection clauses for passenger lawsuits were reasonable because otherwise the cruise line could be subject to lawsuits in different forums and that such clauses create simplicity—litigants would know exactly where to litigate, and a single forum for dispute resolution would ultimately make cruise line tickets less expensive.[341] The Court reversed the appellate court's determination that Washington was the appropriate jurisdiction for the suit.[342]

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333 *See supra* Part I.B.4.

334 *See supra* notes 268–76 and accompanying text.

335 *See supra* notes 57–60 and accompanying text.

336 *See, e.g.*, Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593–94 (1991).

337 *Id.* at 587–88.

338 *Id.* at 588.

339 *Id.*

340 *Id.*

341 *Id.* at 593–94.

342 *Id.* at 589.

The selected forum for virtual world operators could be an internal forum like that of LoL,[343] or could be any particular state. This would allow users to know before entering a virtual world which jurisdiction's laws apply. Ultimately, contractual provisions do not resolve the jurisdictional problems that arise in the virtual world. Rather, the provisions provide a potential solution for virtual world dispute resolution.

While most virtual worlds today do have arbitration provisions in place to settle avatar-sovereign disputes,[344] EULA language is often limited to the relationship between the avatar and sovereign and may not explicitly address avatar-avatar disputes.[345] A suggestion to sovereigns would be to fill the gap and take a stand on avatar-avatar disputes by providing a forum for the otherwise forumless avatars. Doing so would remedy the uncertainty avatars face when sued by other avatars and encourage business development within virtual worlds.[346]

A problem, however, with using a EULA to settle disputes is that third-parties are not bound by the EULA's terms. In the event a virtual world participant violates the intellectual property rights of a third-party, the third-party is not compelled by any EULA provisions.

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343 *See supra* note 57.

344 *See Terms of Service*, *supra* note 56 (providing for only sovereign-avatar dispute resolution in its EULA, and containing a forum selection and choice-of-law clause for California jurisdiction with the potential for arbitration if the parties mutually agree); WORLD OF WARCRAFT, *Terms of Use*, *supra* note 120 (providing for binding arbitration with the American Arbitration Association for sovereign-avatar disputes).

345 *See* WORLD OF WARCRAFT, *Terms of Use*, *supra* note 120.

346 If a virtual world business owner is unsure of where he or she may be sued, the investment necessary to start a virtual world business may not be worthwhile. A dedicated forum for dispute resolution would provide notice to avatars, providing certainty of how disputes will be resolved. A virtual world business owner could then factor in to operating costs the amount necessary for litigating in a specific forum. If I want to start a virtual clothing business, but am worried somewhat that my designs may possible infringe on the trademarks of another avatar, I may be more likely to make the investment of time and money to start the business if I know there is a specific forum or internal procedure for dispute resolution.

III. CONTRACTS AS A BANDAGE, WORLDWIDE AVAILMENT AS SURGERY

Virtual world disputes can best be remedied by a combination of these proposals, set forth plainly in the virtual world sovereign's EULA or ToS.[347] A virtual world EULA or ToS would act as a bandage covering a growing wound courts are currently unprepared or unable to heal. Provided that any such contract clauses contain conscionable forum-selection, choice of law, and venue provisions, jurisdictions outside the agreed-upon venue could routinely reject hearing virtual world suits.

In the event virtual world disputes become more numerous and the forum-selection clause is used more frequently for avatar-avatar disputes, the courts could declare a purposeful worldwide availment upon transacting business in the virtual world, enabling states to protect their citizens from harms committed against them, having effects in the forum.

A. It's in the Fine Print

EULAs define the scope of what is and is not permissible in the virtual world.[348] The EULAs also govern how disputes arising within the virtual world are to be resolved.[349] Thus, a provision for a singular forum, or a single arbitration association, as the forum for the dispute resolution with a single state's choice of law should be binding on the parties and virtual world sovereigns should be encouraged to make such provisions applicable to any dispute—whether avatar-sovereign or avatar-avatar.[350] An in-world virtual tribunal system for dispute resolution would also benefit the

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[347] *See, e.g.*, Evans v. Linden Research, Inc., 763 F. Supp. 2d 735 (E.D. Pa. 2011) (upholding the Second Life ToS including a forum-selection clause); *see also* Totilo, *supra* note 59 (providing for a community-based dispute resolution system). While the case and article address dispute resolution, *Evans* did not deal with an avatar vs. avatar dispute (and it does not appear from Linden's ToS that the forum-selection clause would apply to avatar vs. avatar disputes). *See generally Evans*, 763 F. Supp. 2d 735; *see also Terms of Service*, *supra* note 56, at § 12.2

[348] *See* Grimmelmann, *supra* note 120.

[349] *Id.*

[350] *See supra* II.C.5 (discussing a single arbitration association as the forum for dispute resolution).

avatars by supporting the integrity of the virtual world community.[351]

While sovereigns may not have a direct interest in providing a forum-selection clause or choice-of-law provision for disputes arising between avatars (since these disputes do not involve the sovereign), the lack of such clauses may be a disincentive for business owners to operate in the virtual world.[352] Business owners seeking to operate in the virtual world may therefore choose to operate only in virtual worlds containing forum-selection clauses. Thus, there is a strong economic incentive for virtual world sovereigns to have forum-selection clauses and choice-of-law provisions to delineate where avatars may sue other avatars.[353]

Virtual world sovereigns have much to gain or lose by having EULA provisions that clearly delineate where disputes between their users are to be resolved. Assuming, for a moment, that virtual worlds are interchangeable in terms of functionality and user benefits (and that users actually read the EULA terms), if a virtual world has EULA provisions that do not provide for clear dispute resolution in a given forum with a specific jurisdiction's applicable law, users may choose to leave the given virtual world for a virtual world that provides a clearer dispute resolution process. When the participants in virtual worlds are business operators, earning their incomes from virtual world-based businesses, the business operators will need assurance that their investments are protected, and that they will not have to litigate abroad in the event of a dispute. Virtual worlds will need to use favorable, clearly phrased EULA terms to compete for users.

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351 *See supra* Part I.C.5.

352 *See supra* Part II.C.1 (discussing worldwide availment as an economic disincentive because users could be dragged to any foreign court); *see also e.g.*, First Amended Complaint, *supra* note 122.

353 Increased user participation translates directly to increased revenues for virtual world sovereigns. Linden Labs, for example, earns money by selling premium memberships for users in addition to offering free user accounts. *See Become a Second Life Premium Member*, SECOND LIFE, http://secondlife.com/premium/ (last visited Jan. 28, 2012). Linden also sells land and homes to avatars in Second Life. *See Buying Land*, SECOND LIFE, http://secondlife.com/land/?lang=en-US (last visited Jan. 28, 2012).

The EULA's forum-selection clause is supported by the Supreme Court's holding in *Carnival*.[354] In *Carnival*, the Court upheld a forum-selection clause as reasonable because it 1) was in the cruise line's interest to have a limited forum for dispute resolution, 2) clarified the proper forum for dispute-resolution for all potential litigants, and 3) effectively made the cost of providing cruises less expensive.[355] Virtual worlds are analogous. First, it is in any virtual world operator's interest to have a single forum for dispute resolution; otherwise, parties may litigate in any forum around the world under any country's law. Second, with a forum-selection clause the parties will not need to incur significant expenses trying to find a proper forum for dispute resolution. Third, a single forum would allow virtual world vendors to provide their products and services at a reduced cost compared to what they would need to charge if they feared they could be subject to litigation in any foreign forum.

EULA-provided forum-selection and choice-of-law provisions will also help the virtual worlds comport with the Due Process Clause of the Fourteenth Amendment.[356] Without a pre-determined forum or choice-of-law provision for dispute resolution, there is no sufficient way for a virtual world user to determine if he or she is breaking any foreign jurisdiction's laws or committing a tort in any jurisdiction.

EULA- and ToS-enforced jurisdiction provide the fairest remedy.[357] While worldwide availment may be a foreseeable consequence of virtual world participation,[358] explicit EULA provisions eliminate the guessing game.[359] These contract provisions will allow users to know where they can sue and be

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354 *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593–94 (1991); *see also supra* notes 338–43 and accompanying text.

355 *See Carnival*, 499 U.S. at 593–94.

356 U.S. CONST. amend. XIV.

357 *Compare supra* Part II.C.5, *with* Parts II.C.1–3, *and* Part II.c.4.

358 *See infra* Part I.B.

359 *See, e.g.*, Carnival, 499 U.S. at 593–94 (1991) (holding that a cruise line's forum-selection clause for passenger lawsuits was reasonable because without it the cruise line could be subject to lawsuits in different forums, litigants would know exactly where to litigate, and a single forum for dispute resolution would ultimately make cruise line tickets less expensive).

sued, avoid any ambiguities, and, importantly, comport with the Due Process Clause of the Fourteenth Amendment.[360]

Moreover, adjudication of disputes via in-world tribunals provides the strongest sense of community for users. Entering a real-world courtroom disrupts the fantasy virtual worlds strive to create. Many virtual world users seek anonymity in virtual worlds and do not want to be identified, as would be necessary in a real-world court proceeding.[361] In virtual world tribunals, avatars could remain avatars.

As mentioned above, EULA-supported in-world virtual tribunals cannot bind third-parties whose rights are violated.[362] If, for example, an avatar in Second Life were to sell virtual Louis Vuitton handbags infringing on Louis Vuitton trademarks, Louis Vuitton would not be limited in its legal recourse by the EULA or ToS. While the EULA will not be binding on third-parties like Louis Vuitton who have not entered into a contract with the virtual world sovereign, the internal tribunal can be open to third-parties who wish to resolve a dispute with an avatar. If the internal dispute resolution mechanism operates effectively and provides a quick and equitable resolution for the parties involved, it might incentivize third-parties to have their disputes settled within the virtual world as a more appealing alternative to an expensive, time-consuming real-world court.

B. Accepting Worldwide Availment as a Cost of Doing Business

In lieu of the EULA choice-of-law and forum selection clauses, avatars will need to know where in the real world they can bring suit against other avatars. Limiting jurisdiction to the defendant's home state or the virtual world sovereign's as the singular forum, while a simple solution, penalizes plaintiffs who have suffered

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360 *See* U.S. CONST. amend. XIV; Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (requiring that if an individual is not present in the forum state, due process requires that the individual have "certain minimum contacts . . . such that the maintenance of the suit does not offend traditional notions of foul play and substantial justice.") (internal quotation marks omitted).

361 *See supra* notes 91–92 and accompanying text.

362 *See supra* Part I.C.5.

harm;[363] separate locations in the virtual world corresponding to geography will be constricting on avatars' desires to exist in a virtual world with individuals from around the world;[364] and, the notion of an international virtual court is superfluous and impractical.[365] The only fair, practical solution for avatars is a worldwide availment of all possible forums.[366]

The argument that a state cannot exert personal jurisdiction over a defendant based on contacts within a virtual world is insufficient. A state's power to exert personal jurisdiction over a defendant is a necessary tool for the state to protect its citizens from harms committed against its citizens and having effects within its borders. A user deprived of a property right in the virtual world suffers harm where the user lives in the real world because the avatar's real-world counterpart loses—or forgoes earning—real-world currency.[367] A state's police power would suffer if it could not supply a remedy for users who experienced this harm in the state.

Worldwide availment satisfies minimum contacts. As previously discussed, there is some question as to whether worldwide availment is proper because of the tenuous contacts with the forum state.[368] One might argue that *Calder* and *Zippo* suggest that a virtual world business has not expressly aimed any activity at the forum state, or that the contacts are not active.[369] The contacts in the virtual world, though, are implicitly global. One does not create an avatar and enter a virtual world to not interact with or do business with people outside of the avatar's home state. Users are keenly aware that they will be routinely meeting individuals from around the world in the virtual space. This is part of a virtual world's appeal. To suggest then that one cannot be sued in a forum state because the user did not know the location of the specific individual who brought suit would provide

363 *See supra* Part I.C.3.
364 *See supra* Part I.C.4.
365 *See supra* Part I.C.2.
366 *See supra* Part I.C.1.
367 *See supra* Part I.A.2.
368 *See supra* Part I.A.3.
369 *See supra* Part I.A.2

no suitable forum for relief due to the nature of the virtual world structure.

The split-circuit analogs in the eBay transaction cases suggest there is uncertainty as to whether a single online transaction involving the shipment of goods into a state is sufficient to confer personal jurisdiction.[370] However, worldwide availment differs from the eBay cases. In *Boschetto v. Hansing*, the Ninth Circuit rejected the argument that a plaintiff's home forum could exert personal jurisdiction over an out-of-state defendant based on a single eBay transaction.[371] There were insufficient minimum contacts because the transaction was not part of a "broader e-commerce activity," but was rather a one-off sale.[372] Business transactions in the virtual world, unlike in the *Boschetto* case, generally cannot be characterized as one-off sales. Virtual world retail businesses do not close shop at the end of the day, but rather allow users in any location at any time to purchase virtual goods; they are continually open in the forum state.

Worldwide availment protects national sovereignty, allowing countries to enforce their laws and protect their citizens.[373] In a virtual world, when an individual harms another located in a different country, the harm is suffered and the wrong is committed in the foreign country.[374] When infringing users can be sued in any forum around the world for violating the rights of an individual, the harmed individual's rights are validated. Applying the laws of the state of the aggrieved user ensures that the aggrieving user cannot evade the law.[375]

Worldwide availment also validates the rights of third-parties who do not participate in the virtual world. Virtual world rules do not apply to third-parties.[376] If an avatar in a virtual world violates

370 *See supra* note 154 and accompanying text.

371 Boschetto v. Hansing, 539 F.3d 1011, 1018 (9th Cir. 2008).

372 *Id.* ("Here, the eBay listing was not part of broader e-commerce activity; the listing temporarily advertised a good for sale and that listing closed once the item was sold, thereby extinguishing the Internet contact for this transaction within the forum state (and every other forum)").

373 *See supra* Part II.C.3

374 *See supra* notes 166–71 and accompanying text.

375 *See supra* notes 166–71 and accompanying text.

376 *See supra* Part I.C.5 (noting that EULAs do not apply to third-parties).

the intellectual property rights of an individual located in the real-world, the avatar should expect that he or she could be haled into court in the individual's home forum. The third-party suffers harm everywhere because the virtual world user violates his Intellectual Property rights in an environment that connects people from all over the world.

Worldwide availment provides the fairest solution for all of the parties involved and keeps the integrity of the virtual world intact. A criticism of worldwide availment is that it penalizes the defendant who has to find a lawyer in the forum state; however, to not provide for worldwide availment would discourage litigation for those who have been harmed by users in the virtual world.[377] If users harmed in the virtual world could not bring suit in the state in which they felt the effects of that harm, it would encourage anarchy in the virtual world. If Bowser could not sue Al in Bowser's home state, then Al may feel empowered to disregard the rights of other avatars. The virtual world would be filled with conduct that infringes on the rights of real-world individuals, but due to the anonymous nature of virtual worlds, the infringers would be sheltered from liability.

CONCLUSION

As evidenced by the *Minsky*, *Eros* and *Amaretto* debacles, virtual world sovereigns are not always able to provide a proper resolution for in-world disputes.[378] Where virtual worlds fail to provide the appropriate remedy, real world courts must step in to adjudicate matters, but may only do so in a manner that would not violate the due process rights (for United States citizens)[379] or general sentiments of fairness. Encouraging sovereigns to include explicit contract provisions in their EULAs or ToS provides for the easiest, most contained solution to the jurisdictional problem of

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377 *See supra* Part I.C.1.

378 *See, e.g.*, First Amended Complaint, *supra* note 122; Amended Complaint, Minsky v. Linden Research, Inc., No. 08-CV-819 (filed Aug. 14, 2008), *available at* http://virtuallyblind.com/files/slart/2008-08-14-amended_complaint.pdf. In both cases, the parties settled, and the matter was dismissed.

379 *See* U.S. CONST. amend. XIV ("No State shall . . . deprive any person of life, liberty, or property, without due process of law").

virtual world disputes. In the alternative, where real-world court involvement is necessary, worldwide availment is the most equitable solution for all parties involved, offering the most protection for both citizens' and states' rights.[380] Doing business in the virtual world comes with a risk of litigation anywhere in the world.[381] To hold otherwise would be to reward community-enforced ignorance and dwarf the rights of all parties involved. To hold otherwise would offend the "traditional notions of fair play and substantial justice."[382]

[380] *See supra* Part I.B.

[381] Calder v. Jones, 465 U.S. 783, 789 (1984).

[382] U.S. CONST. amend. XIV ; Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).