

# **MMORPGs:**

## **The Fairness of the Copyright- Contract approach for users?**



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## Summary

This work aims to make the case for recognising the contributions of users to MMORPGs and Virtual Worlds. These environments are software entities which are protected in England and Wales by copyright. These online environments require input from numerous sources, including users, in order to retain their user base. Users therefore interact, create and develop these spaces with both in-game items such as characters, swords and clothing, and items developed outside of these environments. However, users frequently do not receive proprietary interests in any of these game items.

The current paradigm of copyright and contract provides not just the framework for the allocation of claims to in-game items and the underlying software code, but also the governance constructs in these online environments. Contractual provisions are the dominant mechanisms of control, displacing automatically arising proprietary interests, and are required before any user can access an online game or Virtual World. It is argued that the current situation whereby contractual agreements restrict user claims whilst seeking to govern every aspect of MMORPGs and Virtual Worlds does not provide a “fair” system for users, or their interests.

It is concluded that End User License Agreements (EULAs) displace user rights whilst copyright and philosophical justifications indicate strong theoretical claims in support of users. As such, these EULAs ought to be considered in light of unfair contractual terms provisions to challenge the positions they adopt. There is a need to challenge the EULAs to validate the claims of users to items in online games and Virtual Worlds. This challenge must also indicate that there ought to be an appropriate governance system reflecting a balance between the interests of users and developers whilst providing a system whereby disputes between users, and over proprietary interests can be settled.

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## List of Abbreviations

ACID	Anti-Copying in Design.
ADR	Alternative Dispute Resolution.
BBC	British Broadcasting Corporation.
CDPA	Copyright, Designs and Patents Act 1988.
CD-ROM	Compact Disc Read Only Memory; computer file storage mechanism.
DCMS	Department for Culture, Media and Sport.
DVD	Digital optical disc storage format.
EC Commission	European Community Commission.
ENISA	European Network Information and Security Agency.
ERA	Entertainment Retailers Association.
ERRA	Enterprise and Regulatory Reform Act 2013.
EULA	End User License Agreement.
FACT	Federation Against Copyright Theft.
FAST	Federation Against Software Theft.
GDP	Gross Domestic Product.
GNU	A computer operating system which is composed entirely of free software.
HMG	Her Majesty's Government.
IGE	Internet Gaming Entertainment.
IP	Intellectual Property.
IPO	Intellectual Property Office.
IPRs	Intellectual Property Rights.
ISP	Internet Service Provider.

MMOGs	Massively Multiplayer Online Game.
MMORPGs	Massively Multiplayer Online Role Playing Game.
MUD	Multi-User Dungeons. These were the predecessors to MMORPGs.
NCC	National Consumer Council.
NESTA Arts.	National Endowment for Science, Technology and the Arts.
OFCOM	Office of Communications.
OFT	Office of Fair Trading.
RAM	Random Access Memory.
RMT	Real Money Trading.
SABIP	Strategic Advisory Board on Intellectual Property.
UCTA	Unfair Contract Terms Act 1977.
UKIE	UK Interactive Entertainment Association.
UNESCO	United Nations Economic, Scientific and Cultural Organization.
UTCCR	Unfair Terms in Consumer Contracts Regulations 1999.
VSC	Video Standards Council.
WGIG	Working Group on Internet Governance.
WIPO	World Intellectual Property Organization.

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## *Introduction*

### **Brave New World(s)?<sup>1</sup>**

Online gaming has become a popular pastime with the number of people estimated to be interacting with online games or Virtual Worlds at 100 million.<sup>2</sup> It has also become more than just a social activity, with businesses and real wealth being generated in Virtual Worlds.<sup>3</sup> Massively Multiplayer Online Role Playing Games<sup>4</sup> and Virtual Worlds are two genres of online gaming which enjoy incredibly large numbers of subscribers. Within these online environments, users can develop game accounts,<sup>5</sup> characters<sup>6</sup> and items.<sup>7</sup> In some of these environments, users can even acquire virtual land<sup>8</sup> and homes<sup>9</sup> which can be very valuable.<sup>10</sup> These spaces are not exempt from legal dispute, with disagreements over proprietary interests appearing but regulation in these online spaces stems from the dominant mechanism of contractual agreements.

MMORPGs and Virtual Worlds do not fit comfortably within categories such as sport, which enjoy regulation by professional bodies.<sup>11</sup> A number of elements come together to form a system of governance in online games and Virtual Worlds. These elements include: copyright and contract. The dominant method of regulating behaviour is the End User Licence Agreement,<sup>12</sup> which seeks to regulate activity within these environments, but also displaces automatically arising proprietary rights. The use of EULAs is signified by Dannenberg, who states that

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<sup>1</sup> A Huxley, *Brave New World* (1931).

<sup>2</sup> G Lastowka, *Virtual Justice: The New Laws of Online Worlds* (Yale University Press, 2010) 9.

<sup>3</sup> B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA 2008) 243.

<sup>4</sup> Hereafter MMORPGs.

<sup>5</sup> A Krotoski, '\$26 500 paid for property that doesn't exist' (*Guardian Unlimited Games Blog*) 15 December 2004, available online:

<[http://blogs.guardian.co.uk/games/archives/virtual\\_worlds/2004/12/26500\\_paid\\_for\\_property\\_that\\_doesnt\\_exist.html](http://blogs.guardian.co.uk/games/archives/virtual_worlds/2004/12/26500_paid_for_property_that_doesnt_exist.html)> retrieved 19 November 2009. See generally: MMORPGing Copyright: A Challenge or many challenges?

<sup>6</sup> A W M Louie, 'Designing Avatars in Virtual Worlds: How Free Are We to Play Superman?' (2007) *Journal of Internet Law*, 3.

<sup>7</sup> A Krotoski, 'Chinese gamer gets suspended death sentence for stabbing a player who stole his virtual sword' *The Guardian* (London, 9 June 2005) available online:

<<http://www.guardian.co.uk/technology/gamesblog/2005/jun/09/chinese gamers>> retrieved 19 November 2009.

<sup>8</sup> *Second Life*, 'Owning Land' available online: <<http://secondlife.com/land/>> retrieved 18 February 2013.

<sup>9</sup> G Lastowka, *Virtual Justice: The New Laws of Online Worlds* (Yale University Press, 2010) 64.

<sup>10</sup> To the extent that some are now virtual millionaires: Anshe Chung Studios, 'Anshe Chung Becomes First Virtual World Millionaire' (*ACS Press Release*, 26 November 2006), available online at:

<[http://www.anshechung.com/include/press/press\\_release251106.html](http://www.anshechung.com/include/press/press_release251106.html)> retrieved 29 August 2011.

<sup>11</sup> For example, football is regulated by the Football Association in England.

<sup>12</sup> Hereafter EULA.

everything within a Virtual World or online game is constrained by the contract.<sup>13</sup> EULAs combine contract law with the law of copyright, which protects the code of a particular game or world.

The regulatory approach in MMORPGs and Virtual Worlds relies upon interwoven collections of contractual agreements,<sup>14</sup> and whilst there are some broadly similar characteristics, each MMORPG and Virtual World has a custom contractual paradigm. As such, any external involvement in governance tends to relate to the contracts themselves. This is significant as it is these contractual agreements which alter the allocations of proprietary interests in the game content. If a game has a worldwide fan-base, but there is a dispute over proprietary interests between gamers in different countries, how is that dispute to be resolved? Can the EULAs outline the procedures to be followed and are these procedures binding? This research will investigate whether it is a fair framework, or whether it is biased towards one or more of the parties involved - users, or developers - in these online spaces. Such an analysis will require consideration of contractual principles, but also unfair contract term mechanisms in attempting to address the balance or otherwise in these agreements. This is conducted through an examination of the standard form, adhesive<sup>15</sup> agreements. Such an examination is fundamental to understanding the copyright issues arising from intangible environments. This study examines a selection of EULAs, and seeks to apply a set of fragmented legal rules to practical examples of online gaming activity in a diverse selection of environments. A practical examination of both contractual clauses and the application of legal rules to examples of gaming activity and behaviour is necessary to answer the research question, but also adds to our knowledge of how online gaming interests are governed.

Disputes arising before the courts concern in-items and associated rights,<sup>16</sup> largely because users are increasingly seeking recognition,<sup>17</sup> and are willing to challenge developers in order to enforce

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<sup>13</sup> R Dannenberg and Others, *Computer Games and Virtual Worlds: A New Frontier in Intellectual Property Law* (ABA Publishing 2010) 6.

<sup>14</sup> B Glushko, 'Tales of the (Virtual) City: Governing Property Disputes in Virtual Worlds' [2007] Berkeley Tech L J, Vol 22, 251.

<sup>15</sup> A Jankowich, 'EULAw: The Complex Web of Corporate Rule-Making in Virtual Worlds' (2006) 8 Tul J Tech & Intell Prop 2.

<sup>16</sup> C Renaud and S F Kane, 'Virtual World Industry Outlook 2008-2009' (Technology Intelligence Group, 25 August 2008) <[http://blog.techintelgroup.com/files/virtual\\_world\\_outlook\\_20082009.pdf](http://blog.techintelgroup.com/files/virtual_world_outlook_20082009.pdf)> retrieved 20 April 2010, 15, 16.

<sup>17</sup> D G Post, *In Search of Jefferson's Moose — Notes on the State of Cyberspace* (OUP 2009) 184, 185.

their proprietary rights.<sup>18</sup> Developers are evidently prepared to some form of regulatory systems into online games and Virtual Worlds especially as initiatives such as Game Masters have already been used. Considering the spread of online gaming, and the number of different online entities where interaction can occur, it is important to note that these entities are different, and whilst they share some characteristics, also have independent attributes.

If a user contributes to a game or world, and creates a new item, does that user have any proprietary interest in it? Is an avatar capable of copyright protection? How does copyright apply in such a dispute – if at all given the underlying contractual displacement of rights? Where EULAs indicate intellectual property rights rest with the developers, what claims do users have to moral rights<sup>19</sup> in game items? These interwoven copyright and contract issues will be considered from the perspectives of both developers and users.

#### **i. Research Aim**

This work aims to consider the balance within the copyright-contract approach adopted in MMORPGs and Virtual Worlds, and to assess the rights of users and developers within these environments. This research will do this in two ways. Firstly, an analysis and application of copyright to MMORPGs and Virtual Worlds, and an assessment of a selection of End User Licence Agreements will determine whether users have claims to proprietary interests in in-game content. A second element is to identify whether contractual provisions relating to proprietary interests are fair and binding upon the users, and whether contractual agreements are an appropriate governance framework for rights in in-game content.

This work evaluates the application of copyright to items within online games and Virtual Worlds. In testing this, the work will challenge the prevailing approach adopted in the EULA that developers are the sole party with interests in in-game content. It will also assess the fairness or otherwise of contractual provisions<sup>20</sup> and evaluate the strength of users' claims to in-game content

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<sup>18</sup> Y F Lim, *Cyberspace Law: Commentaries and Materials* (2<sup>nd</sup> edn, OUP 2007) 676.

<sup>19</sup> M T S Rajan, 'Moral Rights in Information Technology: A New Kind of Personal Right?' (2004) *Int'l J L & Info Tech* 12(1) 32, 35. See: Chapter 4 - MMORPGing & Copyright. At 4.7. *Moral Rights*.

<sup>20</sup> See: Chapter 5 – Contractual Displacement of Proprietary Interests: EULAw? At 5.5. *Standard Terms – Fairness and Balance?*

through theories such as Lockean Labour Theory.<sup>21</sup> In doing this, consideration will also be made of alternative governance mechanisms for online interactive entities.<sup>22</sup> Discussion will arise of the copyright elements of MMORPGs and Virtual Worlds, as well as some of the litigation that has been lodged in courts,<sup>23</sup> and action taken by judicial systems.<sup>24</sup>

This work looks at practical examples of EULAs used by MMORPGs and Virtual Worlds, applying legal principles – those of copyright and contract – to these agreements. The agreements are therefore tested through the application of legal principles to practical examples of gaming activity. The central hypothesis of this work focuses upon elements of theoretical and legislative proportionality in contractually allocating copyright and proprietary interests in in-game properties.

In testing such a hypothesis, this research adopts both theoretical and legislative approaches to balancing competing interests between users and developers. The theoretical rationale is considered from a philosophical basis, relying on theories developed by John Locke,<sup>25</sup> but also building upon Value Theory,<sup>26</sup> whereas the legislative approach followed in examining the EULAs is that adopted by the Unfair Terms in Consumer Contracts Regulations 1999.<sup>27</sup> The hypothesis of fairness is examined and tested through practical examples and a broader analysis of governance approaches adopted in MMORPGs and Virtual Worlds. This research evaluates the potential claims of users that could stem from the central hypothesis. If the situation relating to proprietary interests under the EULA is unfair to users, users could be entitled to claim in-game items and proprietary rights.

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<sup>21</sup> Including Utilitarian Theory, Hegel's Personality Theory and Lockean Labour Theory.

<sup>22</sup> See for example: M Risch, 'Virtual Rule of Law' [2009] 112 West Virginia Law Review 1, 37. See: Chapter 6 – Governance Structures and the Alternatives.

<sup>23</sup> See for example: *Bragg v Linden Research Inc.* (487 F.Supp 2d 593 E.D. Penn) [2007]; *Eros, LLC, v. John Doe*, US Dist. Ct. Middle District of Florida, Case No: 8:07-cv-1158-T-24TGW [2007]; *Hernandez v Internet Gaming Entertainment*, U.S. Dist. Ct. Southern District of Florida, Case No:07-CIV-21403-COHN/SELTZER [2007]; *BlackSnow Interactive v. Mythic Entertainment Inc.*, No. 02-00112 (C.D. Calif.) [2002]; *Electronic Arts Inc v. Zynga Inc*, U.S. District Court, Northern District of California, No. 12-04099 [2012]; *Amaretto Ranch Breedables v. Ozimals*, 3:10-cv-05696-CRB (N.D. Cal.) [2010].

<sup>24</sup> R Paul, 'Korea Considering Gold Farming Regulation' (*ArsTechnica*, 27 December 2006) <<http://arstechnica.com/business/news/2006/12/8503.ars>> retrieved 11 July 2010; Z Tingting and D Moller, 'Legislation Proposed to Protect Virtual Property' (*China Through A Lens*, 26 January 2004) available online: <<http://http://www.china.org.cn/english/2004/Jan/85502.htm>> retrieved 22 June 2012.

<sup>25</sup> P Laslett (ed), *John Locke: Two Treatises of Government* (Cambridge University Press 1988).

<sup>26</sup> See: Chapter 2 - Property Matters: Virtually Justified? At 2.7. *Theory for Parity?*

<sup>27</sup> See: Chapter 5 - Contractual Displacement of Proprietary Interests: EULAw? At 5.5. *Standard Terms – Fairness and Balance?*



## ii. The Legal Problem.

This research will consider the relationship between contractual and proprietary rights in the End User Licence Agreements<sup>28</sup> of online games<sup>29</sup> and virtual worlds.<sup>30</sup> This work will therefore question the contractual provisions from four EULAs under copyright law and the Unfair Terms in Consumer Contracts Regulations 1999.<sup>31</sup> Whilst there is a body of existing work dealing with the features of online games and virtual worlds,<sup>32</sup> and some consideration has been given within this to copyright and contractual issues,<sup>33</sup> very little specific attention has been conducted on the legal situation under the law of England and Wales. Similarly, whilst there have been a relatively low number of judicial decisions and proceedings relating to these online environments to date,<sup>34</sup> the number of cases lodged is growing. The development of such immersive interactive environments poses challenges to the existing copyright-contract relationship, especially where users are now perceived as consumers, and digital content becomes increasingly valuable,<sup>35</sup> with an estimated value of £25 billion.<sup>36</sup> Disagreements concerning digital game items require consideration under not only intellectual property law, but also contract law to determine firstly,

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<sup>28</sup> Hereafter EULAs.

<sup>29</sup> *World of Warcraft and EverQuest II*.

<sup>30</sup> *Second Life and Habbo Hotel*.

<sup>31</sup> Hereafter UTCCR 1999.

<sup>32</sup> See generally: F G Lastowka and D Hunter, 'The Laws of Virtual Worlds' [2004] 92 Cal L Rev 1; G Lastowka, 'User-Generated Content and Virtual Worlds' (2007-2008) 10 Vand J Ent & Tech L 893; B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA Publishing 2008); G Lastowka, *Virtual Justice: The New Laws of Online Worlds* (Yale University Press, 2010); J M Balkin, 'Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds' (2004) Virginia L Rev 90(8) 2043; M B Caramore, 'Help! My Intellectual Property is Trapped: Second Life, Conflicting Ownership Claims and the Problem of Access' (2008) Rich J L & Tech 3; J A T Fairfield, 'Virtual Property' (2005) 85 Boston U L Rev 1047.

<sup>33</sup> See for example: J Femminella, 'Online Terms & Conditions Agreements: Bound by the Web' (2003) 17 St John's J Legal Comm 57; B J Gilbert, 'Getting to Conscionable: Negotiating Virtual Worlds' End User License Agreements without Getting Externally Regulated' (2009) available at: <[http://works.bepress.com/brendan\\_gilbert/](http://works.bepress.com/brendan_gilbert/)> retrieved 16 February 2013; C Gringras, 'The Validity of Shrink-Wrap Licenses' (1996) Int'l J L & Info Tech 14(2) 77; J T Kunze, 'Regulating Virtual Worlds Optimally: The Model EULA' (2008-2009) N W J Tech & Intell Prop 102.

<sup>34</sup> Disputes that have arisen have concerned not only issues of copyright – for example: *MDY Indus. LLC v Blizzard Entertainment Inc* 2010 WL 5141269, 97 U.S.P.Q.2d (BNA) 1001 (9th Cir. Dec. 14, 2010); *Amaretto Ranch Breedables v Ozimals*, 3:10-cv-05696-CRB (N.D. Cal.) [2010] – but also contractual disputes - *Bragg v Linden Research Inc.* (487 F.Supp 2d 593 E.D. Penn) [2007]; *Hernandez v Internet Gaming Entertainment*, U.S. Dist. Ct. Southern District of Florida, Case No:07-CIV-21403-COHN/SELTZER [2007] as well as criminal prosecutions: *R v Mitchell* (2011) (unreported) and Court of Amsterdam 2 April 2009, *IJN* no. BH9789, BH9790 BH9791.

<sup>35</sup> Deloitte, 'Turn on to digital: getting prepared for digital content creation and distribution in 2012' (2006) available online; <[http://www.deloitte.com/assets/Dcom-UnitedKingdom/Local%20Assets/Documents/uk\\_TMT\\_Digital\\_turn\\_on\\_.pdf](http://www.deloitte.com/assets/Dcom-UnitedKingdom/Local%20Assets/Documents/uk_TMT_Digital_turn_on_.pdf)> retrieved 18 February 2013; PWC, 'Game changer: a new kind of value chain for entertainment and media companies' (December 2013) available online: <[http://www.pwc.com/en\\_US/us/industry/entertainment-media/publications/assets/pwc-value-chain.pdf](http://www.pwc.com/en_US/us/industry/entertainment-media/publications/assets/pwc-value-chain.pdf)> retrieved 18 February 2013.

<sup>36</sup> PWC, 'Digital lives: we value our digital assets at 25 billion.' (2013) available online: <<http://www.pwc.co.uk/cyber-security/insights/digital-lives-we-value-our-digital-assets-at-25-billion.jhtml>> retrieved 18 August 2014.

the proprietary interest and secondly, whether that has been displaced by the contractual agreement. In EULAs such as those used by online game developers, where there appears to be a displacement of proprietary interests, challenges to the contractual terms may then arise.

Who is to be the owner of such in-game items? What interests can a user claim to in-game items attached to his game account? How is this affected by the interaction with the environment? Does the EULA displace proprietary interests in these items? And if so, does the EULA do so with valid and binding contractual terms, or are these terms potentially not binding under the UTCCR? This work will question the relationship between proprietary and contractual interests in online game items because of the suggestion that a paying user of such a game or world may be deprived of his or her proprietary interests, particularly copyright - through one or more unfair contractual terms.

Crawford et al have suggested that video gaming has been firmly secured as part of our social and cultural lives,<sup>37</sup> but perhaps more significantly, contributes to questions of proprietary interests in a digital context. There are growing bodies of research connected to digital content, including questions of who owns such content upon the death of the account holder or user, and who – if anyone – can subsequently access it.<sup>38</sup> Whilst this work does not address this issue, it is concerned with a specific type of digital asset, and the ability to control and own such in-game assets. The legal problem that this work addresses is one which has arisen in the courts and which concerns the proprietary interests in, and control over in-game content. This work considers this aspect under the law of England and Wales, and makes an original contribution through such a consideration.

The number of cases directly concerning control and ownership of in-game items may be low at present, but the expansion and growth of gaming as a subculture, and other social issues

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<sup>37</sup> G Crawford, V K Gosling and B Light (eds), *Online Gaming in Context: The Social and Cultural Significance of Online Games* (Routledge 2011) 6.

<sup>38</sup> See for example: L Hickman, 'Bruce Willis v Apple: who actually 'owns' the music on an iPod?' (The Guardian, 3 September 2012) available online: <<http://www.theguardian.com/technology/shortcuts/2012/spe/03/bruce-willis-v-apple-owns-music-ipod>> retrieved 4 September 2012; L Edwards and E Harbinja, 'What Happens to my Facebook profile when I die?' Legal Issues Around Transmission of Digital Assets on Death' CREATE Working Paper No. 5 (2013) available online: <<http://www.create.ac.uk/publications/what-happens-to-my-facebook-profile-when-i-die-legal-issues-around-transmission-of-digital-assets-on-death/>> retrieved 18 August 2014.

connected to gaming,<sup>39</sup> suggests that gaming disputes is an area which will grow. It is also an issue which attracts – in this work – timely considerations of legislation protecting consumers from unfair contract terms,<sup>40</sup> and this is significant because consumers are generally regarded as being in a much weaker bargaining position. Online game users fall within this category, and this research therefore assesses the imbalances in EULA clauses, with specific attention highlighting control of game items because of the distinction between digital and physical goods, and the role contractual agreements play within that. The lack of cases in this area may indicate that there is no significant legal issue here. However, EULAs are widely used, especially for digital goods and services, and therefore the consideration of control and ownership is a significant one; not only for current users but future users and the future scope of unfair contract term mechanisms, which are likely to be more frequently used in the digital era, and which are currently the subject of reform.

Part of this research considers the relationships between the user and the game developer, and proprietary notions. Whilst technological advances such as the latest game consoles allow users to download the latest game releases,<sup>41</sup> in reality such purchases represent little other than licences to use the game.<sup>42</sup> However, this creates something of an illusion from the perspective of the lay consumer – and user – who may believe – however mistakenly – that he has ‘purchased’ the game or other digital content. This sense of purchase, and therefore ‘ownership’ is one which causes some conceptual difficulties between physical objects and digital objects, and therefore leads to what Leahy has suggested is an, “illusion.”<sup>43</sup> Nevertheless, there is a notion of ownership too which arises in the game items attached to game accounts developed in online games by the users. There is an obvious criticism here – and that surrounds the relationship that users have with such items.

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<sup>39</sup> H Lewis, ‘This is what online harassment looks like’ (The New Statesman, 6 July 2012) available online: <<http://www.newstatesman.com/blogs/internet/2012/07/what-online-harassment-looks>> retrieved 6 July 2012.

<sup>40</sup> Especially timely given the reform of the unfair terms regime in England and Wales, with the draft Consumer Rights Bill 2014.

<sup>41</sup> For example the latest Xbox One console included a digital download copy of FIFA 2014 when pre-ordered. P Goss, ‘Xbox One pre-orders will come bundled with FIFA 14’ (TechRadar 20 August 2013) available online: <<http://www.techradar.com/news/gaming/consoles/xbox-one-pre-orders-will-come-bundled-with-fifa-14-1174288>> retrieved 21 August 2013.

<sup>42</sup> See: Chapter 5 - Contractual Displacement of Proprietary Interests: EULAw? At 5.4. *EULA Case Studies*.

<sup>43</sup> R Leahy, ‘The Magical Illusion of Property Ownership’ (Dodd Scientifics, 13 August 2014) available online: <<http://www.doddscientifics.com/?page=story&id=41>> retrieved 14 August 2014.

Issues concerning the “illusion” of interests in in-game items have recently been highlighted by the Member of Parliament, Mike Weatherley, who posed a written question to the Secretary of State for Justice concerning the treatment of in-game items. More specifically, Mike Weatherley MP was questioning whether there will be a legislative move to consider distinct legislation to ensure that there is the same treatment for actions damaging in-game items as the treatment for equivalent actions in the offline world to non-game items.<sup>44</sup> This call for legislative action is, as suggested by Purewal,<sup>45</sup> something which judges are already having to address through various cases, including the Zynga case from 2010,<sup>46</sup> and the Dutch cases dealing with the illegitimate transfer of in-game items in *Runescape*.<sup>47</sup> Significantly, the Dutch Advocate General in the *Runescape* case highlighted that, “Virtual objects can represent an economic value both inside and outside the game. They are also individually distinguishable and transferable.”<sup>48</sup> This, together with MP Weatherley’s query, highlights that the issues surrounding in-game items are far from settled, and this work therefore considers connected issues.

The relationship users and consumers have with in-items in terms of ownership (and therefore control) stems from social influences,<sup>49</sup> and the markets – particularly capitalist markets – that such users are conditioned to use. Online gaming is little different in this regard to offline markets – capitalist markets also operate in online games and virtual worlds.<sup>50</sup> Such online platforms

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<sup>44</sup> HC Deb 21 July 2014, col 854W.

<sup>45</sup> J Purewal, ‘Should virtual theft be treated like real world theft? A UK MP says yes.’ (Gamer Law, 24 July 2014) available online: <[http://www.gamerlaw.co.uk/2014/should-virtual-theft-be-treated-like-real-world-theft-a-uk-mp-says-yes/?utm\\_source=Gamer%2FLaw+Newsletter&utm\\_medium=email&utm\\_campaign=f32322ec74-G%2FL+RSS+email+updates&utm\\_term=0\\_b6f5e3944e-f32322ec74-410247293](http://www.gamerlaw.co.uk/2014/should-virtual-theft-be-treated-like-real-world-theft-a-uk-mp-says-yes/?utm_source=Gamer%2FLaw+Newsletter&utm_medium=email&utm_campaign=f32322ec74-G%2FL+RSS+email+updates&utm_term=0_b6f5e3944e-f32322ec74-410247293)> retrieved 29 July 2014.

<sup>46</sup> *R v Mitchell* (2011) (unreported).

<sup>47</sup> M Boonk and A R Lodder, ‘Virtual Worlds: Yet Another Challenge to IP Law’ (2007) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1079970](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1079970)> retrieved 11 May 2010.

<sup>48</sup> J Purewal, ‘The second virtual goods crime: is Runescape theft, theft?’ (Gamer Law, 4 July 2011) Available online: <<http://www.gamerlaw.co.uk/2011/the-second-virtual-goods-crime-is-runescape-theft-theft/>> retrieved 10 July 2011.

<sup>49</sup> See for example: B R Scott, ‘The Political economy of Capitalism’ HBS Working Paper No 07-037 (2006) available online: <<http://www.hbs.edu/faculty/Publication%20Files/07-037.pdf>> retrieved 20 August 2013; M Verter, ‘The Production and Consumption of Self and Property in Locke, Hegel and Levinas’ (MRP for Social and Political Thought) available online: <[http://www.waste.org/~roadrunner/writing/Levinas/SelfAndProperty\\_FinalEssay\\_WEB.htm](http://www.waste.org/~roadrunner/writing/Levinas/SelfAndProperty_FinalEssay_WEB.htm)> retrieved 14 August 2014.

<sup>50</sup> R Bloomfield, ‘Property Rights in Virtual Worlds’ (TerraNova, 15 June 2007) available online: <[http://terranova.blogs.com/terra\\_nova/2007/06/property\\_rights.html](http://terranova.blogs.com/terra_nova/2007/06/property_rights.html)> retrieved 20 August 2013; R Bloomfield, ‘World of Bizcraft’ JVWR Vol 2, No 3 (2009); A Sandberg, ‘Protectionist Deities v Economy of Fun: Ownership of Virtual Possessions’ (Oxford University Practical Ethics Blog, 14 October 2008) available online: <<http://blog.practicaethics.ox.ac.uk/2008/10/protectionist-deities-vs-the-economy-of-fun-ownership-of-virtual-possessions/>> retrieved 20 August 2013; E Hoffman, ‘We The Gamers’ (The Escapist, 7 October 2008) available online: <<http://blog.practicaethics.ox.ac.uk/2008/10/protectionist-deities-vs-the-economy-of-fun-ownership-of-virtual-possessions/>> retrieved 20 August 2013.

encourage users to believe and operate in these markets, and create game elements designed to foster and replicate capitalist transactions. Online games exist as part of these capitalist markets and also follow the norms outlined within them. Whilst it may not be desirable for online games and virtual worlds to be constrained in this way, all four environments considered in this work operate in this manner, and do so in relation to not only game accounts, but also game items. This is reflected through the system of trading, but also the encouragement given to users to invest in their game accounts.<sup>51</sup> This work therefore does not seek to challenge the paradigm in which these environments operate,<sup>52</sup> but questions the balance of interests between the user as consumer, and the developer, especially based on the pre-existing constructions of proprietary interests.

When aspects of in-game activity are discussed, there is perhaps, a question of whether there ought to be any intervention from the 'real' world at all, especially for things which are predominantly connected to the virtual environment, and which arguably do not impact upon the real world. However, there are reasons why there should be some form of intervention in relation to gaming issues. Gaming property is digital and it has value.<sup>53</sup> This value is similar to the value – and attachment – arising with online downloads, especially music and films.<sup>54</sup> Digital goods in this context have long been protected by copyright law,<sup>55</sup> and the rights of owners of such works have been at the forefront of recent discussions on potential changes to copyright.<sup>56</sup> As such, it is not inconceivable that there is a transition to recognising other forms of equally valuable – and protectable – digital content. It has been a long standing principle of the law that

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<sup>51</sup> For example, online gaming environments include in-built systems for transactions, and even, in the case of *Second Life*, currency exchanges which allow real currency to be exchanged for the *Second Life* currency, which in turn encourages users to engage in transactions akin to those in the offline world.

<sup>52</sup> The author accepts that there may be other social constructions of property, but considers in this work, the existing capitalist construct through a consideration of proprietary and contractual considerations.

<sup>53</sup> A virtual sword in the game *Legend of Mir 3* was worth over £400; BBC News, 'Chinese Gamer Sentenced to Life' (8 June 2005) <<http://news.bbc.co.uk/1/hi/4072704.stm>> retrieved 19 November 2009. Similarly, other examples include game items worth over \$26 000; A Krotoski, '\$26 500 paid for property that doesn't exist' (*Guardian Unlimited Games Blog*) 15 December 2004, available online: <[http://blogs.guardian.co.uk/games/archives/virtual\\_worlds/2004/12/26500\\_paid\\_for\\_property\\_that\\_doesnt\\_exist.html](http://blogs.guardian.co.uk/games/archives/virtual_worlds/2004/12/26500_paid_for_property_that_doesnt_exist.html)> retrieved 19 November 2009.

<sup>54</sup> WIPO, 'Rights, Camera, Action! IP Rights and the Film-Making Process' (Creative Industries Booklet No. 2) available online: <[http://www.wipo.int/export/sites/www/freepublications/en/copyright/869/wipo\\_pub\\_869.pdf](http://www.wipo.int/export/sites/www/freepublications/en/copyright/869/wipo_pub_869.pdf)> retrieved 12 June 2013, 26; Department for Culture, Media and Sport, 'Skills Review of Video Game and Visual Effects Industries' (DCMS News) 1 February 2011, available online: <[http://www.culture.gov.uk/news/news\\_stories/7754.aspx](http://www.culture.gov.uk/news/news_stories/7754.aspx)> retrieved 13 March 2011.

<sup>55</sup> CDPA 1988, s1(1)(a) and s1(1)(b).

<sup>56</sup> Digital Economy Act 2010; *BT Plc and TalkTalk Telecom Group Plc v Secretary of State for Culture, Olympics, Media and Sport and others* [2012] EWCA Civ 232.

what is worth copying is worth protecting,<sup>57</sup> and gaming items are worth copying, as cases have indicated.<sup>58</sup> Moreover, from the perspective of fairness, it is perhaps appropriate that consideration be given to gaming items and intervention in gaming. This is especially compelling at the same time as other reforms are being made to the copyright system in England and Wales,<sup>59</sup> but also at a European level.<sup>60</sup> Encouragingly, digital content is to be included in the revised consumer protection framework<sup>61</sup> and indicates that perhaps there is an awareness of the challenges ahead for online gaming.

There are other, additional reasons as well. For instance, what happens online does not stay online, especially in a digital society where the line between online and offline is becoming increasingly blurred.<sup>62</sup> The implications and consequences of actions in-game items can be very real. This is evidenced by the physical harm that some gamers have suffered as a result of their online actions.<sup>63</sup> In the offline world this is dealt with under the criminal law,<sup>64</sup> although there is usually little or no penalty for the online element of the issue, creating an impression that one is more valuable than the other.

Online games are a significant part of the digital economy, providing jobs and income for both those who are employed to create and manage the games, and also providing additional incomes

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<sup>57</sup> *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601, per Petersen J at 609-610.

<sup>58</sup> *Amaretto Ranch Breedables v. Ozimals*, 3:10-cv-05696-CRB (N.D. Cal.) [2010]; *Eros, LLC, v. John Doe*, US Dist. Ct. Middle District of Florida, Case No: 8:07-cv-1158-T-24TGW [2007].

<sup>59</sup> For example; the new technical exceptions to copyright, as outlined by the Government response to the Hargreaves' Review: HM Government, 'The Government Response to the Hargreaves Review of Intellectual Property and Growth' (August 2011) available online: <<http://www.ipo.gov.uk/ipresponse-full.pdf>> retrieved 1 October 2012; Intellectual Property Office, 'New Exception for Parody; New Exception for Private Copying; New Exception for Quotation' (7 June 2013) available online: <<http://www.ipo.gov.uk/types/hargreaves/hargreaves-copyright/hargreaves-copyright-techreview.htm>> last accessed 7 June 2013.

<sup>60</sup> The Intellectual Property Office, 'Copyright in Europe: Call for Views' (July 2013) available online: <<http://www.ipo.gov.uk/consult-2013-copyright-europe.pdf>> retrieved 20 July 2013.

<sup>61</sup> Draft Consumer Rights Bill (BIS/13/925) 12 June 2013, available online: <<https://www.gov.uk/Government/publications/draft-consumer-rights-bill>> retrieved 15 June 2013.

<sup>62</sup> S Humphreys, 'Discursive constructions of MMOGs and some implications for policy and regulation.' (2009) *Media International Australia* 130: 53. Ofcom, 'TV, phones and Internet take up almost half our waking hours' Ofcom Marketing Report 2010 available online: <<http://consumers.ofcom.org.uk/2010/08/tv-phones-and-Internet-take-up-almost-half-our-waking-hours/>> retrieved 17 February 2013.

<sup>63</sup> B Slattery, 'Woman jailed for murdering avatar' *Washington Post* (Washington, 27 October 2008) available online: <[http://articles.washingtonpost.com/2008-10-27/news/36838980\\_1\\_maple-story-electronic-data-avatar](http://articles.washingtonpost.com/2008-10-27/news/36838980_1_maple-story-electronic-data-avatar)> retrieved 18 February 2013; BBC News, 'Chinese Gamer Sentenced to Life' (8 June 2005) <<http://news.bbc.co.uk/1/hi/4072704.stm>> retrieved 18 February 2013; A Eisen, 'Feminist Frequency Kickstarter Successful Despite Internet Ashaats' (12 June 2012) <<http://www.gamepolitics.com/2012/06/12/feminist-frequency-kickstarter-successful-despite-Internet-ashaats>> retrieved 20 June 2012.

<sup>64</sup> For example, Offences against the Person Act 1861; Theft Act 1968.

for the users.<sup>65</sup> The value of the digital industry in the UK has recently been recognised,<sup>66</sup> and it is more valuable than the film industry.<sup>67</sup> Interestingly, the protection received by in-game content generated by users, is of a reduced coverage compared to that of the protection received by films and music under the moral rights provisions of the CDPA 1988,<sup>68</sup> again suggesting that there may be a division in the protective framework. The example of the lack of moral rights for computer software and computer generated creations<sup>69</sup> is a stark example of this. This argument is even more compelling when theoretical justifications are considered,<sup>70</sup> but again raises questions over the distinction between what is ‘real’ and what is ‘virtual’ and whether this is a useful division, or whether it serves to mask the real issues surrounding gaming. This will be considered through the interrelationships of contract and copyright in this work.

### iii. Proprietary & Contractual.

The issue under consideration in this work is the balance struck through the copyright-contract approach to proprietary interests in online games and virtual worlds. As such, there are two concepts which are central to this; firstly, proprietary rights, and secondly, contractual rights. These rights – and indeed concepts – differ from one another yet in the context of online games, also overlap.

Property, as a resource is something, which Gray suggests depends upon its ability to be excludable.<sup>71</sup> Essentially, this refers to the notion that in order for something to be controlled by the person claiming it, the access to it must be able to ‘regulate’ the access of others to the object.<sup>72</sup> This notion, whilst arguably suited to real property such as land, is also indicative of the notion of property to be discussed in this work. This approach to property is something which

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<sup>65</sup> J Dibbell, *Play Money* (Basic Books 2007).

<sup>66</sup> National Institute on Economic and Social Research (NIESR), ‘Digital Economy 40% bigger than official statistics suggest’ 22 July 2013, available online: <<http://niesr.ac.uk/press/digital-economy-40-cent-bigger-official-statistics-suggest-11498#.UfEGiqNjum4>> retrieved 23 July 2013.

<sup>67</sup> I Livingstone and A Hope, ‘Next Gen: Transforming the UK into the world’s leading talent hub for the video games and creative effects industries’ NESTA (February 2011) available online: <[http://www.nesta.org.uk/home1/assets/features/next\\_gen](http://www.nesta.org.uk/home1/assets/features/next_gen)> retrieved 1 March 2011, 4.

<sup>68</sup> CDPA 1988 s81(2).

<sup>69</sup> CDPA 1988 s81(2).

<sup>70</sup> See generally: Chapter 2 - Property Matters: Virtually Justified?

<sup>71</sup> K Gray, ‘Property in Thin Air’ (1991) 50 Cambridge LJ 252, 305.

<sup>72</sup> R Cunnington, ‘Contract Rights as Property Rights’ in A Robertson (ed), *The Law of Obligations: Connections and Boundaries* (Routledge Cavendish 2004) 182; R George Wright, ‘Fundamental Property Rights’ 21 Val U L Rev 75 (2011) 75, 86.

identifies the concept of ownership. Harris thus describes the use of the term ‘property’ as indicating the resource in which ownership rights may pertain.<sup>73</sup> As such, proprietary interests are concerned with the enforcement of rights against the world at large, rather than against specific individuals or identified parties. Intellectual property can therefore also be considered to fall within this scope because similar concerns arise as to the exclusion of others<sup>74</sup> - although this is more problematic in the context of copies of digital content and intangible creations.<sup>75</sup> Virtual property, can also be defined by reference to ideas of access and control, and it has been suggested that virtual property – for example, in-game swords – is distinct from intellectual property i.e. the copyright in the software code which produces the representation of a sword in an online game. This differentiation arises in virtual worlds and online games, where it has been indicated that virtual property is similar in its characteristics to real property but exists in virtual environments.<sup>76</sup> There are also aspects of control and access attached to virtual property – in the form of in-game items. Virtual property as game items and game land can also benefit – it is suggested – from intellectual property rights,<sup>77</sup> especially where users of games are involved in the creation of their own independent content through the creation of software code. Moreover, the in-game items conceived by the online games and virtual worlds in this work is referred to as intellectual property by the respective EULAs,<sup>78</sup> and the users of such environments may therefore have claims to proprietary interests in their game content on the basis of regulated control and access.

The related concept in this work; that of contract<sup>79</sup> – and contractual rights – may interfere with these proprietary claims, and alter the access to, and control of, such interests. Contractual rights

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<sup>73</sup> J W Harris, *Property and Justice* (OUP 2002) 12; 13.

<sup>74</sup> *Buckingham CC v Moran* [1990] Ch 623 per Slade LJ at 643E; K Gray and S F Gray, ‘The Idea of Property in Land’ in S Bright and J K Dewar (eds), *Land Law: Themes and Perspectives* (OUP 1998) 24.

<sup>75</sup> R Posner, ‘Antitrust in the New Economy 3’ Uni Chi L Sch, J M Olin Law and Economics Working Paper No 106 (2000); M Boldrin and K D Levine, ‘Economic and Game Theory: Property Rights and Intellectual Monopoly’ available online: <<http://www.dklevine.com/general/intellectual/coffee.htm>> retrieved 12 February 2012.

<sup>76</sup> P K Yu, *Intellectual Property and Information Wealth: Copyright and Related Rights* (Praeger Publishers, 2007) 415; An W J, ‘The Second Life of Judge Richard A Posner’ (*New World Notes*, 11 December 2006) <[http://nwn.blogs.com/nwn/2006/12/the\\_second\\_life.html](http://nwn.blogs.com/nwn/2006/12/the_second_life.html)> retrieved 29 November 2010.

<sup>77</sup> M Boonk and A Lodder, ‘How to apply intellectual property to virtual worlds? On the blurring borders between real world (IRL) and virtual reality (in-game)’ BILETA Conference Paper, 16-17 April 2007, available online: <<http://www.bileta.ac.uk/content/files/conference%20papers/2007/How%20to%20apply%20intellectual%20property%20law%20to%20Virtual%20worlds.pdf>> retrieved 29 November 2010.

<sup>78</sup> P K Yu, *Intellectual Property and Information Wealth: Copyright and Related Rights* (Praeger Publishers, 2007) 415; See for example *World of Warcraft* EULA, Clause 4, available online: <<http://us.blizzard.com/en-us/company/legal/eula.html>> retrieved 20 February 2011.

<sup>79</sup> There is not per se a formal, agreed legal definition of a contract in English law – but there is as, McKendrick highlights greater certainty in relation to the aspects and principles connected to binding agreements. See: E McKendrick, *Contract Law – Text, Cases and Materials* (5<sup>th</sup> edn, OUP 2012) 4.



differ to proprietary rights, and are usually enforceable against only the stipulated parties to the contractual agreements.<sup>80</sup> The contractual agreements – EULAs – in this work are between the developer of the online game or virtual world and the user of it<sup>81</sup> – and the rights under the contract must therefore be enforced against those parties. In this way, there is also some notion of excludability, but it is much more specific and focussed. The contract is a specific form of relationship between only those who have the intention to consent to its terms<sup>82</sup> – it is not to be enforced against anyone who is not a party to it. As such, this is very different to the ways in which proprietary interests arise, and are enforced. This is particularly significant in this work because the contracts will be examined in order to determine the proprietary interests of users but also because contracts are voluntarily undertaken and performance under them is owed to specific persons.

The relationship between proprietary rights and contractual rights is especially significant because proprietary interests such as copyright arise automatically,<sup>83</sup> whereas contractual rights do not, and contractual rights therefore may displace the automatic proprietary rights.<sup>84</sup> In the game context, copyright arises not only in the game environment as a whole work, but also in all of the components that combine to make the game, including for example, individual characters and individual hairstyles.<sup>85</sup> The automatic proprietary interest – copyright – can then be displaced by the contractual EULA that each user is required to agree to before accessing the full environment. Consequently, the automatically arising proprietary interests are displaced by the contractual agreement containing terms drafted to ensure that developers retain all of the rights in the game or environment.<sup>86</sup> This would for example, mean that a user who has created an individual character or hairstyle would not benefit from the copyright; it would vest in the game developer as a contractual transfer of the automatically arising proprietary interest. This could make the user liable to the developer for copyright infringement, were the user to then use a copy of the

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<sup>80</sup> E McKendrick, *Contract Law – Text, Cases and Materials* (5<sup>th</sup> edn, OUP 2012) 5.

<sup>81</sup> See for example, *Second Life* Terms of Service Agreement (*Linden Lab*, 15 December 2010) available online at: <<http://secondlife.com/corporate/tos.php>> retrieved 29 August 2011, Preamble.

<sup>82</sup> *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG (UK Production)* [2010] UKSC 14 per Lord Clarke.

<sup>83</sup> Once the requirements of fixation and originality have been met under Part 1 of the CDPA 1988, and the requirement of qualification has been satisfied under s153 CDPA 1988.

<sup>84</sup> R P Merges, ‘The End of Friction? Property Rights and Contract in the “Newtonian” World of On-line Commerce’ 12 *Berkeley Tech L J* 115 (1997) 115, 121.

<sup>85</sup> B Duranske, ‘*Second Life* Hairstyle Raises Copyright Question’ (*Virtually Blind*, 15 February 2007) <<http://virtuallyblind.com/2007/02/15/second-life-hairstyle-copyright-question/>> retrieved 11 May 2010.

<sup>86</sup> See for example *World of Warcraft* EULA, Clause 4, available online: <<http://us.blizzard.com/en-us/company/legal/eula.html>> retrieved 20 February 2011.

character or hairstyle without permission to do so.<sup>87</sup> As such, before there is a contractual right enforceable against the contracting signatory, there must be a proprietary interest otherwise there cannot be a transfer of the item and the proprietary rights attached to it. Furthermore, the contracts in game scenarios provide for proprietary transfers, but often also outline the rules and norms by which users agree to behave in these environments, and therefore outline the systems of control and governance within these spaces.<sup>88</sup> The interrelationship between proprietary rights and contractual rights is therefore one which will be examined in greater depth in the remainder of this research in assessing the balance between the positions of the users and the developers in MMORPGs and virtual worlds.

## **v. Methodological Approach**

The research methodology used in this study is an examination of legal doctrine and legal measures. The research for this work was carried out predominantly through the use of academic databases and libraries. The analysis is the result of examining a body of documentary material, most usually in the format of legislation, contractual agreements from four online interactive spaces - two MMORPGs and two Virtual Worlds - cases and academic commentary. The examination of the EULAs from a selection of online interactive spaces is especially useful when considering the relationship between contractual and proprietary rights. Of equal importance is the body of discourse relating to copyright reform in England and Wales, and, of course, the recent reviews of intellectual property.<sup>89</sup>

## **vi. Scope of this work**

The dominant focus in this research rests upon the contractual control, and displacement of interests of users. The hypothesis requires consideration of both copyright and contract.

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<sup>87</sup> s16; s17 CDPA 1988.

<sup>88</sup> One example of which is the *EverQuest II* Code of Conduct: *EverQuest II* Code of Conduct; 'Play Nice Policies – Activity within *EverQuest II*' <[https://help.station.sony.com/app/answers/detail/a\\_id/16213](https://help.station.sony.com/app/answers/detail/a_id/16213)> retrieved 29 August 2011.

<sup>89</sup> A Gowers, 'The Gowers Review of Intellectual Property: Independent Review' (December 2006) <[http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06\\_gowers\\_report\\_755.pdf](http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf)> retrieved 17 October 2009; I Hargreaves, 'Digital Opportunity: A review of Intellectual Property and Growth' (2011) available online: <<http://www.ipo.gov.uk/ipreview.htm>> retrieved 14 December 2012.

Copyright is the intellectual property right which provides protection for computer software,<sup>90</sup> including MMORPGs and Virtual Worlds and contract provides for the allocation of copyright and broader governance of such online environments. The central hypothesis has a specific focus upon the rights of users and the theoretical and legislative approaches to the contractual allocation of potentially valuable copyright and proprietary interests in in-game properties.

This work uses three property theories: Lockean Labour Theory, Utilitarian Theory and Hegel's Personality Theory<sup>91</sup> to consider potential justifications for user claims in in-game content. These theoretical foundations are considered in a narrow context, focussing on a justification for specific rights. This work does not consider intellectual property theory in specific detail, nor does it consider copyright theory in this way either. Whilst these theories do exist, they are of limited use in justifying user rights in MMORPGs and Virtual Worlds – the philosophical theories used in this work provide stronger foundations for user claims to proprietary interests in online games and Virtual Worlds.

This work has identified four online entities which have formed the basis of the substantive discussion within Chapter 5: 'Contractual Displacement of Proprietary Interests: EULAw?' The EULAs identified are split into two categories; two MMORPGs and two Virtual Worlds to allow for analysis of specific clauses but also to allow comparisons between the two types of online environment. The EULA clauses are considered in detail, and are examined to highlight areas of potential imbalance. The practical examination of EULA clauses will add to our understanding of how contractual clauses control MMORPGs and Virtual Worlds, but will also indicate how proprietary interests are controlled through contractual mechanisms. Contractual clauses are explored through a legislative perspective of fairness, building upon theoretical discussions in Chapter 2: 'Property Matters: Virtually Justified?' The discussions are then developed in respect of copyright, which is applied to a series of practical examples of gaming activity to determine any potential claims to copyright users may benefit from in Chapter 4: 'MMORPGing & Copyright.' The focus of this research was premised on the perspective of user rights, and in this respect, each MMORPG or Virtual seeks to control the users in a particular environment through a system of contractual control, and alternatives to control are considered in Chapter 6:

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<sup>90</sup> Copyright, Designs and Patents Act 1988, s3(1)(b).

<sup>91</sup> See: Chapter 2 - Property Matters: Virtually Justified? At 2.4 *Utilitarian Theory*; 2.5. *Hegel's Personality Theory* and 2.6. *Lockean Theory of Labour*.

‘Governance Structures and the Alternatives.’ This limited discussion considers cyberspace more widely, before focussing on elements that challenge the control of these environments.

This research focuses on the law of England and Wales, and therefore references to English law may be interpreted as such. References may be made to other jurisdictions and countries, but this is for the sake of examples or for comparative purposes, and no in-depth, detailed comparative study between legal jurisdictions has been made.

#### **i.v. Overview of Chapters**

Chapter 1 – ‘Understanding MMORPGs’ introduces online games and Virtual Worlds, and outlines some of the terminology used to describe these online environments. This chapter also indicates the range of diverse opinion in attempting to define what these spaces are. ‘Understanding MMORPGs’ illustrates the different spaces. This chapter contributes to our knowledge surrounding the different categories of avatars and the differences between avatars and players. This is significant as different categories of avatars have different roles, and may therefore have differing claims to potential rights. Chapter 1 outlines the different categories and attributes of online games and highlights the distinctions between these entities and non-online games.

Chapter 2 – ‘Property Matters: Virtually Justified?’ builds upon Chapter 1 by identifying various theories which could form a justification for users’ rights in in-game content. This chapter is concerned with the theoretical justifications for protecting in-game content and considers three theories: Utilitarian Theory,<sup>92</sup> Hegel’s Personality Theory<sup>93</sup> and Lockean Labour Theory.<sup>94</sup> ‘Property Matters: Virtually Justified?’ builds upon existing justifications of intellectual property, and this research identifies that whilst there are justifiable claims under each theory, Lockean Labour Theory offers the strongest basis. Lockean Theory is then analysed and its weaknesses considered, especially given the later reliance upon this approach. The research in Chapter 2 offers an additional perspective to existing philosophical and theoretical elements of MMORPGs

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<sup>92</sup> D Lyons, *In the Interest of the Governed: A Study in Bentham’s Philosophy of Utility and Law* (Clarendon Press 1991) 131.

<sup>93</sup> G S Alexander and E M Penalver, *An Introduction to Property Theory* (CUP 2012) 57.

<sup>94</sup> P Laslett (ed), *John Locke: Two Treatises of Government* (Cambridge University Press 1988).

and Virtual Worlds and offers a fresh justification for basing claims on ‘Value Theory,’<sup>95</sup> reflecting the value which users place upon their game accounts and items. Part of the discussion here addresses the types of property under consideration in the remainder of this research.

Chapter 3 – ‘Digital Copyright: 1988 or Web 2.0?’ introduces the legislative scheme of protection for computer software in England and Wales and highlights the legislative developments relating to games. This chapter charts the historical development of the protective regime to the present system under the Copyright, Designs and Patents Act 1988. Chapter 3 offers an understanding of copyright law in England and Wales in how it offers protection to computer software, but especially how it protects MMORPGs and Virtual Worlds. The research here is framed in terms of the founding copyright principles and the fundamental tenets that have developed through precedent. This chapter offers a discussion of the foundational elements of copyright which are based upon theoretical perspectives outlined in Chapter 2 - ‘Property Matters: Virtually Justified?’ The issues discussed in Chapter 3 precede the application of legal principles to practical examples in MMORPGs and Virtual Worlds which will form later analysis in Chapter 4 – ‘MMORPGing & Copyright.’

Chapter 4 – ‘MMORPGing & Copyright’ demonstrates that there are persuasive claims to in-game items and proprietary interests for users. The research here demonstrates the diverse coverage of copyright, which is reflected in part through the structural challenges faced in this chapter. Chapter 4 contributes a detailed understanding of copyright in MMORPGs and Virtual Worlds in two distinct, yet, related ways. Firstly, copyright in online games and Virtual Worlds as overall entities is examined. The second consideration of copyright offered here discusses issues of copyright arising through the activities of users in online environments. It is seen from the research that users have strong claims for copyright in in-game items, and strong claims for moral rights irrespective of the contractual clauses outlined in Chapter 5. The hypothesis tested in Chapters 4 and 5 builds upon the research in Chapters 2 and 3 to frame the discussion in ‘Chapter 6: Governance Structures and the Alternatives.’

Chapter 5 – ‘Contractual Displacement of Proprietary Interests: EULAw?’ offers a detailed assessment of four End User Licence Agreements to determine the contractual stance on user claims in game content. Chapter 5 draws upon the EULAs of *World of Warcraft*, *Second Life*,

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<sup>95</sup> See: Chapter 2 – Property Matters: Virtually Justified? At 2.7. *Theory for Parity?*

*EverQuest II* and *Habbo Hotel*. It offers a fresh appreciation and comparative analysis of the common clauses laid out in these agreements. This chapter highlights the significance of contractual agreements, and by extension contract law. The research here examines, from a practical perspective, the implications of EULA clauses before examining the fairness of specific clauses contained within these agreements and tests the hypothesis that the contractual provisions allocating rights to users are potentially unfair. This involves discussion and application of the Unfair Terms in Consumer Contracts Regulations 1999 and their applicability to EULAs. It is seen that some of the contractual provisions which users are required to agree to, are potentially imbalanced and disproportionate. The research outlined in Chapter 5 draws upon theoretical considerations from Chapter 2 – ‘Property Matters: Virtually Justified?’

Chapter 6 – ‘Governance Structures and the Alternatives’ draws upon the preceding research to expand our knowledge and understanding of the current copyright-contract governance approach adopted in MMORPGs and Virtual Worlds. This discussion emphasises approaches to governing these spaces – and the associated challenge of enforceability, but the discussion itself was also challenging, especially as MMORPGs and Virtual Worlds are fragmented environments with fragmented approaches to governance and control. It assesses the current system of EULA control and regulation, and considers a range of potential alternative approaches in light of the conclusions reached in Chapters 4 and 5 about users’ claims for copyright and the potential failings of the contractual model. It is seen from the research that EULAs are potential equivalents to constitutions, and could potentially contain all-encompassing sets of rules for interactions within MMORPGs and Virtual Worlds. Chapter 6 offers a fresh consideration of governing mechanisms, and elements of the discussion in Chapter 6 – ‘Governance Structures and the Alternatives’ draw upon the issues identified in Chapter 1 – ‘Understanding MMORPGs.’

The concluding remarks highlight the central hypothesis of this work - that the contractual-copyright system of displacing rights in in-game items is unfair to users, and that as a result there is a significant and unjustifiable imbalance between the interests and position of developers and users. The concluding remarks explain how the central hypothesis has been examined throughout this research. Virtual Worlds and MMORPGs are growing in complexity;<sup>96</sup> disputes are rising but it seems that the law is not addressing the situation. Social norms have played a leading role

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<sup>96</sup> BBC News, ‘Eve players stage giant online space battle’ 29 July 2013, available online: <<http://www.bbc.co.uk/news/technology-23489293>> retrieved 29 July 2013.

in internet control and policing, and perhaps these, combined with some private regulatory mechanisms or an oversight body, are the leading ideas for overhauling the current system. This work offers an understanding of how the copyright-contract approach is potentially disproportionate to users - based on theoretical and legislative interpretations of balance through a consideration of both copyright and contract.

Words importing the masculine gender include the feminine gender and vice versa. This thesis reflects the law as it stood at 30 July 2013.<sup>97</sup>

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<sup>97</sup> The EULAs examined are the EULAs as applicable at the time they were last retrieved.

## *Chapter 1*

### Understanding MMORPGs.

#### 1.1. Introduction.

In discussing the issues that arise in relation to proprietary interests – in particular copyright – in online interactive environments, it is important to understand what these spaces are, and what they are not. Similarly, when considering legal disputes that can arise in these spaces, an appreciation of how they differ from both the offline world, but also from each other, is useful.

Bell defines Massively Multiplayer Online Role Playing Games<sup>98</sup> and Virtual Worlds through their characteristics: “A synchronous, persistent network of people, represented as avatars, facilitated by networked computers.”<sup>99</sup> This is not the only suggested definition applicable to such spaces. The European Network and Information Security Agency<sup>100</sup> for example, suggests that there are four categories into which games can be placed depending upon their precise characteristics.<sup>101</sup> Kennedy, meanwhile, adopts a similar approach to that of Bell,<sup>102</sup> indicating that whilst a definition is hard to determine, characteristics are a useful means of identification.<sup>103</sup> The Virtual World Review adopts a different focus,<sup>104</sup> building upon the ideas of Bell<sup>105</sup> and Kennedy<sup>106</sup> that there are common characteristics; but, also, distinguishing features. The difficulties in agreeing upon a definition, and classification of games, are indicative of some of the challenges they pose to the application of traditional legal rules, but also in understanding the issues arising within them.

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<sup>98</sup> Hereafter MMORPGs.

<sup>99</sup> M Bell, ‘Toward a Definition of Virtual Worlds’ (2008) J V W R 1(1).

<sup>100</sup> Hereafter ENISA.

<sup>101</sup> ENISA Position Paper, ‘Virtual Worlds, Real Money—Security and Privacy in Massively Multiplayer Online Games and Social and Corporate Virtual Worlds’ (November 2008), available online: <<http://www.enisa.europa.eu>> retrieved 1 August 2011, 8.

<sup>102</sup> M Bell, ‘Toward a Definition of Virtual Worlds’ (2008) J V W R 1(1).

<sup>103</sup> R Kennedy, ‘Virtual Rights? Property in Online Game objects and Characters’ (June 2008) Information & Communication Technology Law Vol 17(2), 95, 96.

<sup>104</sup> Virtual Worlds Review, ‘What Is A Virtual World?’ available online: <<http://www.virtualworldsreview.com/info/whatis.shtml>> retrieved 1 August 2011.

<sup>105</sup> M Bell, ‘Toward a Definition of Virtual Worlds’ (2008) J V W R 1(1).

<sup>106</sup> R Kennedy, ‘Virtual Rights? Property in Online Game objects and Characters’ (June 2008) Information & Communication Technology Law Vol 17(2), 95, 96; K Barker, ‘MMORPGing, Law and Lingo’ in M Freeman and F Smith (eds) *Current Legal Issues: Law and Language* (Vol 13, OUP 2013).



The discussion identifies some commonly used terminology definitions in the realm of online gaming and virtual worlds, but will also broadly highlight the dangers of not having an agreed upon, or common understanding, of such spaces. This is especially significant in terms of understanding the issues in potential legal disputes that could arise from interactions in such spaces, including disputes over, and claims to proprietary interests in in-game content.<sup>107</sup> This is directly relevant to both the contractual framework<sup>108</sup> applicable in all of these online platforms but also in identifying potential imbalances between the interests of the various parties to online gaming.

This discussion is the preface to ensuring consideration of copyright for in-game items and user creativity, but also governance of online environments. This chapter will conclude that MMORPGs and Virtual Worlds as one category can encompass a range of different environments, and that some greater element of categorisation is desirable. It will also highlight that these spaces are valuable and attract high volumes of users, therefore it is useful to have a clear appreciation of the nuances in the terminology applicable to this genre of mass media.

## **1.2. The Importance of MMORPGs and Virtual Worlds.**

*World of Warcraft* is one example of a MMORPG that, at its peak had over 12 million users.<sup>109</sup> In 2006, it had attracted some seven million subscribers,<sup>110</sup> an increase of five million users in just over four years. This is just one of a number of Virtual Worlds and MMORPGs that are available, and highlights the size of the market for online games, which was estimated to include 100 million users in 2009.<sup>111</sup> Given the large volume of users, questions have arisen over, in particular, the legal rights attached to these environments, and who benefits from proprietary interests such as copyright.<sup>112</sup> Questions often include: are online games and worlds the same as ordinary

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<sup>107</sup> See: Chapter 4 - MMORPGing & Copyright: At 4.8. *Subsets of Creativity – a new context for user creativity?*

<sup>108</sup> See: Chapter 5 - Contractual Displacement of Proprietary Interests: EULAw? At 5.3. *EULAs and ToS – General Position.*

<sup>109</sup> Blizzard Entertainment, 'World of Warcraft Subscriber Base reaches 12 Million Worldwide' (*Blizzard Entertainment Press Release*), 7 October 2010, available online: <<http://us.blizzard.com/en-us/company/press/pressreleases.html?101007>> retrieved 14 October 2010.

<sup>110</sup> D P Sheldon, 'Claiming Ownership But Getting Owned: Contractual Limitations on Asserting Property Interests in Virtual Goods' (2006-2007) 54 UCLA L Rev 751, 757.

<sup>111</sup> G Lastowka, *Virtual Justice: The New Laws of Online Worlds* (Yale University Press 2010) 9.

<sup>112</sup> See for example: S Humphreys and Others, 'Fan based production for computer games: User led innovation, the 'drift of value' and the negotiation of intellectual property rights' Media International Australia incorporating Culture and Society (2005) February, Issue 114, 16; Y H Lee, 'Play again? Revisiting the case for copyright

computer programs, or do they differ in some way? Do online games and worlds need to be granted different protection?<sup>113</sup> Before any of these legal rights can be determined, the nature and characteristics of these virtual spaces will be outlined.

From the earliest software, games have developed, growing from text-based entities<sup>114</sup> to fully functional three-dimensional graphical representations of places other than the real world. As computers and technology have developed, so have software programming abilities and capabilities, graphics, video attributes and networking technology, and in particular, the Internet. Essential MMORPG aspects include the ability to interact with other players spread across the globe, but also to compete with them over in-game items.<sup>115</sup> These in-game items encompass a wide selection: from avatars<sup>116</sup> to swords;<sup>117</sup> houses, virtual land,<sup>118</sup> shields and other game specific items, some of which are fought for, devalued,<sup>119</sup> stolen<sup>120</sup> or even created by users. This activity leads to an understanding on the behalf of users that there is value<sup>121</sup> in the in-game items they have created, gathered and worked for,<sup>122</sup> and this causes conflict where the EULAs seek to displace proprietary interests in in-game items.

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protection of gameplay in videogames' [2012] EIPR 34(12); Y F Lim, 'Is It Really Just A Game? Copyright and Online Role-Playing Games' [2006] JIPL&P 1(7) 481.

<sup>113</sup> M Turner, 'Do Old Legal Categories fit new Multimedia Products? A Multimedia CD-ROM as a film.' (1995) EIPR 17(3) 107, 110.

<sup>114</sup> Predominantly Multi-User Dungeons; G Lastowka, *Virtual Justice: The New Laws of Online Worlds* (Yale University Press 2010) 39.

<sup>115</sup> R Kennedy, 'Virtual Rights? Property in Online Game objects and Characters' (June 2008) Information & Communication Technology Law Vol 17(2), 95, 96.

<sup>116</sup> R Reynolds, 'Hands off my Avatar! Issues with claims of property and identity' Alderman Group, available online: <<http://www.ren-reynolds.com/downloads/HandsOffMYavatar.htm>> retrieved 14 October 2010.

<sup>117</sup> See for example: BBC News, 'Game theft' led to fatal attack' (31 March 2005) <<http://news.bbc.co.uk/1/hi/technology/4397159.stm>> retrieved 8 August 2011, where a Chinese gamer lost his life in a dispute over a virtual sword.

<sup>118</sup> *Second Life*, 'Owning Land' available online: <<http://secondlife.com/land/>> retrieved 18 February 2013; F G Lastowka and D Hunter, 'The Laws of Virtual Worlds' [2004] 92 Cal L Rev 1 48.

<sup>119</sup> Through the use of sinks, or drains.

<sup>120</sup> See for example, the convictions of Dutch teenagers for stealing items in Virtual Worlds. A R Lodder, 'Conflict Resolution in Virtual Worlds: General Characteristics and the 2009 Dutch Convictions on Virtual Theft' in K Cornelius and D Hermann (eds), *Virtual Worlds and Criminality*, available online: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1590144](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1590144)> retrieved 18 February 2013.

<sup>121</sup> S Humphreys and Others, 'Fan based production for computer games: User led innovation, the 'drift of value' and the negotiation of intellectual property rights' Media International Australia incorporating Culture and Society (2005) February, Issue 114, 16.

<sup>122</sup> Under for example, a Labour Theory approach to property. See: Chapter 2 - Property Matters: Virtually Justified? At 2.6. *Lockean Theory of Labour*.

### 1.3. MMORPGs – The Issues?

MMORPGs differ from ordinary computer games that can be purchased on a CD-ROM. With a MMORPG, the game continues, and the world develops and regenerates whilst a particular avatar is not present; MMORPGs are persistent.<sup>123</sup> With a game purchased on a CD-ROM, the game does not continue when the software is not running, and will need the user to be present. Virtual Worlds are incomparable with CD-ROM based games; continuing when avatars are not active,<sup>124</sup> in a similar way that the real world continues around us whilst we work or sleep. MMORPGs are essentially software but they are also places - in a computer sense they are worlds. They have an existence even if it is only an existence in a place that nobody can touch, and where no single avatar can control what happens.

Eventually, given time, and the rapid development – and demand – for personal computers, computer networks arrived to enable game players to play against and alongside each other. Consequently, as Kennedy points out, the whole idea of online gaming today is vastly different to that of the first computer games.<sup>125</sup> These different online games allow users the chance to interact with others across an array of distinct online platforms, often engaging in direct competition rather than co-operation.

Older games are predominantly free, co-operative and not dominated by the need to succeed<sup>126</sup> – there are options for greater control over the rules. Similarly there is the option to play for enjoyment rather than playing to win. However, modern and recently conceived MMORPGs are almost the exact opposite of this, with the possible exception of *Second Life*. This Virtual World has a unique selling point in that the resident (user)<sup>127</sup> does not have to compete with anyone or anything; users can simply create and develop alter egos, should they choose to do so.<sup>128</sup> Equally,

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<sup>123</sup> M Bell, 'Toward a Definition of Virtual Worlds' (2008) J V W R 1(1).

<sup>124</sup> D Rowland, 'Cyberspace – A Contemporary Utopia?' 1998 (3) The Journal of Information, Law and Technology (JILT) available online: <<http://www.law.warwick.ac.uk/jilt/98-3/rowland.html>> retrieved 20 December 2010.

<sup>125</sup> R Kennedy, 'Virtual Rights? Property in Online Game objects and Characters' (June 2008) Information & Communication Technology Law Vol 17(2), 95, 96.

<sup>126</sup> R Kennedy, 'Virtual Rights? Property in Online Game objects and Characters' (June 2008) Information & Communication Technology Law Vol 17(2), 95, 97.

<sup>127</sup> S Robbins and M Bell, *Second Life for Dummies* (John Wiley & Sons 2008) 10.

<sup>128</sup> See *Second Life's* claims about how free you can be: *Second Life*, 'What is *Second Life*?' Available online: <<http://secondlife.com/whatis/?lang=en-US>> retrieved 22 July 2013.

users can choose to become virtual business tycoons. The choice is entirely the users in *Second Life*. There are significantly fewer constraints when compared to other role-playing games.

On the whole, MMORPGs are more sophisticated, more rigid in terms of the rules, subscription based and restricted by the developers' in-built software constraints. Players participate in these games because of the ability to assume an entirely new persona, challenging that persona and associated gaming skill against intense competition.<sup>129</sup>

There is a conceptual problem with MMORPGs. It is easy to describe what they are, and what they allow players to do, but defining them is far from straightforward. However, what is not so easy is to understand how they work, the technology behind them and the laws that may or may not apply to property in these Virtual Worlds. A phenomenon like that of MMORPGs brings with it not only traditional legal problems including theft,<sup>130</sup> fraud,<sup>131</sup> and ownership disagreements,<sup>132</sup> but is also accompanied by the digital factor. MMORPGs are digital creations; there are no physical attributes. All of these traditional and well-established infringing acts occur in what is a digital world. It cannot be touched.

With the definitional and conceptual issues in mind, there are additional difficulties surrounding the legal position of these games themselves, and also items that are generated in these games. If there is no solid and reliable definition, or an understanding of these spaces, how can legal rules or regimes be applied to existences and objects in these worlds? The primary legal issue concerns how proprietary interests in in-game items can be protected, as digital property akin to real property in the offline world, or as a derivative form of intellectual property. Further issues arise from the potential for copyright and trademark infringement, not only of game property, game

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<sup>129</sup> R Kennedy, 'Virtual Rights? Property in Online Game objects and Characters' (June 2008) Information & Communication Technology Law Vol 17(2), 95, 97.

<sup>130</sup> See for example, the convictions of Dutch teenagers for stealing items in Virtual Worlds. A R Lodder, 'Conflict Resolution in Virtual Worlds: General Characteristics and the 2009 Dutch Convictions on Virtual Theft' in K Cornelius and D Hermann (eds), *Virtual Worlds and Criminality*, available online: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1590144](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1590144)> retrieved 18 February 2013.

<sup>131</sup> *R v Mitchell* (February 2011), Unreported; T Brewster, 'British Hacker jailed for two years' (ITPro, 21 March 2011), available online: <<http://www.itpro.co.uk/632056/british-zynga-hacker-jailed-for-two-years>> retrieved 26 May 2011.

<sup>132</sup> *Bragg v Linden Research Inc.* (487 F.Supp 2d 593 E.D. Penn) [2007]; *Eros, LLC, v. John Doe*, US Dist. Ct. Middle District of Florida, Case No: 8:07-cv-1158-T-24TGW [2007].

characters and game accounts, but also of items that are sold in the real world through initiatives such as eBay.<sup>133</sup>

Contractual debates surround MMORPGs. End User License Agreements<sup>134</sup> seek to govern all aspects of activity in MMORPGs, including subscriptions to, and participation in, online spaces. Questions over how rights are enforced and the proprietary interests that users may have are prevalent topics. Specific legal debate has arisen about the enforceability of the EULA between users themselves.<sup>135</sup> It is plausible that such disputes may arise under the legacy of *Clarke v Dunraven*,<sup>136</sup> and allow users to enforce the EULA provisions against one another directly. Virtual Worlds and MMORPGs are now a major source of business and revenue, not only in the virtual environment but also in terms of real money<sup>137</sup> and the gaming industry is equally valuable to the economy in England and Wales.<sup>138</sup>

With the increase in disputes over game items, the boundaries between the virtual and the real are harder to define.<sup>139</sup> It would seem that, given the dominance of technology and electronic information, the novel problems associated with enforcing rights and proprietary interests will soon lead to the development of Kennedy refers to as ‘virtual rights.’<sup>140</sup> This is a foreseeable scenario,<sup>141</sup> albeit such a development would potentially need to be accompanied by a rethinking of copyright principles and their application to in-game items.<sup>142</sup> This is perhaps not so different from other digital properties such as music and film downloads; however, the control which users

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<sup>133</sup> See for example: G Sandoval, ‘eBay, Yahoo Crack Down on Fantasy Sales’ (*CNET News*, 26 January 2001) available online: <<http://cnet.news.com/2100-1017-251654.html>> retrieved 20 November 2009.

<sup>134</sup> Hereafter EULAs.

<sup>135</sup> *Hernandez v Internet Gaming Entertainment*, U.S. Dist. Ct. Southern District of Florida, Case No: 07-CIV-21403-COHN/SELTZER [2007].

<sup>136</sup> *Clarke v Earl of Dunraven* [1897] AC 59. Hereafter *Satanita*.

<sup>137</sup> Knowledge Wharton, ‘The New New Economy: Earning Real Money in the Virtual World’ (2 November 2005) <<http://knowledge.wharton.upenn.edu/article.cfm?articleid=1302>> retrieved 11 May 2010; A Krotoksi, ‘Real Profits from Play Money’ *The Guardian* (London, 15 April 2004) <<http://www.guardian.co.uk/technology/2004/apr/15/media.newmedia>> retrieved 4 January 2010.

<sup>138</sup> I Livingstone and A Hope (*Nesta*), ‘Next Gen’ (February 2011) available online: <[http://www.nesta.org.uk/publications/assets/features/next\\_gen](http://www.nesta.org.uk/publications/assets/features/next_gen)> retrieved 8 October 2012, 8; Department of Culture, Media and Sport, ‘Creative Industries Economic Estimates—Headline Findings’ (9 December 2010) available online at: <[http://www.culture.gov.uk/images/research/CIEE\\_Headline-Findings\\_Dec2010.pdf](http://www.culture.gov.uk/images/research/CIEE_Headline-Findings_Dec2010.pdf)> retrieved 1 August 2011.

<sup>139</sup> D G Post, *In Search of Jefferson’s Moose – Notes on the State of Cyberspace* (OUP 2009) 185.

<sup>140</sup> R Kennedy, ‘Virtual Rights? Property in Online Game objects and Characters’ (June 2008) *Information & Communication Technology Law* Vol 17(2), 95.

<sup>141</sup> W J An, ‘The *Second Life* of Judge Richard A Posner’ (*New World Notes*, 11 December 2006) available online: <[http://nwn.blogs.com/nwn/2006/12/the\\_second\\_life.html](http://nwn.blogs.com/nwn/2006/12/the_second_life.html)> retrieved 29 November 2010.

<sup>142</sup> G Lastowka, ‘User-Generated Content and Virtual Worlds’ (2007-2008) 10 *Vand J Ent & Tech L* 893, 899.

have over these creations is very different to the freedom which consumers of digital music and films will legally have shortly.<sup>143</sup> In some cases, the results of the acquisition of in-game items in terms of real-world currency may also be visible, especially in light of the first banking licence granted to a Virtual World.<sup>144</sup> Given that economic value is at stake,<sup>145</sup> there ought to be recognition and protection for the proprietary interests of users in MMORPGs and Virtual Worlds.

This situation is compounded by the licence agreements that are much relied upon by game developers.<sup>146</sup> These licences, in many situations, grant the developers control of all of the intellectual property rights – specifically copyright – that arise out of the game, and game-play.<sup>147</sup> In recent years, there has been a growing trend by gamers to claim interests in the in-game items that have been developed as a result of game play: “In the context of online games...Players are claiming the right to trade ‘virtual goods’, something that is contested by game developers and generally prohibited by the contracts they offer to prospective players.”<sup>148</sup>

#### 1.4. Virtual Worlds, MMORPGs and Categories of Game.

Selected commentators<sup>149</sup> talk about cyberspace, the virtual environments, online games, MMOGs<sup>150</sup> and MMORPGs as though they are all one and the same. This misuse of terms relating to different spaces and media – which all have different characteristics and attributes – diminishes the attempt to achieve a clear appreciation for these spaces. It also undervalues the individual

<sup>143</sup> i.e. ‘Format shifting’ which will soon be legal under amendments to the CDPA 1988; Intellectual Property Office, ‘New Exception for Parody; New Exception for Private Copying; New Exception for Quotation’ 7 June 2013, available online: <<http://www.ipo.gov.uk/types/hargreaves/hargreaves-copyright/hargreaves-copyright-techreview.htm>> retrieved 7 June 2013.

<sup>144</sup> A Gudamuz, ‘Blurring the Real and Virtual Boundaries’ (*TechnoLlama Blog*, 26 March 2009) <<http://www.technollama.co.uk/blurring-the-real-and-virtual-boundaries>> retrieved 6 July 2010.

<sup>145</sup> S Humphreys and J Banks, ‘The labour of user co-creation. Emerging social network markets?’ (2008) *Convergences* 14(4) 401; B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA 2008) 225.

<sup>146</sup> A Jankowich, ‘EULAW: The Complex Web of Corporate Rule-Making in Virtual Worlds’ (2006) 8 *Tul J Tech & Intell Prop* 2.

<sup>147</sup> See: Chapter 5 - Contractual Displacement of Proprietary Interests: EULAW? At 5.4.1. *Ownership Issues*.

<sup>148</sup> R Kennedy, ‘Virtual Rights? Property in Online Game objects and Characters’ (June 2008) *Information & Communication Technology Law* Vol 17(2), 95, 96.

<sup>149</sup> J M Balkin and B S Noveck (eds), *The State of Play: Law, Games and Virtual Worlds* (New York University Press 2006); R Koster, ‘Declaring the Rights of Players’ (27 August 2000) available online: <<http://www.raphkoster.com/gaming/playerrights.shtml>> retrieved 28 November 2012; Y F Lim, *Cyberspace Law: Commentaries and Materials* (2<sup>nd</sup> edn, OUP 2007); B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA, 2008).

<sup>150</sup> Massively Multiplayer Online Games.

attributes of each environment, the consideration of which is necessary for any consideration of potential governance approaches.

In order to examine the proprietary claims which users may have to in-game items and content, and consider the types of activity which threaten such claims, it is necessary to identify the category of entity under discussion.<sup>151</sup> Many of the different – and separate – environments in the cyber world have subdivisions that embody different attributes to those of their parental spaces. Given the breadth of these environments, it is necessary to be clear which ‘space’ is under discussion at any given time. Some of the entities and that will be discussed later in this work will be briefly identified below.

#### **1.4.1.      *Massively Multiplayer Online Games – MMOGs.***

MMOGs are online games played by thousands of people in hundreds of different places over the Internet at the same time. This term identifies several important factors; such games are played over the Internet by large numbers of people yet the term fails to state what kind of games these are, or whether players are playing against each other or in unison. This is significant for two reasons. Firstly, players will be participating in the environment from around the world and operating in different jurisdictions,<sup>152</sup> each of which will have different legal principles applicable. Secondly, the spread of players, and the jurisdictional elements to these games indicates that any disputes could be difficult to resolve through recourse to offline courts, especially as many EULAs state the law applicable to any disputes – albeit these may not be binding contractual terms.<sup>153</sup> As such, the size of these games, and their jurisdictional coverage is challenging in itself, and when identifying the avatar / user which is added to this situation, it could be challenging and prohibitively expensive to pursue traditional legal claims against either the developer or the users. Claims against the latter are likely to be incredibly difficult to pursue based on the lack of a direct contractual relationship between users.

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<sup>151</sup> K Barker, ‘MMORPGing, Law and Lingo’ in M Freeman and F Smith (eds) *Current Legal Issues: Law and Language* (Vol 13, OUP 2013) 433.

<sup>152</sup> This work will not discuss conflicts of laws.

<sup>153</sup> See: Chapter 5 - Contractual Displacement of Proprietary Interests: EULAw? At 5.5. *Standard Terms – Fairness and Balance?*

Alemi points out that there are three categories of MMOGs; ‘scripted’, ‘unscripted’ and casual games.<sup>154</sup> This is however, not the only classification that has been suggested. ENISA indicates that there are four classes of online interactive environment: Civic Worlds, Social Worlds, Game Worlds and Corporate Worlds.<sup>155</sup> Moreover, Nichols has suggested that there are also four categories but the division employed in this instance rests on what a user does in a particular environment.<sup>156</sup> Duranske meanwhile has indicated that there are classifications based on a similar approach to that of ENISA,<sup>157</sup> advocating for divisions such as Social Virtual Worlds,<sup>158</sup> whereas Suzor<sup>159</sup> has approached these spaces under the category of virtual communities and this has been adopted by de Zwart also.<sup>160</sup> Lastowka focuses upon the idea of Virtual Worlds as an all-encompassing category,<sup>161</sup> but ascribes to the model outlined by Duranske,<sup>162</sup> and indicates that there are different genres of space: social worlds,<sup>163</sup> MMORPGs<sup>164</sup> and kid worlds.<sup>165</sup> Sociological perspectives differ again, with Taylor indicating that these games and worlds should be referred to as “boundary spaces.”<sup>166</sup> Dannenberg highlights the crux of the issue however, stating that there is no clear division between video games and virtual worlds.<sup>167</sup> Whilst this may be so, it is perhaps now more appropriate to treat the ‘categories’ as different strands in their own right rather than as being derived from one main idea. This argument is particularly meritorious when the different characteristics of the categories advanced by Alemi<sup>168</sup> are considered.

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<sup>154</sup> F Alemi, ‘An Avatar’s Day In Court: A Proposal for Obtaining Relief and Resolving Disputes in Virtual World Games’ [2007] UCLA J L & Tech 6 [20].

<sup>155</sup> ENISA Position Paper, ‘Virtual Worlds, Real Money—Security and Privacy in Massively Multiplayer Online Games and Social and Corporate Virtual Worlds’ (November 2008), available Online: <<http://www.enisa.europa.eu>> retrieved 1 August 2011, 8.

<sup>156</sup> W J Nichols, ‘Painting Through Pixels: The Case for Copyright in Videogame Play’ (2006-2007) 30 Colum J L & Arts 101, 104.

<sup>157</sup> ENISA Position Paper, ‘Virtual Worlds, Real Money—Security and Privacy in Massively Multiplayer Online Games and Social and Corporate Virtual Worlds’ (November 2008), available online: <<http://www.enisa.europa.eu>> retrieved 1 August 2011, 8.

<sup>158</sup> B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA 2008) 5, 6.

<sup>159</sup> N Suzor, ‘Order Supported By Law: The Enforcement of Rules in Virtual Communities’ (2012) Mercer Law Review 63(2) 523.

<sup>160</sup> M de Zwart, ‘Contractual Communities: Effective Governance of Virtual Worlds’ (2010) 33 U N S Wales L J 605.

<sup>161</sup> G Lastowka, *Virtual Justice: The New Laws of Online Worlds* (Yale University Press 2010) 9.

<sup>162</sup> B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA 2008) 5, 6.

<sup>163</sup> G Lastowka, *Virtual Justice: The New Laws of Online Worlds* (Yale University Press 2010) 61.

<sup>164</sup> G Lastowka, *Virtual Justice: The New Laws of Online Worlds* (Yale University Press 2010) 59.

<sup>165</sup> G Lastowka, *Virtual Justice: The New Laws of Online Worlds* (Yale University Press 2010) 64.

<sup>166</sup> T L Taylor, *Play Between Worlds – Exploring Online Game Culture* (The MIT Press 2006) 9 - 11.

<sup>167</sup> R Dannenberg and Others, *Computer Games and Virtual Worlds: A New Frontier in Intellectual Property Law* (ABA Publishing 2010) 3.

<sup>168</sup> F Alemi, ‘An Avatar’s Day In Court: A Proposal for Obtaining Relief and Resolving Disputes in Virtual World Games’ [2007] UCLA J L & Tech 6 [20].



#### 1.4.2. 'Scripted,' 'Unscripted' and Scripting.

The use of the terms 'scripted' and 'unscripted' to describe categories of MMOGs<sup>169</sup> is conceptually intriguing, and environmentally distinguishing. However, such a practice also raises difficulties because, in *Second Life* for example, users can participate in the process of 'scripting' i.e. generating program code to make objects in the Virtual World.<sup>170</sup> Accordingly therefore, the same term is used to refer to two separate things; a category of game and a gaming activity.

If a similar term is then used for more than one thing in the realm of Virtual Worlds, it adds to the already perplexing picture. Such a confusing system is endemic of the fact that cyberspace is so diverse, and that there is no sole programming base<sup>171</sup> or model. Each environment or world is different, and has different terminology, albeit some which is transferable. Perhaps before considering any alterations to the regulatory framework, it would be prudent to arrive at a standard set of terminology.<sup>172</sup>

#### 1.4.3. 'Scripted' MMOGs: Massively Multiplayer Online Role Playing Games (MMORPGs).

The first group of games suggested by Alemi<sup>173</sup> is that of 'scripted' games. These are more commonly referred to as MMORPGs. Such games include *World of Warcraft* and *EverQuest II*, and usually involve thousands of players working individually and / or collaboratively to accomplish tasks, meet goals and 'level-up' in order to complete the game. However, there remains some debate as to whether games such as *World of Warcraft* and *EverQuest II* are games or worlds, with Duranske suggesting that they can be both.<sup>174</sup> Sheldon<sup>175</sup> advocates distinguishing between worlds

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<sup>169</sup> F Alemi, 'An Avatar's Day In Court: A Proposal for Obtaining Relief and Resolving Disputes in Virtual World Games' [2007] UCLA J L & Tech 6 [20].

<sup>170</sup> Linden Scripting Language is the language used to work with the underlying code of *Second Life*; *Second Life*, 'LSL Portal' (18 March 2011) available online: <[http://wiki.secondlife.com/wiki/LSL\\_Portal](http://wiki.secondlife.com/wiki/LSL_Portal)> retrieved 1 August 2011.

<sup>171</sup> S F Kane, 'Virtual Judgment: Legal Implications of Online Gaming' (May / June 2009) IEEE Computer and Reliability Societies 7(3) 23, 27 <<http://www.computer.org/portal/web/csdl/doi/10.1109/MSP.2009.81>> retrieved 16 March 2010.

<sup>172</sup> K Barker, 'MMORPGing, Law and Lingo' in M Freeman and F Smith (eds) *Current Legal Issues: Law and Language* (Vol 13, OUP 2013) 433.

<sup>173</sup> F Alemi, 'An Avatar's Day In Court: A Proposal for Obtaining Relief and Resolving Disputes in Virtual World Games' [2007] UCLA J L & Tech 6 [20].

<sup>174</sup> B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA 2008) 6.

<sup>175</sup> D P Sheldon, 'Claiming Ownership But Getting Owned: Contractual Limitations on Asserting Property Interests in Virtual Goods' (2006-2007) 54 UCLA L Rev 751, 757.

and games, and includes *World of Warcraft* and *EverQuest II* as worlds rather than games. This also fails to establish a clear system of categorisation. To clarify the definition, Virtual Worlds are not the same as *World of Warcraft* and *EverQuest II*, which have limits defined by the software code, and preset levels, challenges and objectives. Virtual Worlds are not ‘scripted’ in this way.

These entities; *World of Warcraft*, *EverQuest II* are games – the user is encouraged to play, to be the best and to win. They are fundamentally different from Virtual Worlds, although arguably the MMORPG environment is a different world. Calling MMORPGs ‘Virtual Worlds’ seeks only to blur the distinctions between these categories, and makes life difficult for regulators when assessing attributes.

MMORPGs inherently include trade of in-game items and objects<sup>176</sup> and it is from such transactions that questions of users’ proprietary interests in in-game content arise, requiring close interaction with the EULA and game rules. If the games are designed so as to prohibit trading of items and users are supposed to trade, how can items be sold for currency by the gamers who seem not to be entitled to transfer the items? Users of MMORPGs tend not to ‘script’ i.e. to write their own pieces of software code to develop game items. Such activity tends to be left for participants in Virtual Worlds, rather than for players in MMORPGs, although it is possible for MMORPG users to engage in such creative endeavour.<sup>177</sup>

MMORPGs are online environments that are entirely virtual, but which may be home to other worlds; for example, the world of *Norrath* is found in *EverQuest*.<sup>178</sup> However, there is a distinction to be drawn between these games and Virtual Worlds. Games only allow players to carry out actions that are allowed by the software code. As such, everything that can be done, made and achieved within the game, is controlled by the developers, and this is usually supported by their contractual claims to all of the proprietary interests in a particular environment.<sup>179</sup>

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<sup>176</sup> M Stephens, ‘Sale of In-Game Assets: An Illustration of the Continuing Failure of Intellectual Property Law to Protect Digital Content Creators’ [2001-2002] 80 Tex L Rev 1513; D Spohn, ‘Gaming for Money: Trading Game Assets’ available online: <<http://Internetgames.about.com/cs/gamingnews/a/gameassets.htm>> retrieved 17 February 2013.

<sup>177</sup> And *Lineage II* users did create items to upload into the game, but these items were claimed by the game developers under the EULA.

<sup>178</sup> *EverQuest*, ‘Lore of Norrath’ available online: <<https://www.everquest.com/lore>> retrieved 20 July 2013.

<sup>179</sup> The exception being *Second Life*.

#### 1.4.4. *Unscripted' MMOGs: Virtual Worlds.*

The second category Alemi raises is that of 'unscripted' games,<sup>180</sup> which differ from 'scripted' games by more than just the lack of 'script.' Kane also refers to 'unscripted' games as open worlds rather than as closed worlds,<sup>181</sup> providing greater freedoms whilst pointing out that there will be, "A significant need to regulate and protect intellectual property ownership."<sup>182</sup> They are commonly known as Virtual Worlds and are not games in the sense that MMORPGs like *EverQuest II* and *World of Warcraft* are gaming experiences. Virtual Worlds allow for an entirely different existence, to do as the user pleases within the general constraints of the world. They do not require any degree of collaboration with others, and there is no sense of structure to levelling or completing certain missions in order to advance. Virtual Worlds allow for the virtual land,<sup>183</sup> cars, personal property<sup>184</sup> and even relationships.<sup>185</sup>

Like MMORPGs, trade is allowed and even encouraged to the point where virtual businesses exist and generate profits.<sup>186</sup> Virtual Worlds allow users to 'script' i.e. to generate their own code in order to build items that can be added to the world. Users in *Second Life* can be said to own these items and can sell them, control who has access to them, and determine how many there are. This can happen in *Second Life* because the developers – Linden Labs – grant all the proprietary interests in user-developed items to the users themselves.<sup>187</sup> This is in stark contrast to the majority of MMORPGs which contain EULAs detailing the rights and obligations of each party. Most MMORPGs require all users to agree to be bound by these contracts before

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<sup>180</sup> F Alemi, 'An Avatar's Day In Court: A Proposal for Obtaining Relief and Resolving Disputes in Virtual World Games' [2007] UCLA J L & Tech 6 [26].

<sup>181</sup> See: Chapter 6 - Governance Structures and the Alternatives At 6.7. *The Magic Circle, and Play Spaces*.

<sup>182</sup> S F Kane, 'Virtual Judgment: Legal Implications of Online Gaming' (May / June 2009) IEEE Computer and Reliability Societies, Vol 7(3), 23 <<http://www.computer.org/portal/web/csdl/doi/10.1109/MSP.2009.81>> retrieved 16 March 2010.

<sup>183</sup> *Second Life*, 'Owning Land' available online: <<http://secondlife.com/land/>> retrieved 18 February 2013; F G Lastowka and D Hunter, 'The Laws of Virtual Worlds' [2004] 92 Cal L Rev 1 48.

<sup>184</sup> B Duranske, 'Second Life Hairstyle Raises Copyright Question' (*Virtually Blind*, 15 February 2007) available online: <<http://virtuallyblind.com/2007/02/15/second-life-hairstyle-copyright-question/>> retrieved 12 December 2010.

<sup>185</sup> R Edwards, 'Woman divorces husband for having 'virtual affair' on Second Life' *The Telegraph* (London, 14 November 2008) available online: <<http://www.telegraph.co.uk/technology/3453273/Woman-divorces-husband-for-having-a-virtual-affair-on-Second-Life.html>> retrieved 12 December 2010.

<sup>186</sup> For example, there have been reports of virtual millionaires: R Hof, 'Second Life's First Millionaire' (*Bloomberg Business Week*, 26 November 2006) available online: <[http://www.businessweek.com/the\\_thread/techbeat/archives/2006/11/second\\_lifes\\_fi.html](http://www.businessweek.com/the_thread/techbeat/archives/2006/11/second_lifes_fi.html)> retrieved 16 March 2010.

<sup>187</sup> Second Life Terms of Service, Clause 7, (6 October 2010) available online: <<http://secondlife.com/corporate/tos.php>> retrieved 14 October 2010.

participation in a MMORPG is permitted.<sup>188</sup> Proprietary interests, including intellectual property rights are usually retained by the developers and are expressly withheld from the user under the EULAs.

Virtual Worlds are rather more than games; they are worlds. Calling such entities games - it is suggested – serves to blur the divisions between MMOGs and Virtual Worlds, and in particular for users of *Second Life*, provide annoyance as they prefer to be referred to as ‘residents.’<sup>189</sup> Equally, calling worlds ‘unscripted’ MMOGs, whilst necessary for this discussion, also blurs the distinction somewhat. Moreover, whilst MMORPGs are environments that may contain worlds, Virtual Worlds are worlds in themselves that may contain other smaller worlds and environments.<sup>190</sup>

### 1.5. Virtual Nations.

The overwhelming use of terminology sees online spaces and communities referred to as either Virtual Worlds or MMORPGs, often interchangeably. However, it is possible to argue that there is another, overarching category into which many of these entities will fall. It is possible to conclude that each world or game is like a nation in its own right rather than a world. This argument becomes even more compelling given that each world or game has its own contractual regulation, contractually binding rules and regulations and standards of acceptable behaviour.<sup>191</sup> This would also broadly reflect the suggestion that there is no role for Governments to play in cyberspace.<sup>192</sup> If MMORPGs and Virtual Worlds classify themselves as independent from the rule of Governments, then it is possible to view this as seeking independent rule. Rowland considers the development of “cybercommunities” and questions whether societies that have no recognisable form of Government should be controlled from within, or externally.<sup>193</sup> This forms

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<sup>188</sup> A Jankowich, ‘EULAw: The Complex Web of Corporate Rule-Making in Virtual Worlds’ (2006) 8 Tul J Tech & Intell Prop 2.

<sup>189</sup> S Robbins and M Bell, *Second Life for Dummies* (John Wiley & Sons 2008) 10; B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA 2008) 5.

<sup>190</sup> Virtual Worlds Review, ‘What Is A Virtual World?’

<<http://www.virtualworldsreview.com/info/whatis.shtml>> retrieved 13 May 2010.

<sup>191</sup> See for example, *Sony’s EverQuest II* Code of Conduct; ‘Play Nice Policies – Activity within *EverQuest II*.’ Available online: <[https://help.station.sony.com/app/answers/detail/a\\_id/16213](https://help.station.sony.com/app/answers/detail/a_id/16213)> retrieved 29 August 2011.

<sup>192</sup> See generally: Chapter 6 - Governance Structures and the Alternatives.

<sup>193</sup> D Rowland, ‘Cyberspace – A Contemporary Utopia?’ 1998 (3) The Journal of Information, Law and Technology (JILT) available online: <<http://www.law.warwick.ac.uk/jilt/98-3/rowland.html>> retrieved 20 December 2010.

part of a larger consideration over the norms and controls that are recognised by, and applicable to such spaces, but Rowland makes it clear that it would be inappropriate to seek to apply unsuitable regulations to these environments.<sup>194</sup> Similar suggestions have recently been made by Reed, who has advocated a return to the use of social norms to regulate online environments.<sup>195</sup>

If a Virtual World or Online Game is compared to a nation state in the real world, such contractual documents could replicate constitutions, acceptable standards of behaviour could replicate criminal law and social attitudes with contractual regulations replicating the everyday activities that real people enter into, the critical difference being that many Virtual World or Online Game providers do not purport to be democratic or guarantee transparency.<sup>196</sup> Each game and nation has its own systems, environment, rules, attributes and identity, much like nations in the real world. In fact, in cyberspace, each Virtual Nation and game seeks to explicitly differentiate itself from its rivals,<sup>197</sup> suggesting that being different and individual is important. This is supported by the claims of Rosedale that *Second Life* is a country rather than a game or a virtual world.<sup>198</sup>

## 1.6. The ‘People.’

When dealing with proprietary interests in in-game items, there are a number of different parties involved. There are also different implications for each category of user, some of which will be briefly outlined below.

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<sup>194</sup> D Rowland, 'Cyberspace – A Contemporary Utopia?' 1998 (3) The Journal of Information, Law and Technology (JILT) available online: <<http://www.law.warwick.ac.uk/jilt/98-3/rowland.html>> retrieved 20 December 2010.

<sup>195</sup> C Reed, *Making Laws for Cyberspace*, (Oxford 2012).

<sup>196</sup> V Mayer-Schönberger and J Crowley, 'Napster's Second Life? The Regulatory Challenges of Virtual Worlds' (2006) N W U L R 100(4) 1775, 1794.

<sup>197</sup> B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA 2008) 126, 127.

<sup>198</sup> *Evans v Linden Research, Inc.* E.D. Pa. Feb. 3, 2011 [30].

### 1.6.1. *Avatars.*

An avatar is the gaming term used to describe a virtual representation<sup>199</sup> of the user; it is the gaming persona.<sup>200</sup> An avatar is the player's character – although depending on the MMORPG the user may not actually own the character, or as Duranske describes it, the player's proxy.<sup>201</sup> It is the player in the virtual environment, but that does not mean that the character has to have the user's name, dress like the user, look like the user or even act like the user would act.

The design of an avatar is a user's opportunity to represent himself in the Virtual World that he plans to inhabit. Avatar then is just another word for character. In MMORPGs and Virtual Worlds, the avatars are representatives of their real world controllers; essentially they are electronic personae to use Gervassis' terminology.<sup>202</sup> The avatar controls the in-game items but the gamer controls the game accounts and the activities of the avatar in the relevant virtual space. Avatars in either MMORPGs or Virtual Worlds usually have very few, if any, rights attached to them. In *Second Life*, avatars can acquire items such as houses and clothing.<sup>203</sup> However, this is the exception to most environments. Furthermore, most EULAs specifically stipulate that players can claim no proprietary interests over their avatars or other items in the MMORPG or Virtual World.<sup>204</sup>

### 1.6.2. *Players.*

The player – or user – is the person who signs up to the game or Virtual World, creates the game account, designs the avatar and controls his or her representative in the online environment of his or her choosing.<sup>205</sup> The player is also the person required to abide by the Terms of Service and

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<sup>199</sup> G Lastowka, *Virtual Justice: The New Laws of Online Worlds* (Yale University Press 2010) 35.

<sup>200</sup> D C Miller, 'Determining Ownership in Virtual Worlds: Copyright and Licence Agreements' [2003] 22 Rev. Litig. 435, 437.

<sup>201</sup> B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA 2008) 7.

<sup>202</sup> N Gervassis 'In Search of the Value of Online Electronic Personae: Commercial MMORPGs and the Terms of Participation in Virtual Communities' [2004] 2 JILT 26 available online:

<[http://www2.warwick.ac.uk/fac/soc/law2/elj/jilt/2004\\_3/gervassis/](http://www2.warwick.ac.uk/fac/soc/law2/elj/jilt/2004_3/gervassis/)> retrieved 6 May 2010; F Alemi, 'An Avatar's Day In Court: A Proposal for Obtaining Relief and Resolving Disputes in Virtual World Games' [2007] UCLA J L & Tech 6 [15].

<sup>203</sup> *Second Life* Frequently Asked Questions (FAQs), 'Is Second Life A Game?'

<<http://SecondLife.com/whatis/faq.php>> retrieved 13 May 2010.

<sup>204</sup> R Koster, 'Declaring the Rights of Players' in J M Balkin and B S Noveck (eds), *The State of Play: Law, Games and Virtual Worlds* (New York University Press 2006) 131.

<sup>205</sup> G Lastowka, *Virtual Justice: The New Laws of Online Worlds* (Yale University Press 2010) 10.

comply with the EULA. However, much like avatars themselves, players have very limited rights in MMORPGs or in Virtual Worlds. Taylor indicates this may be due to the fact that avatars and players can never really have their identity separated.<sup>206</sup>

### 1.6.3. *Griefers.*

The key distinction between griefers and avatars arises from the activity undertaken by a griefer compared to that of an ordinary avatar. A griefer is an avatar which sets out to blight the in-game experience of others.<sup>207</sup> Alemi points out that the griefer seeks to hurt and damage the game or virtual experience of other 'law-abiding' avatars in a given virtual environment largely by contravening the game rules, world rules and EULAs.<sup>208</sup> Where griefers are released in MMORPGs, there could be enormous potential damage suffered not only to the gaming experience of the users affected by the griefer, but also to the value of in-game items.

With griefers damaging the game play in MMORPGs, it is possible that they would seek to destroy scarce items, thereby making the game even harder. Contrastingly, they could seek to reproduce scarce objects so as to reduce the skill needed to progress in a game. Either of these scenarios could result in a negative outcome for users, and have a significant – perhaps, detrimental – impact upon in-game items.<sup>209</sup> Griefers could quite easily initiate virtual vigilantism,<sup>210</sup> which would be an alarming development for all concerned due to the potential for retaliatory damage that could occur to game content.

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<sup>206</sup> T L Taylor, *Play Between Worlds – Exploring Online Game Culture* (The MIT Press 2006) 9 – 11.

<sup>207</sup> C Y Foo and E M I Koivisto, 'Defining Grief Play in MMORPGs: Player and Developer Perceptions' Proceedings of the 2004 ACM SIGCHI International Conference on Advances in Computer Entertainment Technology (ACM, New York, 2004) 246 available online: <<http://doi.acm.org/10.1145/1067343.1067375>> retrieved 1 August 2011; S Humphreys, 'Discursive constructions of MMOGs and some implications for policy and regulation.' (2009) Media International Australia 130: 53, 62.

<sup>208</sup> F Alemi, 'An Avatar's Day In Court: A Proposal for Obtaining Relief and Resolving Disputes in Virtual World Games' [2007] UCLA J L & Tech 6 [5].

<sup>209</sup> See: Chapter 4 - MMORPGing & Copyright. At 4.10.1. *Scarcity*. See also: Chapter 6 - Governance Structures and the Alternatives At 6.4.2. *Kill Stealing*.

<sup>210</sup> P Stoup, 'Development and Failure of Social Norms in Second Life' (2008) 58 Duke LJ 311, 328; D Rowland, 'Cyberspace – A Contemporary Utopia?' 1998 (3) The Journal of Information, Law and Technology (JILT) available online: <<http://www.law.warwick.ac.uk/jilt/98-3/rowland.html>> retrieved 20 December 2010.

#### 1.6.4. Farmers.

Gold farmers<sup>211</sup> are an important albeit controversial aspect of online games and Virtual Worlds. The use – and encouragement<sup>212</sup> - of gold farming to engage in Real Money Trading<sup>213</sup> for game items and currency is also potentially problematic because of the impact it can have on game items. Gold farming is a practice where players – usually in poor and less developed countries<sup>214</sup> – are paid in real money to sit and collect gold in MMORPGs and Virtual Worlds. This ‘farmed gold’ is then sold to other players in more developed real world countries for real money, turning a profit for the operators of the farming operation.<sup>215</sup> It also allows the purchasers to acquire in-game or in-world currency without having to perform the time-consuming and repetitive tasks required to generate gold themselves.

Gold farming has also given rise to legal action elsewhere,<sup>216</sup> and it must be pointed out that farmers do not play the game or inhabit the Virtual Worlds in the same way that avatars, or even griefers do. Farmers exist solely to generate gold which can be sold on, or to develop game characters,<sup>217</sup> which again can be sold for real money profits.

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<sup>211</sup> See for example: R Davis, ‘Welcome to the new gold mines’ *The Guardian* (London, 5 March 2009) available online: <<http://www.guardian.co.uk/technology/2009/mar/05/virtual-world-china>> retrieved 16 February 2013; R Heeks, ‘Current Analysis and Future Research Agenda on ‘Gold Farming:’ *Real World Production in Developing Countries for the Virtual Economies of Online Games*’ Paper 32 (2008) available online: <[http://www.sed.manchester.ac.uk/idpm/research/publications/wp/di/documents/di\\_wp32.pdf](http://www.sed.manchester.ac.uk/idpm/research/publications/wp/di/documents/di_wp32.pdf)> retrieved 16 February 2013.

<sup>212</sup> See for example: Microsoft’s Asheron’s Call encourages users to trade, with the developer taxing the trading activity; J Dibbell, ‘Serfing the Web: Black Snow Interactive and the World’s First Virtual Sweat Shop’ (*Wired Magazine*, January 2003) available online: <<http://www.juliandibbell.com/texts/blacksnow.html>> retrieved 29 July 2010.

<sup>213</sup> Hereafter RMT.

<sup>214</sup> G Lastowka, *Virtual Justice: The New Laws of Online Worlds* (Yale University Press 2010) 24.

D Rosenberg, ‘‘Gold Farming’ Good for Multiplayer Games?’ (*CNET News*, 2 October 2008) <<http://news.cnet.com/8301-13846-3-10056262-62.html>> retrieved 29 July 2010.

<sup>215</sup> T Thompson, ‘They Play Games For 10 Hours And Earn £2.80 In A ‘Virtual Sweatshop’’ *The Guardian* (London, 13 March 2005) available online: <<http://www.guardian.co.uk/technology/2005/mar/13/games.theobserver>> retrieved 11 May 2010.

<sup>216</sup> *BlackSnow Interactive v Mythic Entertainment Inc*, No 02-00112 (C.D. Calif.) [2002]; *Blizzard Entertainment Inc., v In Game Dollar, LLC*, US Dist. Ct. Central District of California, Case No: 8:07-cv-00589-JVS-AN [2008]; *Hernandez v Internet Gaming Entertainment*, U.S. Dist. Ct. Southern District of Florida, Case No:07-CIV-21403-COHN/SELTZER [2007].

<sup>217</sup> T Thompson, ‘They Play Games For 10 Hours And Earn £2.80 In A ‘Virtual Sweatshop’’ *The Guardian* (London, 13 March 2005) <<http://www.guardian.co.uk/technology/2005/mar/13/games.theobserver>> retrieved 11 May 2010.



#### 1.6.5. *Game Masters.*

Game Masters are characters run and operated by the game developers and their staff predominantly to maintain 'law and order' in the Virtual World or MMORPG.<sup>218</sup> Game Masters also have responsibility for enforcing aspects of the EULA and Terms of Service for various worlds.<sup>219</sup> Essentially, these are a special kind of avatar and because they do not play the game or inhabit a Virtual World in the same way as an average avatar or resident, they are deserving of separate treatment. Predominantly, their function is customer-service based, with a secondary aspect being to resolve problems brought to their attention by a user in-game or in-world.<sup>220</sup>

These avatars inhabit the same environments as avatars and griefers but do not 'play' the game or develop their virtual lives because they are designed to assist others, to the extent that in some environments such as *EVE Online* —a science fiction based MMORPG - impersonating a Game Master is a contravention of the EULA.<sup>221</sup> It is apparent that, in some online environments, limited measures have been incorporated with an aim of regulating at least some forms of activity and controlling some of the behaviour of the users.

#### 1.6.6. *Wizards.*

Wizards are another form of avatar, yet have a predominantly distinct function from farmers, avatars and even griefers. This variety of avatar existed in a very specific environment which was one of the first online games: *LambdaMOO*. Essentially, in *LambdaMOO*, Wizards had a designated function; to 'toad' misbehaving avatars or those deserving of punishment. In *LambdaMOO*, there were few specific rules about acceptable or permitted behaviour.<sup>222</sup> Therefore, this world was dependent on the community of avatars deciding what they were prepared to accept, and behaviour that is not allowable. Certain avatars were therefore empowered to carry out punishments if the community agreed that such punishment was deserved. However, Wizards

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<sup>218</sup> WordIQ, 'Game Master – Definition' (2010) <[http://www.wordiq.com/definition/Game\\_Master](http://www.wordiq.com/definition/Game_Master)> retrieved 30 July 2010.

<sup>219</sup> EVELOPEDIA, 'GameMaster' <<http://wiki.eveonline.com/en/wiki/Gamemaster>> retrieved 29 July 2010.

<sup>220</sup> World of Warcraft, 'The Game Masters' (2009) <<http://www.wow-europe.com/en/support/gm-article.html>> retrieved 30 July 2010.

<sup>221</sup> EVELOPEDIA, 'GameMaster' <<http://wiki.eveonline.com/en/wiki/Gamemaster>> retrieved 29 July 2010.

<sup>222</sup> J Dibbell, *My Tiny Life* (Fourth Estate Ltd 1998) 19.

could also determine that a punishment was necessary without the agreement of the community.<sup>223</sup>

One such incident occurred with the ‘tloading’<sup>224</sup> of Mr Bungle following repeated incidents of virtual rape in *LambdaMOO*.<sup>225</sup> When a Wizard ‘tloads’ an avatar, the process essentially deletes the character and account; i.e. Mr Bungle was deleted and ejected from *LambdaMOO*.

### 1.7. Conclusion.

If generic terms are used, it is likely to give rise to confusion, and could, in legal disputes, have unintended consequences. Accordingly therefore, the correct terminology should be used. In doing so, it will be easier to understand the attributes and legally important characteristics applying to each. Moreover, when determining questions of copyright and contractual obligations, it is important to be accurate. Presently, there is no standard terminology and agreed upon definitions for online entities, because as Duranske states, “If you ask ten people who participate in virtual worlds to tell you what a virtual world is, you will get ten different answers.”<sup>226</sup>

It is for clarity and the application of rules that it becomes necessary to introduce and define what is meant by a given term. Terms must be used in their correct context to avoid confusion; they must be used accurately to provide an understanding of some of the aspects of MMORPGs. This discussion has set out some commonly used terms, highlighting the lack of agreement on definitions, and has explained their attributes. Given the unique nature of online games and virtual worlds, discussing them in the real world requires respect to be given to their characteristics. Part of that means fully understanding features, attributes and capabilities. This is particularly important when discussing the practical examples of MMORPG activity, and the fragmented sets of legal rules which apply to them, which is the focus of this work.

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<sup>223</sup> J Dibbell, *My Tiny Life* (Fourth Estate Ltd 1998) 19.

<sup>224</sup> See Glossary.

<sup>225</sup> R MacKinnon, ‘Virtual Rape’ *Journal of Computer Mediated Communication* Vol 2(4) (1997) available online: <<http://jcmc.indiana.edu/vol2/issue4/mackinnon.html#References>> retrieved 20 January 2013.

<sup>226</sup> B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA 2008) 1.

This chapter – ‘Understanding MMORPGs?’ has outlined some of the key terms which will appear throughout the remainder of this research. It has placed these in the context of online games, highlighting the diverse array of potential parties which are connected to MMORPGs and Virtual Worlds. In identifying such elements, and placing these within the gaming context, this chapter provides a platform for later discussions relating to the potential imbalances between the competing interests of the parties involved in online gaming.<sup>227</sup>

The following chapter, ‘Property Matters: Virtually Justified?’ will discuss some of the theoretical justifications which may provide a basis for the claims of users to proprietary interests in the in-game content of MMORPGs and Virtual Worlds. ‘Property Matters: Virtually Justified?’ will also provide a basis for copyright discussion and contextualise the later examination of contractual provisions and regulatory approaches to behaviour impacting upon potential user rights in online gaming environments.

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<sup>227</sup> See generally: Chapter 5 - Contractual Displacement of Proprietary Interests: EULAw?

## *Chapter 2*

### **Property Matters: Virtually Justified?**

#### **Introduction.**

Theoretical considerations are an important foundation for discussing the potential rights for users in Massively Multiplayer Online Role Playing Games<sup>228</sup> and Virtual Worlds. Parts of such claims are reliant upon theoretical justifications. The potential proprietary interests in in-game items will be considered upon a theoretical basis.

Copyright is the cornerstone of the protection granted to computer software,<sup>229</sup> and is a property based right, with an added theoretical aspect to it.<sup>230</sup> The justification commonly cited for copyright – and especially the economic interests stemming from copyright – rests on the idea of economic reward for creative endeavour.<sup>231</sup> Griffin indicates that there are ideas of proprietary exploitation in other areas of property, and that it could be possible to export such exploitation to other areas, including a new copyright economy.<sup>232</sup> As such, copyright, intellectual property rights generally, and property theories are all relevant to any consideration of users proprietary interests in online interactive environments.

This discussion will consider three property theories: Utilitarian Theory; Lockean Labour Theory; and Hegelian Personality Theory alongside an added, fourth dimension relating to the ‘Value Theory.’ Each of these will determine justifications for proprietary interests. This consideration will also include broader arguments, especially as interests for one party could result in reduced interests for the other, or even potentially shared interests in the same items.

‘Property Matters: Virtually Justified?’ will consider that whilst these theories could be used as a basis for rights, there is a stronger claim under Lockean Theory. It is this theory which will

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<sup>228</sup> Hereafter MMORPGs.

<sup>229</sup> Copyright, Designs and Patents Act 1988, s3(1)(b).

<sup>230</sup> T Hardy, ‘Six Copyright Theories for protection of Computer Object Programs’ (1984) 26 Ariz L Rev 895.

<sup>231</sup> J Hughes, ‘Philosophy of Intellectual Property’ (1985) Georgetown L J 77, 287; L Zemer, ‘On the value of copyright theory.’ (2006) IPQ 1, 35; D Burkett, ‘Copyright culture – the history and cultural specificity of the Western model of copyright.’ (2001) IPQ 2, 146.

<sup>232</sup> J Griffin, ‘Making a new copyright economy: a new system parallel to the notion of proprietary exploitation in copyright.’ (2013) IPQ 1, 69.

therefore be given greater attention, and will be examined from the perspective of both the users and the developers, with its weaknesses in a gaming context considered. Lockean Theory, when advanced in the context of gaming claims, provides a clear basis for user interests in in-game items because it potentially undermines the contractual, and governance frameworks adopted by game developers. This theoretical basis will outline perspectives which may indicate that there are imbalances between the proprietary interests of users and developers of online platforms. Such potential imbalances will be discussed from the perspectives of copyright and contract elsewhere in this research,<sup>233</sup> but this chapter identifies the theoretical basis from which imbalances may become apparent.

The discussion here will also include consideration of both the respective strengths and weaknesses of the identified theories, and their relevance to MMORPGs and Virtual Worlds. This will also necessarily include discussions of how such theories could be relied upon in a gaming context, before concluding that, amongst differing preferences, there is considerable support for Lockean Theory, and the support available for this theory is the strongest. ‘Property Matters: Virtually Justified?’ will form the basis for a detailed exploration of copyright in MMORPGs. The research here explores property theories which may be relied upon to the question the contractual control – and displacement – of proprietary interests in environments which are reliant upon fragmented sets of rules to provide a governance system.

## **2.1. Intellectual Property: Theoretical Context.**

Intellectual Property is a diverse form encompassing a range of rights including copyright, and deals predominantly with proprietary interests in items that are not per se tangible.<sup>234</sup> This is particularly the case in relation to copyright, and more so for digital properties. Hettinger discusses theories relating to intellectual property in great depth, highlighting that rights such as copyright are justifiable, and ought to remain so, irrespective of the difficulties in justifying them.<sup>235</sup> Despite such arguments, there have been concerns mooted over whether such rights are justifiable, or whether intellectual property rights – and copyright in particular – restrict

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<sup>233</sup> See generally: Chapter 4 - MMORPGing & Copyright. See also: Chapter 5 - Contractual Displacement of Proprietary Interests: EULAw? At 5.5. *Standard terms – Fairness and Balance?*

<sup>234</sup> L Bently and B Sherman, *Intellectual Property Law* (3<sup>rd</sup> edn, OUP 2009), 2.

<sup>235</sup> E C Hettinger, ‘Justifying IP’ (Winter 1989) *Philosophy and Public Affairs*, 18(1) 31.

creativity and economic rights attaching to creativity<sup>236</sup> which would ordinarily benefit from protection.

Copyright has been the subject of criticism because of its scope and historical roots,<sup>237</sup> particularly in justifying the need for the economic protections, and duration of protection it provides.<sup>238</sup> Alternative proposals have been suggested as replacements for copyright such as the Creative Commons<sup>239</sup> and CopyLeft<sup>240</sup> movements. Whilst these models have had some success, it is difficult to envisage a Wikipedia style commons model<sup>241</sup> being widely applicable to all manner of copyright works, but especially MMORPGs and Virtual Worlds.

Theories of intellectual property are very similar to the theories cited for justifying property rights in real property such as land more generally. Consequently, the economic incentives provide encouragement for creativity and the making available of that creativity. However, MMORPGs and Virtual Worlds are copyrighted, and the copyright protection vests in the developers.<sup>242</sup> This is both as authors of the computer software as a work, but also as the economic reward for contributing to the creative economy through the development of the online platform. It is, however, slightly more difficult to justify providing greater economic incentives for developers, when they will be benefitting from their efforts through charging a fee to their customers and users. If theories – such as those of John Locke – are used to justify proprietary interests for developers as a result of their creative efforts, then the same basis must be provided for users who have added to - or improved in some way - the work of the developers of a particular MMORPG or Virtual World.

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<sup>236</sup> See for example: M Boldrin and K D Levine, *Against Intellectual Monopoly* (CUP 2008).

<sup>237</sup> See for example: S Breyer, 'The uneasy case for copyright: A study of copyright in books, photocopies, and computer programs' (1970) 84:2 Harv L R 281.

<sup>238</sup> Directive 2011/77/EU of The European Parliament and of The Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights. Hereafter Duration Directive 2011.

<sup>239</sup> Creative Commons, 'About' available online: <creativecommons.org> retrieved 18 February 2013.

<sup>240</sup> GNU, 'What is CopyLeft?' available online: <<http://www.gnu.org/copyleft/>> retrieved 18 February 2013.

<sup>241</sup> See: D O'Sullivan, *Wikipedia: A New Community of Practice* (Ashgate 2009) 177.

<sup>242</sup> Copyright, Designs and Patents Act 1988, s3(1)(b).

## 2.2. 'Property.'

The term 'property' is widely used in discussions to cover a number of potential categories, including: real property, marital property, intangible property, intellectual property, personal property and commercial property to name but a few examples.<sup>243</sup> What counts as property and which interests flow from property is subject to change across time through social movements, technological innovation and economic developments.<sup>244</sup> Property can however have a more precise meaning in legal matters, and as a term, can be defined as, "the right to possess, use and enjoy a determinate thing."<sup>245</sup> The definition offered here indicates that property is concerned with the uses of items and objects, and the enjoyment of them, but that there are also elements of control and thus ownership too.<sup>246</sup> However, there are other interpretations of the meaning of property, which indicate there is something more than merely a right to possess or to use an object. Property is concerned with control,<sup>247</sup> and it provides a description of the relationships individuals have with the items they use on a regular basis.<sup>248</sup> Property is however, more problematic than this – and it has been suggested that property actually is an essential part of our social structure, albeit this is not strictly the legal definition of property.<sup>249</sup> The legal concept of property is entrenched within the notions of control and exclusivity – the ability to control items by ensuring that there is some manner of excluding others from the use of those items. This approach to property is not without opposition, and it is suggested that it is possible for control over items to arise without the need to enforce exclusivity<sup>250</sup> – property is not defined by Garner as the exclusive right to enjoy or possess,<sup>251</sup> rather it is the right to enjoy or possess.

One form of property - intellectual property - meanwhile, is defined as, "a category of intangible rights protecting commercially valuable products of the human intellect."<sup>252</sup> There is a distinction

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<sup>243</sup> This is a non-exhaustive, illustrative list only.

<sup>244</sup> R A Cass and K Hylton, *Laws of Creation – Property Rights in the World of Ideas* (Harvard University Press 2013) 14.

<sup>245</sup> B A Garner (eds), *Blacks' Law Dictionary* (8<sup>th</sup> edn, Thomson West 2004) p1252.

<sup>246</sup> Blacks Law Dictionary, 'What is Property?' available online: <thelawdictionary.org/property/> retrieved 18 August 2014.

<sup>247</sup> T W Merrill and H E Smith, 'What Happened to Property in Law and Economics' Yale L J (2001) 357; 358.

<sup>248</sup> J Couser, 'Cyber property' in A Murray and M Klang (eds) *Human Rights in the Digital Age* (Cavendish Publishing, 2005) 126.

<sup>249</sup> See: A J Galambos, *Thrust for Freedom: An Introduction to Volitional Science* (Universal Scientific Publications Company, 1999).

<sup>250</sup> L Katz, 'Exclusion and Exclusivity in Property Law' (2008) 58 Uni Toronto Law Jou 275.

<sup>251</sup> B A Garner (eds), *Blacks' Law Dictionary* (8<sup>th</sup> edn, Thomson West 2004) 1252.

<sup>252</sup> B A Garner (eds), *Blacks' Law Dictionary* (8<sup>th</sup> edn, Thomson West 2004) 824.

between this and the definition attached to property, with the emphasis when defining property falling upon the rights to use, whilst intellectual property – as a category of property – is considered in terms of what it encompasses. The distinction between property and intellectual property was highlighted by Salmond when he indicated that property is first and foremost concerned with the rights a person has over an item or object: “In its widest sense, property includes all a person’s legal rights of whatever description.”<sup>253</sup> Such an interpretation would evidently include divisions such as intellectual property. Therefore, when considering what intellectual property is, one interpretation offered here is that it is the right to possess and use the intangible products of human intellect.

This is likely to differ again, from the meaning given to ‘virtual property.’ As Horowitz highlights, intellectual property and virtual property are separate; each protecting bundles of different, yet inter-related interests.<sup>254</sup> Virtual property – whilst not finding a definition within a legal dictionary – can be approached in a similar manner to that of intellectual property. The definition of property is also relevant here, and the emphasis falls on the meaning of ‘virtual’ rather than that of property in light of the definition already advanced. As such, ‘virtual’ can be taken to mean – in the context of online gaming and computing – something which does not physically exist as such but which is made to appear as existing by computer software.<sup>255</sup> Whilst it is possible to arrive at a definition of ‘virtual property’ by amalgamating definitions of property, and virtual, this still does not indicate what will fall within such a category, and highlights the problematic nature of defining this type of property. Nevertheless, as Abramovitch and Cummings state, this does not mean that a parallel definition cannot arise:

“Although it is difficult to compose a decisive legal definition for virtual property, it is clear that many parallels exist between virtual property and real world property, and the intangible nature of virtual property does not

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<sup>253</sup> G Williams, *Salmond on Jurisprudence* (11<sup>th</sup> edn, Sweet & Maxwell 1957) 423.

<sup>254</sup> S J Horowitz, ‘Competing Lockean Claims to Virtual Property’ (2007) 20 Harv J L & Tech 443, 444.

<sup>255</sup> Oxford Dictionaries, ‘Virtual’ <<http://www.oxforddictionaries.com/definition/english/virtual>> accessed 8 August 2014.



necessarily rule out the possibility of treating virtual property akin to physical property for legal purposes.”<sup>256</sup>

Indeed, such a definition has not been straightforward, and there remains a lack of consensus. Fairfield for example indicates that ‘virtual property’ has been around for longer than computer software – and cites the example of a bank account as one of the first forms of virtual property, followed by other examples such as URLs and email accounts.<sup>257</sup> Evidently, if users are treating their in-game swords and cars in the same way as their physical car and physical sword, there is a close connection to property as legally defined.<sup>258</sup> Erkkisson and Grill,<sup>259</sup> Bartle,<sup>260</sup> Stephens,<sup>261</sup> Westbrook<sup>262</sup> and Fairfield<sup>263</sup> have all suggested that it is a similar concept to that of property, and should result in similar interests. Blazer expands further, indicating that there are five indicators of ‘virtual property:’ rivalry; persistence; interconnectivity; secondary markets and value-added-by-users.<sup>264</sup> If this is indeed the situation, then the same rights that arise under the legal definition of property must also attach to in-game items and objects. Westbrook is unequivocal in his argument that there is a distinction between intellectual property and virtual property,<sup>265</sup> and this too is reflected in the stance adopted by Fairfield who suggests that examples of virtual property are easily recognisable.<sup>266</sup> Gong takes this further, and argues that international treaties must take account of virtual property such as avatars and virtual chattels.<sup>267</sup>

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<sup>256</sup> S Abramovitch and D Cummings, 'Virtual property, real law: the regulation of property in video games: Part 2' (2010) Ent L R 52; 57.

<sup>257</sup> J A T Fairfield, 'Virtual Property' (2005) 85 Boston U L Rev 1047; 1051, 1057.

<sup>258</sup> S Abramovitch and D Cummings, 'Virtual property, real law: the regulation of property in video games: Part 2' (2010) Ent L R 52; 57.

<sup>259</sup> A Eriksson and K Grill, 'Who Owns My Avatar? Rights in Virtual Property' (Changing Views: Worlds in Play Conference, Vancouver June 16 – 20 2005).

<[http://www.digra.org/dl/search\\_results?general\\_search\\_index=who+owns+my+avatar&SUBMIT=Search](http://www.digra.org/dl/search_results?general_search_index=who+owns+my+avatar&SUBMIT=Search)> retrieved 27 January 2010.

<sup>260</sup> R A Bartle, 'Virtual Worldliness: What the Imaginary Asks of the Real' [2004] N Y L Sch L Rev 20.

<sup>261</sup> M Stephens, 'Sale of In-Game Assets: An Illustration of the Continuing Failure of Intellectual Property Law to Protect Digital Content Creators' [2001-2002] 80 Tex L Rev 1513.

<sup>262</sup> T Westbrook, 'Owned: Finding A Place for Virtual World Property Rights' [2006] Mich St L Rev 779.

<sup>263</sup> J A T Fairfield, 'Virtual Property' (2005) 85 Boston U L Rev 1047.

<sup>264</sup> C Blazer, 'The Five Indicia of Virtual Property' (2006-2007) 5 Pierce L Rev 137; 139.

<sup>265</sup> T Westbrook, 'Owned: Finding A Place for Virtual World Property Rights' [2006] Mich St L Rev 779; 784.

<sup>266</sup> J A T, Fairfield 'Virtual Property' (2005) 85 Boston U L Rev 1047; 1057.

<sup>267</sup> J Gong, 'Note: Defining and Addressing Virtual Property in International Treaties' (2011) 17 B U J Sci & Tech L 101; 107.

The distinction between ‘virtual property’ such as in-game swords, and intellectual property such as copyright, is an even finer one than the distinction between real property such as land, and in-game items. Whilst intellectual property is an established area, with well-recognised rights such as copyright,<sup>268</sup> patents<sup>269</sup> and trademarks,<sup>270</sup> virtual property – in the form of in-game items – is much less recognised. In the context of online gaming however, there is a synergy between these two kinds of property, and that arises through the intellectual property provisions governing the game software. Both intellectual and virtual creations are intangible and therefore it is more difficult to exclude others from using such creations. With real property such as a car or a house, it is possible for the owner and possessor of the house to exclude anyone else from accessing, using or enjoying it by physically closing the door and windows. With intangible creations, it is much more difficult to exclude others from using the same software or the same musical track at the same time as you. This is partially because there is a lack of physical item, but also because intangible items can be reproduced much more easily. It is for example, more difficult to reproduce an exact copy of a house and share that than it is to produce an exact copy of a song and share that.

The excludability, or right to possess is something that is central to the legal definition. This is rather different when dealing with forms of property such as copyright and in-game items. Both of these types of property potentially give rise to different proprietary interests. For example, in an online game, the developer will have an interest in the intellectual property – particularly copyright – of the game software, whereas the user will have proprietary interests in the game items arising from his or her interactions and manipulations of the same software, particularly in terms of control, alongside copyright claims that also arise from those interactions. Were a developer to claim that he was the sole interested party in all of the items and code in the game that would potentially create a conflict between the interests of the user and the developer.

Consider the examples of Microsoft Office, and Crayola crayons. Microsoft Office is a software package, which is produced and licensed by Microsoft.<sup>271</sup> There is no limit on the number of users

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<sup>268</sup> Copyright, Designs and Patents Act 1988.

<sup>269</sup> Patents Act 1977.

<sup>270</sup> Trademarks Act 1994.

<sup>271</sup> See: Microsoft Office: <<http://office.microsoft.com/en-GB/>> retrieved 18 August 2014.

of this software package – Microsoft will not license a copy to User A at the expense of User B who will be required to wait until User A has finished with the software before using it. This software does not require users to take it in turns to use it. Whilst Microsoft will have intellectual property interests in the software – for example copyright – it is difficult to envisage that these interests also give them similar interests in every document produced by every user of the software package. As such, there is a distinction here between the intellectual property interests of the different parties. Microsoft does not acquire an interest in the novel produced in Microsoft Office by User B, nor does Microsoft acquire an interest in the lecture slides produced by User A in Microsoft PowerPoint. There is therefore a distinction between the interests which arise for the user and the developer of Microsoft Office, even though they are both premised on copyright as a form of intellectual property.

A similar example can be found with Crayola crayons.<sup>272</sup> Crayola manufactures and sells packets of crayons. There is no limit on the number of crayons that can be used at any time simultaneously – Crayola does not prevent Customer C from drawing with crayons whilst Customer D does the same. Crayola, like Microsoft's interest in the software, will have interests in the physical property that is the crayons i.e. they will be passed to the buyer upon payment. Crayola will also have interests in the intellectual property – design rights and trademarks – surrounding the design and appearance of the crayons. However, again, it is difficult to envisage that Crayola will claim they have copyright interests in the outputs of the every single person who has ever used a Crayola crayon. Crayola sells the crayons, and that is where the Crayola's interest ends. Crayola does not then acquire copyright in the character design produced with the crayons bought and used by Customer D. There is a distinction that arises between the claims of Crayola in manufacturing and supplying the Crayons, and the copyright arising through the use of those crayons in producing character designs or other creative works. Similarly, the owner of a packet of crayons is unlikely to claim that he owns all other identical crayons. It is apparent that there are differing interests for the purchaser and user of the crayons to those of the manufacturer of the crayons.

These examples are markedly different to the situation in online games and virtual worlds, where the game developers claim not only the entire intellectual property interests in all aspects of the

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<sup>272</sup> See: Crayola: < <http://www.crayola.co.uk/> > retrieved 18 August 2014.

game and game items, but also claim sole interests in all of the items attached to a game account developed by users.<sup>273</sup> There are some close correlations here to the Microsoft example – the game developers, much like Microsoft, provide a platform for others to use. In this way, they provide the toolbox for their users and customers to benefit from. However, the correlation then ends. Whilst the developers provide this toolbox and framework for gamers, they too claim all of the interests in the platform. The game developers do not, as Microsoft or Crayola, provide their goods / service and then cease their claims to creations produced within the framework or with the tools; game developers claim these too. In doing so, the claims of game developers extend further than the claims made by Microsoft or Crayola. Microsoft and Crayola differ; they provide the framework and the toolbox for their users and consumers but do not seek to claim all of the interests in the outputs produced using the products. Game developers therefore, seek to control not only the framework and platform itself, but also everything within it, including the proprietary interests of the users.

The issue of identifying intellectual property and virtual property interests has arisen as a sub-issue in a recent US certification.<sup>274</sup> In this context Judge Ryu presiding over the case, included in her discussion, reference to the statements made by *Second Life* as to the extent of the ownership interests users may have. This is similar to the position adopted by Posner<sup>275</sup> who suggests that there is a distinction between intellectual property and virtual property, and reiterates other indications from Judge Robreno who “found issues”<sup>276</sup> with the *Second Life* terms of service in 2007.<sup>277</sup> Judge Ryu considered that implications of harm suffered can be the same even if the products may not be functionally equivalent to one another,<sup>278</sup> thereby suggesting a distinction arises between the proprietary interests such as control of in-game items, and the intellectual property – particularly copyright – which arise in the same items. This recognition coincides with the supposition from Fairfield that virtual property such as in-game items mimics the

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<sup>273</sup> See: Chapter 5 – Contractual Displacement of Proprietary Interests: EULAw? At 5.4.1. *Ownership Issues*.

<sup>274</sup> *Evans et al v Linden Research Inc. et al* No. C 11-01078 DM,. United States District Court, N.D. California (November 20 2012).

<sup>275</sup> W J An, ‘The *Second Life* of Judge Richard A Posner’ (*New World Notes*, 11 December 2006) <[http://nwn.blogs.com/nwn/2006/12/the\\_second\\_life.html](http://nwn.blogs.com/nwn/2006/12/the_second_life.html)> retrieved 29 November 2010.

<sup>276</sup> T Nino, ‘Evans et al vs Linden Lab: The new lawsuit on the block’ *Massively by Joystiq* (21 April 2010) available online: <<http://massively.joystiq.com/2010/04/21/evans-et-al-vs-linden-lab-the-new-lawsuit-on-the-block/>> retrieved 1 May 2010.

<sup>277</sup> *Bragg v Linden Research Inc.* (487 F.Supp 2d 593 E.D. Penn) [2007].

<sup>278</sup> *Evans et al v Linden Research Inc. et al* No. C 11-01078 DM. United States District Court, N D California (November 20 2012).

characteristics of real property, and is rivalrous, persistent and interconnected.<sup>279</sup> This is also broadly reflective of similar indications from Chinese courts, where in 2003, a court ordered the return of game items to a gamer following a third party hacking theft,<sup>280</sup> because of the need to “protect a distinct property right – the right of the owner to control the property against the world.”<sup>281</sup> Further similar indicators arose in the opinion of a Dutch Advocate General when assessing claims to items in *Runescape*,<sup>282</sup> who considered that in-game items have economic value which is distinct.<sup>283</sup> This not only shows the willingness of courts to protect in-game items, but also the link made between real property and the in-game virtual property, on the same basis of excludability. In making such a determination, the Chinese court relied upon an earlier provincial decision<sup>284</sup> which ruled in favour of granting protection to weapons from an online game because they had property value.<sup>285</sup>

It is therefore apparent that whilst intellectual property interests can arise in online games and virtual worlds, so too – potentially – can property interests such as copyright in the in-game items. This is because both intellectual and virtual interests stem from the same definition of property, and are also concerned with ownership and control. Courts have indicated that online game items, as virtual property, ought to benefit from protection because the right to control such items is akin to the right to control physical property.<sup>286</sup> Proprietary interests therefore extend beyond pure intellectual property concerns such as copyright to interests of control and ownership in in-game items. Whilst judicial recognition suggests synergy between the ways in which proprietary interests in game items may be protected, there is still discussion to be had in relation to the basis of such interests.

<sup>279</sup> J A T, Fairfield ‘Virtual Property’ (2005) 85 Boston U L Rev 1047; 1053.

<sup>280</sup> Second Medium Level People’s Court on the case *Li Hongchen v Beijing Artic Ice Technology Development Co* (Case No. (2004) er-zhong-min-zong-zi No. 02877) available at: <<http://www.4oa.com/office/750/964/1734/1737/200511/79842.html>> retrieved 18 August 2014.

<sup>281</sup> J A T, Fairfield ‘Virtual Property’ (2005) 85 Boston U L Rev 1047; 1084 at n188.

<sup>282</sup> M Boonk and A R Lodder, ‘Virtual Worlds: Yet Another Challenge to IP Law’ (2007) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1079970](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1079970)> retrieved 11 May 2010.

<sup>283</sup> J Purewal, ‘The second virtual goods crime: is Runescape theft, theft?’ (Gamer Law, 4 July 2011) Available online: <<http://www.gamerlaw.co.uk/2011/the-second-virtual-goods-crime-is-runescape-theft-theft/>> retrieved 10 July 2011.

<sup>284</sup> *Zhao v Shanda Networking*, cited in Sarah Xuan, ‘Virtual Property in Greater China’ MMLC Group – MMLC Murphy Wang <<http://www.hg.org/article.asp?id=5538>> accessed 14 August 2014.

<sup>285</sup> S Lucchetti and S Lo, ‘Virtual Items in a Legal Vacuum: Perspectives on Virtual Property from China’ (2009) 54 IPBA Journal, 9; n 31.

<sup>286</sup> Second Medium Level People’s Court on the case *Li Hongchen v Beijing Artic Ice Technology Development Co* (Case No. (2004) er-zhong-min-zong-zi No. 02877) available at: <<http://www.4oa.com/office/750/964/1734/1737/200511/79842.html>> retrieved 18 August 2014.

### 2.3. Theory of Property.

The theory of individuation<sup>287</sup> implies that property is a concept rather than a right; rights *attach* to it rather than *stem* from it. Despite the conceptual similarities, and Horowitz's vociferous argument that there ought to be a division of rights between intellectual property and other property types,<sup>288</sup> along the basis of a division between real property and all other property, the idea of virtual property in the form of in-game items differs from that of real world property such as land in part due to the intangibility, but also because virtual property is also strongly influenced by intellectual property rights, particularly in an online context.<sup>289</sup> Theoretical justifications have been mooted in support of intellectual property rights. The philosophical approaches of Utilitarianism, Hegelian Personality Theory and Lockean Labour Theory will now be considered to identify the strongest basis for supporting user claims to proprietary interests in virtual environments.

### 2.4. Utilitarian Theory.

Bentham's Utilitarian Theory views law as a system of social control, introducing restrictions and imposing obligations upon citizens.<sup>290</sup> Caramore views it slightly differently however, and focuses on the incentive element of Utilitarian Theory to support the claim that users will invest in something only if there is an incentive to do so.<sup>291</sup> Whilst an interesting stance, it appears flawed, as there is likely to be an incentive for users to gain items or be creative in the first instance if it serves their gaming aims at a particular time. This interpretation is therefore rather superficial in its consideration of the 'long game' some users undertake. The system of 'social control' envisaged by Bentham does not refer to physical means of restricting behaviour, but rather refers to rules and guidelines that are designed to encourage people to determine their own self-control.<sup>292</sup> In this respect, such rules do not restrict the movement of persons but neither do they add freedoms. Given that Crisp and Chappell<sup>293</sup> define Utilitarianism as relating to welfare rather

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<sup>287</sup> J E Penner, *The Idea of Property in Law* (Clarendon Press 1997) 37.

<sup>288</sup> S J Horowitz, 'Competing Lockean Claims to Virtual Property' (2007) 20 Harv J L & Tech 443, 444.

<sup>289</sup> S J Horowitz, 'Competing Lockean Claims to Virtual Property' (2007) 20 Harv J L & Tech 443, 444.

<sup>290</sup> D Lyons, *In the Interest of the Governed: A Study in Bentham's Philosophy of Utility and Law* (Clarendon Press 1991) 131.

<sup>291</sup> M B Caramore, 'Help! My Intellectual Property is Trapped: Second Life, Conflicting Ownership Claims and the Problem of Access' (2008) Rich J L & Tech 3 [16].

<sup>292</sup> D Lyons, *In the Interest of the Governed: A Study in Bentham's Philosophy of Utility and Law* (Clarendon Press 1991) 131.

<sup>293</sup> R Crisp and T Chappell, 'Utilitarianism' in *Concise Routledge Encyclopedia of Philosophy* (Routledge 2000) 909.

than strict control, it would appear that rules and guidelines are designed to encourage wellbeing and support welfare, rather than strictly control behaviour. This idea is closely related to the idea of excluding one from interfering with the rights of another. It is difficult to grant rights without imposing obligations.<sup>294</sup> Indeed to attempt to introduce rights without corresponding obligations would seem to go against principles identified by Lyons,<sup>295</sup> and Crisp and Chappell;<sup>296</sup> guidelines would be few and far between, and it would be practically impossible to meet the aim of encouraging wellbeing through self-control. If rights are being interfered with due to the lack of obligations on behalf of other parties, such interfering behaviour is likely to mean that guidelines are breached, self-control is lost and wellbeing becomes an ambition rather than a reality. It would therefore appear that there are two interlinked elements to Utilitarianism. Firstly, rules will determine certain behaviour and secondly, rights will encourage wellbeing.

A Utilitarian account of Virtual Worlds and MMORPGs suggests that allocating rights to individuals is justified through the benefit to society as a whole.<sup>297</sup> The allocation of proprietary rights can only be justified if such an allocation maximises the good of society. It would seem therefore, that in applying Utilitarianism to Virtual Worlds, there has to be a maximisation of the benefit to the world as a whole or to the ‘commons’ of a particular world for individual rights to be justified. Seemingly, in applying Utilitarian principles to MMORPGs and Virtual Worlds, to maximise the greatest good for the greatest number, if the users - who are greater in number - seek proprietary interests, these rights should be granted, where justifiable to do so. Despite this, the interests of developers must also be considered; and if developers wished users to be in possession of similar proprietary interests, they would have expressly granted them to users in their End User Licence Agreements<sup>298</sup> and Terms of Service.<sup>299</sup> However, when the greatest good for the greatest number is of paramount consideration, it would seem that under Utilitarian Theory, proprietary interests for individuals – i.e. users – should be granted.

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<sup>294</sup> D Lyons, *In the Interest of the Governed: A Study in Bentham's Philosophy of Utility and Law* (Clarendon Press 1991) 125.

<sup>295</sup> D Lyons, *In the Interest of the Governed: A Study in Bentham's Philosophy of Utility and Law* (Clarendon Press 1991) 131.

<sup>296</sup> R Crisp and T Chappell, ‘Utilitarianism’ in *Concise Routledge Encyclopedia of Philosophy* (Routledge 2000) 909.

<sup>297</sup> T Westbrook, ‘Owned: Finding A Place for Virtual World Property Rights’ (2006) *Mich St L Rev* 779, 795.

<sup>298</sup> Hereafter EULAs.

<sup>299</sup> See: Chapter 5 - Contractual Displacement of Proprietary Interests: EULAw? At 5.4.1. *Ownership Issues*.

#### ***2.4.1. Problems with Utilitarian Theory.***

What has not been stipulated, or determined at any point, is what exactly is meant by ‘property’ or ‘proprietary’ interests under this theoretical approach. If users are granted such interests but have no ability to sell, trade or transfer items, the rights will be of little use to them, and could potentially undermine the idea of the greatest good identified in Bentham’s original approach. In a Virtual World or MMORPG, wellbeing may be difficult to measure or control, and challenging to improve. Wellbeing could apply to several entities - the community or world as a whole, individual avatars, or users. In potentially being deprived of proprietary interests, avatars / users may be affected in terms of who they can and cannot enter trade arrangements with, and what they can and cannot do. However, users are also affected, because it is users who control avatars and who do the strategising behind the game play. As Stephens highlights, it is the avatar which is, “the source of goods and services...in reality however, the player is the source of goods and services because the player’s decisions and skill control the character...”<sup>300</sup> Therefore, not only is the wellbeing of avatars at stake, but that of the users also. And if users are affected, surely that means that the wellbeing of the community as a whole could potentially suffer if the greatest good for the greatest number is ignored. One leading aspect of engagement in Virtual Worlds and MMORPGs is social interaction. As such, there appears to be a significant level of community existence in online interactive spaces. Perhaps, the overriding Utilitarian concern should focus on the wellbeing of the community, because greater numbers form the community than form the individual – whether that individual is an avatar or a user.

In assigning proprietary interests to users under a Utilitarian Theory, this may satisfy the greatest number in the short term. However, there is a longer term consideration that appears to have been overlooked; enforcement and protection of the allocated interests. Once a user has a proprietary claim, he or she may be happier, and that may contribute to a boost in the overall good of the community as a whole. What a user is perhaps not considering in the desire for recognition of proprietary interests, is how he or she is going to be able to protect his or her interest when seeking to benefit from that recognition. In many Virtual Worlds, there is no contract between users; all contractual relationships stem from the End User Licence

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<sup>300</sup> M Stephens, ‘Sale of In-Game Assets: An Illustration of the Continuing Failure of Intellectual Property Law to Protect Digital Content Creators’ [2001-2002] 80 Tex L Rev 1513; 1532.



Agreement<sup>301</sup> between a user and the developer.<sup>302</sup> Consequently, in Virtual Worlds and MMORPGs where there is no realistic grievance system or form of redress, and no system of Virtual World governance, users have few, if any, methods of redress for wrongs they may suffer as a result of other users.

This highlights some of the deficiencies of a Utilitarian approach where there is no governance or grievance system in place. Moreover, the contractual governance approach adopted in many MMORPGs and Virtual Worlds may also need to be altered if the Utilitarian Theory is the one used to justify proprietary interests in in-game items. The current systems make it very difficult for users to gain recognition of any interests they may have, and enforcing such interests is equally difficult under the current governance paradigm, especially in terms of rights of redress against other users.

#### **2.4.2. Utilitarian conclusions.**

In maximizing the greatest good for the greatest number,<sup>303</sup> interests for users in in-game items can be justified in a Virtual World or MMORPG. However, there is one potential flaw with the Utilitarian approach; Utilitarian Theory does not recognize an automatic proprietary rights for individuals;<sup>304</sup> the dominant focus is on society and promotion of the greatest good. Utilitarianism does not focus on labour and therefore reduces the perceived potential struggle between developers and users. Instead, Utilitarianism relies upon a calculation<sup>305</sup> of whether protecting or not protecting the proprietary interests for individuals provides the greatest good for society. The challenge of calculating the 'greatest good' is one which poses potential problems, including, for example, questions relating to what is meant by 'good.'<sup>306</sup> Utilitarian Theory can apply to Virtual

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<sup>301</sup> Hereafter EULA.

<sup>302</sup> K Barker, 'MMORPGing - The Legalities of Game Play.' (2012) *European Journal for Law and Technology*, Vol. 3, No.1, 7; *Hernandez v Internet Gaming Entertainment*, U.S. Dist. Ct. Southern District of Florida, Case No: 07-CIV-21403-COHN/SELTZER [2007].

<sup>303</sup> R Crisp and T Chappell, 'Utilitarianism' in *Concise Routledge Encyclopedia of Philosophy* (Routledge 2000) 909.

<sup>304</sup> T Westbrook, 'Owned: Finding A Place for Virtual World Property Rights' (2006) *Mich St L Rev* 779, 795.

<sup>305</sup> T Westbrook, 'Owned: Finding A Place for Virtual World Property Rights' (2006) *Mich St L Rev* 779, 796.

<sup>306</sup> 'Greatest good' could, for example, be considered from the perspective of value and the worth of gaming property. See for example: A Eriksson and K Grill, 'Who Owns My Avatar? Rights in Virtual Property' (Changing Views: Worlds in Play Conference, Vancouver June 16 – 20 2005) available online:

<[http://www.digra.org/dl/search\\_results?general\\_search\\_index=who+owns+my+avatar&SUBMIT=Search](http://www.digra.org/dl/search_results?general_search_index=who+owns+my+avatar&SUBMIT=Search)> retrieved 27 January 2010; S Humphreys and Others, 'Fan based production for computer games: User led innovation, the 'drift of value' and the negotiation of intellectual property rights' (2005) *Media International Australia incorporating Culture and Society* February, Issue 114, 16; S Humphreys and J Banks, 'The labour of

Worlds and MMORPGs, and can be used to justify proprietary interests, although the strongest use of Utilitarian Theory is to justify intellectual proprietary interests more broadly.<sup>307</sup>

## 2.5. Hegel's Personality Theory.

Hegel's Personality Theory, when related to in-game items, relies on the idea that proprietary interests are linked to identity; that the item concerned is bound into the personality of its owner.<sup>308</sup> This theory essentially proposes that objects cannot be separated from personality or liberty<sup>309</sup> and that interests and rights in such objects are a necessity for individuals to enjoy liberty. Personality Theory, when applied to in-game items, rests on the avatar to make its case. The user is responsible for the avatar; it becomes part of its user, and therefore, users should be able to receive proprietary interests because the avatar which develops in-game items in a virtual space is part of the user's personality.<sup>310</sup> This reflects the idea that users adopt a sense of ownership and control over the game account because of the value it holds for them.<sup>311</sup>

Hunter and Lastowka succinctly explain the application of Personality Theory; "to the extent that Personality Theory justifies private property in land or goods, it justifies property in virtual land or goods."<sup>312</sup> Difficulties do not arise in Hegelian Theory in relation to the differences between tangible and intangible creations.<sup>313</sup> This would suggest that this theory is therefore easy to apply in Virtual Worlds and MMORPGs, but just because it may be easy to apply does not mean that it is the theory that affords the best justification for proprietary interests in in-game items. In Virtual Worlds and MMORPGs, the central question revolves around the justifiability of the identification between the users and the avatars. If the relationship is justifiable, then proprietary interests must be granted to protect objects. If the relationship is unjustifiable, the law ought not

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user co-creation. Emerging social network markets?' (2008) *Convergences* 14(4) 401; T Kujanpää, T Manninen and L Vallius, 'What's My Game Character Worth – The Value of Components of MMOG Characters' (Situating Play DiGRA Conference, Tokyo 24-28 September 2007) available online:

<<http://www.digra.org/dl/db/07312.35346.pdf>> retrieved 27 January 2010; N Gervassis 'In Search of the Value of Online Electronic Personae: Commercial MMORPGs and the Terms of Participation in Virtual Communities' [2004] 2 *JILT* 26, available online:

<[http://www2.warwick.ac.uk/fac/soc/law2/elj/jilt/2004\\_3/gervassis/](http://www2.warwick.ac.uk/fac/soc/law2/elj/jilt/2004_3/gervassis/)> retrieved 6 May 2010.

<sup>307</sup> E C Hettinger, 'Justifying IP' (Winter 1989) *Philosophy and Public Affairs*, 18(1) 31, 47.

<sup>308</sup> G S Alexander and E M Penalver, *An Introduction to Property Theory* (CUP 2012) 57.

<sup>309</sup> T Westbrook, 'Owned: Finding A Place for Virtual World Property Rights' (2006) *Mich St L Rev* 779, 798.

<sup>310</sup> F G Lastowka and D Hunter, 'The Laws of Virtual Worlds' [2004] 92 *Cal L Rev* 1, 63.

<sup>311</sup> See below: Chapter 2 - Property Matters: Virtually Justifiable? At 2.7. *Theory for Parity?*

<sup>312</sup> F G Lastowka and D Hunter, 'The Laws of Virtual Worlds' [2004] 92 *Cal L Rev* 1, 48.

<sup>313</sup> F G Lastowka and D Hunter, 'The Laws of Virtual Worlds' [2004] 92 *Cal L Rev* 1 48, 49.

to protect the avatar. Whilst this theory appears to have a straightforward application in MMORPGs and Virtual Worlds, there are difficulties attached to it.

### *2.5.1. Problems with Hegelian Theory.*

In order to determine what is central to personality, there is a need to draw a distinction between personal and commercial items, or property. If an item is “justifiably central”<sup>314</sup> to personality, it will receive greater protection than that which is unjustifiable. This distinction is somewhat controversial, and not always straightforward. Hunter and Lastowka,<sup>315</sup> and Westbrook<sup>316</sup> both cite the example of the wedding ring as something that would receive a higher degree of protection when compared to a pile of waste for instance. The wedding ring is taken to be more personal than a pile of rubbish. Determining what is worthy of the highest level of protection based on personality is not always an easy task and this difficulty is compounded in relation to in-game items. A justifiable connection is deemed to be more deserving of protection.<sup>317</sup> However, it is somewhat harder to determine whether an avatar has the same level of personal attachment as a wedding ring. It is, however, likely that an avatar will rank higher than a pile of rubbish.

Avatars seem to have the strongest claim to in-game items under the Hegelian Personality Theory because the items that accrue to them in a Virtual World or MMORPG add to their skills and experience, enhancing their avatars abilities and interaction. Given the value to a user, an avatar may become extremely important to its controller. The difficulty in granting proprietary interests to an avatar is that the avatar has no legal identity, unlike that granted for example to companies.<sup>318</sup> The avatar is controlled by the user, therefore any claims an avatar may have must be available for the user to control.

Furthermore, there is an additional – and significant – difficulty that arises in relation to Hegelian Personality Theory. Providing the theory justifies proprietary interests in an avatar, the theory may not necessarily justify trading in avatars. Hunter and Lastowka argue that alienability is

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<sup>314</sup> T Westbrook, ‘Owned: Finding A Place for Virtual World Property Rights’ (2006) Mich St L Rev 779, 798.

<sup>315</sup> F G Lastowka and D Hunter, ‘The Laws of Virtual Worlds’ [2004] 92 Cal L Rev 1, 49.

<sup>316</sup> T Westbrook, ‘Owned: Finding A Place for Virtual World Property Rights’ (2006) Mich St L Rev 779, 798.

<sup>317</sup> M J Radin, ‘Property and Personhood’ (1982) 34 Stan L Rev 957, 960.

<sup>318</sup> *Salomon v A Salomon & Co Ltd* [1897] AC 22.

accepted for wedding rings (which are deemed to be extremely personal property).<sup>319</sup> If alienability is acceptable for personal property, and if avatars are accepted as personal items, surely they too should be capable of alienability. Taylor indicates that there can never really be total separation between a user and his avatar,<sup>320</sup> which would suggest that avatars are a form of personal intangible item. When added to the perceptions a user has of the value of his avatar and game account,<sup>321</sup> this strongly suggests that alienability is plausible. The overriding problem with this could prove to be the EULA of a particular Virtual World or MMORPG, which in many cases will prohibit the trading of in-game or in-world items. However, given that the Hegelian Personality Theory is being used to justify proprietary interests, it could also be used to argue that such interests include the right to trade.

### 2.5.2. *Hegelian Conclusions.*

Hegel's Personality Theory offers a strong argument for the allocation of proprietary interests in in-game items to avatars.<sup>322</sup> However, there are substantial questions surrounding Real Money Trading and the alienability of such avatars. Part of the debate surrounding Virtual Worlds and MMORPGs focuses on users' abilities to sell and trade gaming objects and items. If this theory is unable to support such action, it is of limited value. Despite this serious flaw, it does have merit in terms of not distinguishing between tangible and intangible goods. Moreover, this theory seems only to support proprietary interests in and for avatars, essentially focussing on the rights of an intangible and - in the real world - almost non-existent being that has no capability of autonomous thought. Allocating proprietary interests in what could prove to be valuable in-game items to such an entity is unusual, especially when a user is required to control an avatar.

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<sup>319</sup> F G Lastowka and D Hunter, 'The Laws of Virtual Worlds' [2004] 92 Cal L Rev 1, 49.

<sup>320</sup> T L Taylor, *Play Between Worlds – Exploring Online Game Culture* (The MIT Press 2006) 9 -11.

<sup>321</sup> See below: Chapter 2 - Property Matters: Virtually Justified? At 2.7. *Theory for Parity?*

<sup>322</sup> See: A W M Louie, 'Designing Avatars in Virtual Worlds: How Free Are We to Play Superman?' (2007) *Journal of Internet Law*, 3. See also T D Marcus, 'Fostering Creativity in Virtual Worlds: Easing the Restrictiveness of Copyright for User-Created Content; (2007-2008) 52 N Y L Sch L Rev 67.

## 2.6. Lockean Theory of Labour.

The Lockean Theory of Labour stems from John Locke's treatise,<sup>323</sup> which states that, those who expend time and effort in creating and developing something should be rewarded for their labour with proprietary rights to it.<sup>324</sup> This theory, unlike Utilitarianism, focuses on labour, and the fruits of that labour. As such, this theory engenders a conflict between the interests of users and the interests of developers; a conflict which is explored in detail by Horowitz.<sup>325</sup> Under Lockean Theory, those who do not expend any labour are not entitled to claim proprietary interests. This seems to be a realistic approach; if you work for something, it should be yours but if you do not, you cannot expect to have it. This applies equally in the real world as it does in the game environment. However, in the game environment, there are a number of entities with different characteristics that all have competing claims to items; users, avatars and developers.

MMORPG and Virtual World users can spend many hundreds of hours gradually completing aspects of a particular game or developing their particular character and resident in virtual worlds.<sup>326</sup> Not only do such users spend many hours working on the appearance and characteristics of their avatars, but they also spend time on developing game items. In addition to this, in MMORPGs, users can spend countless hours performing basic tasks in order to progress through the game and 'level-up.' It is very difficult to dispute that expending such energy counts as labour; if users did not do such repetitive tasks, their character and game progress would be diminished. However, users often receive no proprietary interests in return for such an expenditure of labour. Given that the developers are different to the users, the developers often enter into contractual agreements with users which expressly displace automatically arising proprietary interests such as copyright.<sup>327</sup> Consequently, users, who are required to agree to such contracts in order to access the Virtual World or MMORPG, are potentially contractually

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<sup>323</sup> S J Horowitz, 'Competing Lockean Claims to Virtual Property' (2007) 20 Harv J L & Tech 443, 450; D P Sheldon, 'Claiming Ownership But Getting Owned: Contractual Limitations on Asserting Property Interests in Virtual Goods' (2006-2007) 54 UCLA L Rev 751, 760; F G Lastowka and D Hunter, 'The Laws of Virtual Worlds' [2004] 92 Cal L Rev 1, 29.

<sup>324</sup> P Laslett (ed), *John Locke: Two Treatises of Government* (Cambridge University Press 1988).

<sup>325</sup> S J Horowitz, 'Competing Lockean Claims to Virtual Property' (2007) 20 Harv J L & Tech 443, 450.

<sup>326</sup> N Yee, 'The Psychology of MMORPGs: Emotional Investment, Motivations, Relationship Formation, and Problematic Usage' In R Schroeder and A Axelsson (eds), *Avatars at Work and Play: Collaboration and Interaction in Shared Virtual Environments* (Springer-Verlag 2006) 187.

<sup>327</sup> For example: *World of Warcraft* EULA, Clause 4 (A).

deprived of the possibility of claim proprietary interests in anything they create or develop in the world or game.<sup>328</sup>

### 2.6.1. Problems with Lockean Theory

Lockean theory – and its limitations<sup>329</sup> – will be considered here, before the claims of game users and developers are considered. Lockean justifications rest upon the thesis that every person has a right to own something in which he has mixed his labour. Day refers to this as Locke’s “Labour Theory of Property”<sup>330</sup> whereas Sreenivasan refers to the “Doctrine of Maker’s Right.”<sup>331</sup> Lockean Theory, or ‘fruits of labour’ is an oft-cited justification for proprietary rights<sup>332</sup> but it is not without its criticisms. Lockean theory advances the premise that anyone who adds value to an item or object be entitled to a share of that value. This justification for proprietary interests has been used to support claims of rights in for example, trade secrets, demonstrating that it is a justification for proprietary interests that stretch beyond land and tangible goods.<sup>333</sup> In fact, as Vaughn states, “Locke believed that labour was the primary source of use value”<sup>334</sup> despite contrary suggestions by Smith, that labour was the only “real measure of the exchangeable value of all commodities.”<sup>335</sup> Despite the claims that may rest on Lockean justifications, the theory itself has been subject to critique and scrutiny.<sup>336</sup>

The controversy stems from differing interpretations of Lockean Theory, and of its different aspects. Hughes considers these, and indicates that there are differing degrees of support for

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<sup>328</sup> See: Chapter 5 - Contractual Displacement of Proprietary Interests: EU Law? At 5.4.1. *Ownership Issues*.

<sup>329</sup> The limitations of Lockean justifications will be examined given the reliance upon Lockean theory later in this work.

<sup>330</sup> J P Day, ‘Locke on Property’ *The Philosophical Quarterly* (1966) 16 (64), 207.

<sup>331</sup> G Sreenivasan, *The Limits of Lockean Rights in Property* (OUP 1995) 5.

<sup>332</sup> See for example: E C Hettinger, ‘Justifying IP’ (Winter 1989) *Philosophy and Public Affairs*, 18(1) 31; L Becker, ‘Deserving to Own Intellectual Property’ (1993) *Chicago-Kent L Rev* 68, 609; W J Gordon, ‘A Property Right in Self-Expression: Equality and Individualism in the Natural law of Intellectual Property’ *Yale L J* (1993) 102, 1533; J Hughes, ‘Philosophy of Intellectual Property’ (1985) *Georgetown L J* 77, 287.

<sup>333</sup> B Cwik, ‘Labor as the Basis for Intellectual Property Rights’ *Ethic Theory Moral Prac* (2014) 17: 681, 683.

<sup>334</sup> K I Vaughn, ‘John Locke and the Labour Theory of Value’ *Journal of Libertarian Studies* (1978) 2(4) 311, 315.

<sup>335</sup> A Smith, *An Inquiry into the Nature and Causes of The Wealth of Nations*, Vol 2 (W Strahan and T Cadell, 1778) 13.

<sup>336</sup> See for example: J Hughes, ‘Philosophy of Intellectual Property’ (1985) *Georgetown L J* 77, 287; E C Hettinger, ‘Justifying IP’ (Winter 1989) *Philosophy and Public Affairs*, 18(1) 31; G Sreenivasan, *The Limits of Lockean Rights in Property* (OUP 1995); S J Horowitz, ‘Competing Lockean Claims to Virtual Property’ (2007) 20 *Harv J L & Tech* 443; J P Day, ‘Locke on Property’ *The Philosophical Quarterly* (1966) 16 (64), 207; R Nozick, *Anarchy, State and Utopia* (Basic Books 1974); and J Waldron, ‘From Authors to Copiers: Individual Rights and Social Values in Intellectual Property’ (1993) *Chicago-Kent L Rev* 68, 841 to name but a few critics of Lockean justification.

theories with the differing degrees of credibility attached to such theories supporting the validity of existing laws, and vice-versa, in what he refers to as the, “metaphor of mirroring.”<sup>337</sup> Whilst Locke’s theory focuses on fruits of labour, there are a number of problems with reliance upon such a doctrine. Hettinger highlights the difficulties with Lockean justifications yet underlines the importance of justifying intellectual property rights, and the “formidable task” in doing so,<sup>338</sup> whilst Mossoff outlines the weaknesses with Locke’s theory as being two-fold: “First, it cannot separate out the proportional contributions of intellectual labour by past and present creators in the market value of an invention or book, and, second, it ignores the necessary social context that defines economic value as such.”<sup>339</sup> These are not the only critics of Lockean theory – Nozick has also commented (albeit in a non-legal context) on the weaknesses of such a theory and the difficulties it poses,<sup>340</sup> as have Waldron,<sup>341</sup> Grant,<sup>342</sup> Proudhon<sup>343</sup> and Perry,<sup>344</sup> who all outline potential limitations.

Interestingly, Mossoff argues that there has been a misunderstanding and misuse of Lockean theory by contemporary philosophers as well as by legal scholars.<sup>345</sup> This misinterpretation is premised on the notion that philosophers have assumed Lockean theory to mean that labour can only be considered as physical exertion, and that value is only construed in terms of economic value to society. Whilst this is an argument Mossoff makes, it is evident that there are a number of perspectives to be adopted in considering the benefits and limitations of Lockean justifications. It remains one of the key justifications for rights in intangible objects.

The limitations of Lockean theory will therefore be considered below – especially given the later reliance upon such justifications in this work – before a consideration of the potential claims that may arise under such justifications are considered. The criticisms can be broadly categorised into

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<sup>337</sup> J Hughes, ‘Philosophy of Intellectual Property’ (1985) *Georgetown L J* 77, 287, 289.

<sup>338</sup> E C Hettinger, ‘Justifying IP’ (Winter 1989) *Philosophy and Public Affairs*, 18(1) 31, 51.

<sup>339</sup> A Mossoff, ‘Saving Locke from Marx: The Labour Theory of Value in Intellectual Property Theory’ *Social Philosophy and Policy* (2012) Vol. 29(2), 283, 287.

<sup>340</sup> R Nozick, *Anarchy, State and Utopia* (Basic Books 1974).

<sup>341</sup> J Waldron, ‘From Authors to Copiers: Individual Rights and Social Values in Intellectual Property’ (1993) *Chicago-Kent L Rev* 68, 841.

<sup>342</sup> R Grant, *John Locke’s Liberalism* (University of Chicago Press 1987).

<sup>343</sup> P J Proudhon (D Kelly and B Smith (trans)), *What is Property? An Inquiry into the Principles of Right and of Government* (CUP 1994).

<sup>344</sup> J R Perry, *A Dialogue on Personal Identity and Immortality* (Hackett Publishing Company 1978).

<sup>345</sup> A Mossoff, ‘Saving Locke from Marx: The Labour Theory of Value in Intellectual Property Theory’ *Social Philosophy and Policy* (2012) Vol. 29(2), 283, 287.

four strands: the ‘Lockean provisos,’ the distinctiveness problem; the allocation of rights difficulty; and the ‘social produce’ proposition. Each of these will now be considered in turn.

#### 2.6.1.1. *The Lockean Provisos.*

The Lockean justifications include two provisos, recognised by Locke himself as to the scope of the justifications offered. The justification advanced by Locke is not all encompassing, and it is clear from the second treatise<sup>346</sup> that there are some restraints to be placed upon this theory. The first proviso is that of appropriation, or as Nozick refers to it, sufficiency<sup>347</sup> and the second proviso is that of spoilage.

The Lockean appropriation proviso highlights that there can only be a claim to title providing that there will be “enough and as good left in common for others.”<sup>348</sup> This essentially means that there will be no claim to title based on a Lockean justification where the claim would prevent others from enjoying the item or object. Nozick highlights this in a critical manner, claiming that, “It will be implausible to view improving an object as giving full ownership to it, if the stock of un-owned objects that might be improved is limited.”<sup>349</sup> Consequently the ‘enough and as good left over’ proviso is strictly limited to instances where the claim to title would not deprive others, or worsen their situation. This does not however mean that these limits will apply all the time, and in fact, there are likely to be instances where the proviso will not be violated because mitigation can occur to limit the impact of the claim to title. This may for instance occur through compensation to those who would otherwise be deprived of the item. In this way, there is a clear connection between the claim to title, and the exchange, or trading of that claim for some other form of compensation.

The proviso of sufficiency is significant because without it Locke’s theory presupposes that there will be sufficient resources to satisfy demand wherever there is a claim to title. It is possible that there is a finite resource that is in high demand from those with a claim to title. However, where

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<sup>346</sup> P Laslett (ed), *John Locke: Two Treatises of Government* (Cambridge University Press 1988) 285.

<sup>347</sup> R Nozick, *Anarchy, State and Utopia* (Basic Books 1974), 178.

<sup>348</sup> P Laslett (ed), *John Locke: Two Treatises of Government* (Cambridge University Press 1988) 287-288.

<sup>349</sup> R Nozick, *Anarchy, State and Utopia* (Basic Books 1974), 156.



there are more people with a claim to title than the resource can satisfy, there is then a difficulty in satisfying the claims under Lockean theory. As such, the appropriation proviso must be used to consider the claims for title in the item. This suggests that Locke imposes the limitation of sufficiency here because it is necessary to do so.<sup>350</sup> Waldron however rejects the notion of a sufficiency limitation, and suggests that Locke did not intend for the clause to be taken as a restriction.<sup>351</sup> If Waldron is correct, it is difficult to see how else Locke considered the notion. Therefore whilst the appropriation proviso places limits upon claims to title, it also provides for a practical circumvention of some of the difficulties with Lockean justification.

The appropriation proviso is not the only proviso that arises in Lockean theory, with a second being the spoilage proviso. This proviso also places limits upon when Lockean theory can produce a claim to title but unlike the appropriation proviso, the spoilage proviso occurs in relation to limiting what people can use before waste, and spoilage arise. In effect, Locke indicates that whilst there are claims to title, people should take only as much as is necessary so that resources are not wasted, or 'spoiled.' This, as Hull, suggests implies that the Lockean justification arises where there is a "legitimate means to achieve the optimal use of resources"<sup>352</sup> but within this, there must be limits as to what can be claimed because where there is waste, there is also likely to be a worsening of the situation for others. Consequently, whilst the two provisos have traditionally been viewed as distinct, it is submitted here that they are closely and intrinsically connected in placing constraints upon the use of Lockean justifications but that the theory itself remains viable.

The spoilage proviso, under Locke's theory, is used to explain claims to title in two ways. Firstly, to prevent the depletion of natural resources limits must be used; and secondly, if too many claims to title are granted there may be an underdevelopment of the resource because of conflicting vetoes on the use of the item.<sup>353</sup> Therefore, whilst Lockean theory justifies proprietary rights on the basis of resource use, there are restrictions to these claims to title because of the potential for waste or under-development. The underdevelopment of a resource or item is

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<sup>350</sup> G Sreenivasan, *The Limits of Lockean Rights in Property* (OUP 1995) 37.

<sup>351</sup> J Waldron, 'Enough and as Good Left for Others' *The Philosophical Quarterly* (1979) 29 (117) 319, 320.

<sup>352</sup> G Hull, 'Clearing the Rubbish: Locke, The Waste Proviso and the Moral Justification of Intellectual Property' *Public Affairs Quarterly*, (2009) Vol 23(1) 67, 75.

<sup>353</sup> G Hull, 'Clearing the Rubbish: Locke, The Waste Proviso and the Moral Justification of Intellectual Property' *Public Affairs Quarterly*, (2009) Vol 23(1) 67, 75.

therefore contradictory to the premise of Lockean theory because where there is an underdevelopment there is unlikely to be any addition of value or use of labour. This may not necessarily be a weakness, and could instead be seen as a positive step in that including the spoilage proviso allows provision for instances where a lapse of title may occur.<sup>354</sup> In such instances, to not allow other claims to title would effectively be allowing the waste of the object or item. It is consequently possible to perceive the Lockean provisos as being charged with ensuring succession. In this way, resources are not wasted and there will be sufficient resources to satisfy demand.

It is therefore arguable that Locke recognised the potential weaknesses in his theory, and sought to place provisos to address them. Whilst Locke outlined these provisos of appropriation or sufficiency, and spoilage in his theory, other, subsequent considerations of Lockean theory have also arisen. The subsequent discussions have questioned other aspects of the Lockean justifications. These will now each be considered and critiqued in turn, beginning with ‘distinctiveness.’

#### 2.6.1.2. *Lockean Theory and ‘Distinctiveness.’*

There are two immediate questions to be resolved in addressing the distinctiveness of labour: firstly, what is distinctive about labour? And secondly, why are proprietary interests the entitlement of creators, instead of some other form of reward?<sup>355</sup> Both Day and Cwik highlight that there is a challenge in defining what Locke means by ‘labour.’<sup>356</sup> For example, labour could mean working towards the creation of something, or it could mean the collaboration with others to produce a joint endeavour. Similarly, Day highlights that there is a distinction between the types of work;<sup>357</sup> labour and a work (or mixing), whereby there are difficulties in rights attaching to the end-result. This is especially the situation where there is a mixing of labour in some way – how are the claims of multiple contributors to be dealt with? If, as Locke suggests, all of the

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<sup>354</sup> G Sreenivasan, *The Limits of Lockean Rights in Property* (OUP 1995) 101.

<sup>355</sup> B Cwik, ‘Labor as the Basis for Intellectual Property Rights’ *Ethic Theory Moral Prac* (2014) 17: 681, 683.

<sup>356</sup> J P Day, ‘Locke on Property’ *The Philosophical Quarterly* (1966) 16 (64), 207, 209; B Cwik, ‘Labor as the Basis for Intellectual Property Rights’ *Ethic Theory Moral Prac* (2014) 17: 681, 685.

<sup>357</sup> J P Day, ‘Locke on Property’ *The Philosophical Quarterly* (1966) 16 (64), 207, 209.

contributors are to be rewarded for their efforts with proprietary claims, how will this be dealt with?

Under a Lockean interpretation, the suggestion is that the reward split will be dependent upon the amount of labour and skill that has been deployed by each of the contributors in producing the end result. Proudhon addresses the issue of distinctiveness differently, and in a manner that assesses the claims of multiple contributors. Proudhon therefore focuses on the equality of rights rather than pure distinctiveness; outlining that if labour is significant then the rights in the object would need to be given the same level of significance.<sup>358</sup> If two people contribute to an object, but do so at different times, each of them has laboured in some way. Under a Lockean interpretation, this should mean that each of the contributors benefits from interests in that item. Proudhon adds to this, and stipulates that not only should each contributor attain rights in the object, but also that those rights be equal because if labour is the significant factor, then the rights need to be reliably treated in the same manner. Day queries this, suggesting that the way to resolve the issue of multiple claims rests with Locke's exposition that the rights be determined according to the extent of the labour involved.<sup>359</sup>

Clearly, when Cwik and Day outline that there are difficulties under a Lockean interpretation of identifying what is meant by labour,<sup>360</sup> it was not envisaged that such uncertainties would fragment and splinter to produce additional queries, each of which challenges the basis of Lockean justifications. These additional queries, when analysing the Lockean perspective, include questions not only of what is to be classified as labour, but also what the distinction is between labour, work and toil.<sup>361</sup> Merely tinkering, or directionless endeavour is very different to labour, and labour may not necessarily refer to manual labour – it can also potentially include the exercise of skill, resources, energy and time.<sup>362</sup> Simmons identifies labour as being distinct; it is the use of one's abilities and capacities to produce something through an activity that has a purpose.<sup>363</sup> This is a definition finding resonance with Cwik, who considers labour to be an action, and an action

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<sup>358</sup> P J Proudhon (D Kelly and B Smith (trans)), *What is Property? An Inquiry into the Principles of Right and of Government* (CUP 1994); A D Moore, 'Intellectual Property and Copyright' (Working Papers Series, Dec 2012). Available at SSRN: <<http://ssrn.com/abstract=2194729>> 9.

<sup>359</sup> J P Day, 'Locke on Property' *The Philosophical Quarterly* (1966) 16 (64), 207, 210.

<sup>360</sup> B Cwik, 'Labor as the Basis for Intellectual Property Rights' *Ethic Theory Moral Prac* (2014) 17: 681, 683; J P Day, 'Locke on Property' *The Philosophical Quarterly* (1966) 16 (64), 207, 209.

<sup>361</sup> B Cwik, 'Labor as the Basis for Intellectual Property Rights' *Ethic Theory Moral Prac* (2014) 17: 681, 685.

<sup>362</sup> It is particularly skill and time that are deployed in building a game character and game account.

<sup>363</sup> A J Simmons, *The Lockean Theory of Rights* (Princeton University Press, 1992).

with an intended result.<sup>364</sup> Considering labour to cover skills, resources, energy and time allows Lockean justifications to attach to objects other than solely excludable items, but also to intangible items such as in-game items.

However, it is not just identifying what is meant by labour which is problematic, it is also the mixing of labour, as advocated by Locke, which is far from clear, and, as Waldron comments, is actually “incoherent” because “actions cannot be mixed with objects.”<sup>365</sup> Such a criticism undermines the position adopted by Locke in that if someone contributes in some way, he should be rewarded. This is particularly vulnerable where there is a contribution to what would otherwise be ‘common’ i.e. owned by others rather than just the person contributing. To resolve such a situation would presumably result in some form of collective reward – everyone who has contributed to the ‘commons’ would be rewarded with proprietary interests in and over the object. Whilst this may work on a theoretical level, where there is a non-excludable item, those contributing actually lose the bargaining power attached to the proprietary interest – such as copyright – they may have acquired.<sup>366</sup>

Similarly, this situation would also give rise to questions concerning the split of rights between the contributors, and how these would be resolved, which, again, according to the Lockean position would be determined by reference to the amount of labour expended. This in itself is a difficulty. If labouring in some manner i.e. expending skill, energy or time is sufficient to give rise to rights in the object upon which you have worked, how is this to be calculated and apportioned? If there is only a sole party involved then this should be straightforward. However, as has been discussed above, Proudhon and Day<sup>367</sup> have queried how the situation where there are multiple parties are involved should be dealt with, and could be particularly problematic where there are multiple contributors in, for example, an online game. This criticism by Day and Proudhon is reminiscent of Mossoff’s comments concerning the misinterpretation of Lockean theory to one of quantifiable interest<sup>368</sup> – considering rights in a manner requiring quantification is difficult to resolve. The situation becomes more difficult when different types of skill are

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<sup>364</sup> B Cwik, ‘Labor as the Basis for Intellectual Property Rights’ *Ethic Theory Moral Prac* (2014) 17: 681, 685.

<sup>365</sup> J Waldron, ‘From Authors to Copiers: Individual Rights and Social Values in Intellectual Property’ (1993) *Chicago-Kent L Rev* 68, 841.

<sup>366</sup> B Cwik, ‘Labor as the Basis for Intellectual Property Rights’ *Ethic Theory Moral Prac* (2014) 17: 681, 688.

<sup>367</sup> P J Proudhon (D Kelly and B Smith (trans)), *What is Property? An Inquiry into the Principles of Right and of Government* (CUP 1994); J P Day, ‘Locke on Property’ *The Philosophical Quarterly* (1966) 16 (64), 207, 209.

<sup>368</sup> A Mossoff, ‘Saving Locke from Marx: The Labour Theory of Value in Intellectual Property Theory’ *Social Philosophy and Policy* (2012) Vol. 29(2), 283, 287.

compared. For example, if someone with low skills labours for three hours and someone who is highly skilled labours for thirty minutes, are these to be considered equal labours, and should these respective labours result in equal interests? Proudhon would suggest this to be so, whereas Locke would suggest the contrary. This is a particularly pressing issue where for example, many software writers are involved in the collaborative production of software code for an online game, and an individual user corrects a flaw in the software code or adds something minor to it. Are these respective labours to be rewarded equally?

This challenge is compounded where there is some form of labour expended over something not owned by the person or persons labouring on it. Locke referred to this as 'labour mixing' i.e. mixing the labour with an object. Waldron in particular is critical of such a notion outlining that it is far from coherent to mix actions and objects,<sup>369</sup> but he is not the only critic, and Nozick has also been vociferous in his consideration of such a theoretical position.

Nozick cites the example of pouring tomato juice into the ocean,<sup>370</sup> to argue that labour mixing is a method of losing rights, rather than gaining them. The Lockean interpretation of labour mixing sees that the labourer mixes labour (over which the labourer controls) with something that the labourer does not (the object), and justifies rights on the basis that to respect the labour results in recognizing that labour and the impact it has had. Nozick uses the tomato-juice metaphor to indicate that there is a clear division between what the labourer has a right to and what the labourer does not have a right to.<sup>371</sup> Whilst this can be regarded as a way of identifying the lack of control, by pouring tomato juice into the ocean, it is now very difficult to make a distinction between that which can be controlled and that which cannot, and indeed, the mixing of the tomato juice means that control of that has been lost rather than control over (at least part) of the ocean having being gained. This issue is one which is potentially connected to gaming and it is possible to perceive that the user mixes his or her labour with that of the developer of the platform. As such, Nozick's approach would be to suggest that such a user would lose any proprietary interest rather than gain any. However, Locke's approach is one whereby the effort of the user is perceived as adding to the environment and therefore should be rewarded.

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<sup>369</sup> J Waldron, 'From Authors to Copiers: Individual Rights and Social Values in Intellectual Property' (1993) Chicago-Kent L Rev 68, 841.

<sup>370</sup> R Nozick, *Anarchy, State and Utopia* (Basic Books 1974), 156.

<sup>371</sup> R Nozick, *Anarchy, State and Utopia* (Basic Books 1974), 157.

The criticisms of Lockean theory in connection to what is distinctive about labour raise several questions. However, Lockean justifications also consider other aspects, such as the interests that arise, and the value added as a result of the labour. Whilst criticisms concerning distinctiveness arise, the justification itself remains. The questions over the distinctiveness of labour are closely connected to the allocations of proprietary interests, which have also attracted criticism and comment.

### 2.6.1.3. *Lockean Theory and the Allocation of Rights.*

In considering the second strand of criticism levied at Lockean justifications, the issue to be addressed is one of the generation of proprietary interests – why does a Lockean justification result in such potential claims? If A labours over something B owns, why should A be entitled to proprietary interests in that item? Nozick<sup>372</sup> and Day<sup>373</sup> question why Lockean labour theory results in the generation of such interests, rather than resulting in the loss of rights. An extension of Nozick's query is to question why Lockean theory does not generate some other form of reward, distinct from proprietary interest claims, such as a mention in the Honours List,<sup>374</sup> tax rebates or prizes for example. Waldron<sup>375</sup> is also critical of the assertion that labour justifies proprietary claims, and suggests that where labour is mixed with objects that are not owned by the labourer, that there should be a reward that is akin to less than full ownership rights.<sup>376</sup> This stems from the notion that it is illogical to suggest that one can own labour.<sup>377</sup>

Hettinger raises other similar criticisms, questioning not only the appropriate reward, but also whether the person labouring actually deserves proprietary interests.<sup>378</sup> Indeed, to pursue this further, if it were appropriate for rewards to always stem from labour directly, and be connected to the ownership of labour, parents should seemingly be entitled to claim proprietary interests in their offspring as items capable of ownership.<sup>379</sup> This suggests that there are situations where it

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<sup>372</sup> R Nozick, *Anarchy, State and Utopia* (Basic Books 1974), 157.

<sup>373</sup> J P Day, 'Locke on Property' *The Philosophical Quarterly* (1966) 16 (64), 207, 212.

<sup>374</sup> L Becker, 'Deserving to Own Intellectual Property' (1993) *Chicago-Kent L Rev* 68, 609, 622.

<sup>375</sup> J Waldron, 'From Authors to Copiers: Individual Rights and Social Values in Intellectual Property' (1993) *Chicago-Kent L Rev* 68, 841.

<sup>376</sup> J Waldron, 'From Authors to Copiers: Individual Rights and Social Values in Intellectual Property' (1993) *Chicago-Kent L Rev* 68, 841; J R Perry, *A Dialogue on Personal Identity and Immortality* (Hackett Publishing Company 1978).

<sup>377</sup> J P Day, 'Locke on Property' *The Philosophical Quarterly* (1966) 16 (64), 207, 212.

<sup>378</sup> E C Hettinger, 'Justifying IP' (Winter 1989) *Philosophy and Public Affairs*, 18(1) 31, 41.

<sup>379</sup> L Becker, *Property Rights* (Routledge 1977) 46.

may be appropriate for proprietary interests to be the reward for labour, and vice versa, and echoes the implication that there may be a reward which is less than ownership rights. This is also resonant of the critique offered that there are in fact no grounds for rights to be awarded, and instead, there is a loss of interests because the item or object is no longer in the exclusive control of the person who controlled it prior to the labour. Indeed, this would be consistent with the definition of the term property offered by Garner.<sup>380</sup> In considering the Lockean justification for the allocation of proprietary interests, it is difficult to distinguish again, what is distinctive about labour for proprietary claims to be the reward. This is not the sole interpretation of Lockean labour however, and there are suggestions that labour can in fact be owned, and can therefore result in proprietary claims as the reward for such endeavours.

Labour in the sense that it requires skill, direction or thought, and resources to perform is a skill or ability that an individual can control rather than claim to own. Gordon and Yen disagree with this perspective, and argue that the produce of intellectual labour can be regarded as an extension of the person labouring and therefore can be owned.<sup>381</sup> Child builds upon these arguments, and offers a revised version, stipulating that there is no detriment to value when proprietary interests are the reward for labour: “What intellectual labour does is increase the amount of value in the world, without destroying or depleting any existing valuable resources.”<sup>382</sup> Child’s interpretation does not offer an explanation of value however, and that is a weakness,<sup>383</sup> irrespective of the unusual argument advanced in terms of labour and the control of it. It would however appear that a Lockean justification for the allocation of proprietary rights in the items that have been laboured over is an accepted one, and one which has been used to advance additional perspectives exploring notions of value and labour mixing.

If, as Gordon, Yen and Child suggest, labour can be capable of being owned and therefore can justify proprietary interests, it can also be traded. The notion of trade is premised upon control of that which is to be traded, and control is reliant upon the establishment of such interests. As such, if labour is capable of ownership, then so too must be the products of that labour, and if

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<sup>380</sup> B A Garner (eds), *Blacks’ Law Dictionary* (8<sup>th</sup> edn, Thomson West 2004) 1252.

<sup>381</sup> W J Gordon, ‘A Property Right in Self-Expression: Equality and Individualism in the Natural law of Intellectual Property’ *Yale L J* (1993) 102, 1533, 1545; A C Yen, ‘Restoring the Natural Law: Copyright as Labour and Possession’ *Ohio State Law J* (1990) 51: 517, 547.

<sup>382</sup> J W Child, ‘The Moral Foundations of Intangible Property’ in A D Moore (eds) *Intellectual Property: Moral, Legal and International Dilemmas* (Rowman and Littlefield 1997) 67-68.

<sup>383</sup> B Cwik, ‘Labor as the Basis for Intellectual Property Rights’ *Ethic Theory Moral Prac* (2014) 17: 681, 684.

labour is capable of ownership, proprietary claims must follow. The classic example of such a scenario is one of employment. Under Lockean theory, it would seem that when X is in the employment of Y, X sells his labour for money to Y, and when X's labour is then mixed with that of Z, the product is rightfully Y's. It is possible to perceive in this situation that X 'owns' his labour, and that it is therefore traded to Y in exchange for payment. Lockean justifications granting proprietary interests can therefore be seen as a form of trade in commodities, of which labour is one. The 'trade' being the labour in exchange for the benefits and reward that will flow from that labour. This not only addresses the issue of labour mixing, but also would seemingly outline the rationale for proprietary interests arising as a result of labour. Hettinger outlines that the importance of markets is directly connected to the proprietary claims upon which markets are based: "Markets work only after property rights have been established and enforced, and our question is what sorts of property rights an inventor, writer, or manager should have, given that the result of her labor is a joint product of human intellectual history."<sup>384</sup> This is indicative of the weight placed upon the bargaining power attached to the fruits of one's labour. It provides a useful bargaining chip, especially for non-excludable items, where it becomes much more difficult to exclude others from the fruits of ones labour.<sup>385</sup>

Indeed, having a right to the fruits of labour can also mean having a right to possess and personally use the object which has been developed. However, as Hettinger highlights, there is a distinction between the right to possess and use personally the object of your labour, and the right to profit from what a market is willing to exchange for it because this is nothing other than privilege constructed by society.<sup>386</sup> There is, a difference between the personal right and the right to profit from the labour in a market context. However, given that labour, and labour mixing is concerned with the notion of trade, it is a distinction that connects the value of labour to the exchange of that labour, and therefore Hettinger's concerns, whilst theoretically interesting, can be mitigated through the labour mixing approach. This seemingly accepts that proprietary interests are the reward for labour, but does not stipulate the kind of interest. Nevertheless it provides a response to criticisms levied at Lockean justifications for the emphasis on proprietary rewards rather than some other form. Arguably such a response is particularly well received in connection to intangible items over which labour has occurred. Intangible items also involve labour, and if the

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<sup>384</sup> E C Hettinger, 'Justifying IP' (Winter 1989) *Philosophy and Public Affairs*, 18(1) 31, 38.

<sup>385</sup> B Cwik, 'Labor as the Basis for Intellectual Property Rights' *Ethic Theory Moral Prac* (2014) 17: 681, 688

<sup>386</sup> E C Hettinger, 'Justifying IP' (Winter 1989) *Philosophy and Public Affairs*, 18(1) 31, 40.



labour in those items is recognized as value for trade purposes, Lockean justifications are as relevant to intangible items as to tangible items, and particularly in this work, in-game items.

Furthermore, Cwik builds upon this, and outlines that labour justifies proprietary interests because the granting of these rights ensures that those who have created can obtain a set of benefits in exchange for their creation.<sup>387</sup> This is a very similar stance to that of a desert-for-labour argument, which suggests that the justification rests on rewards. This is also not problem-free however, and the difficulties of such a justification are evident in the context of intangible creations. Quite often for example, music and books are not entirely new creations; rather they are modifications, developments, or even tweaks of pre-existing content.<sup>388</sup> As such, it is difficult to envisage that anything new can ever be created. If this is true, the benefits in intangible creations that are not entirely new seem to be rather reduced. Moore suggests that this would indicate a stance in favour of access to information and works rather than proprietary claims.<sup>389</sup> This would apparently seem to defeat the labour justifications for copyright interests in creative content, and allow some to disproportionately benefit from the creative efforts of others. Cwik seeks to resolve this difficulty by advancing a different interpretation of Lockean justification; the productive capacities view.<sup>390</sup> Under such an interpretation, labour can be rewarded irrespective of its level, intensity or type. The productive capacities interpretation values the time, energy, skill and resources used in labour, but also includes the decisions about how such resources are best used to justify proprietary claims, and therefore offers a modified version of Lockean theory. It too is subject to critique because it would seem to raise queries very similar to those discussed above in relation to the distinctiveness of labour, although the productive capacities view offers a broad definition of labour to address the criticism levied at it, and therefore offers an interpretation of Lockean justifications which support labour-based claims to intangible goods.

The concerns and criticisms relating to proprietary interests as the Lockean reward for labour are varied, encompassing difficulties such as why this reward rather than some other form of reward. These difficulties with Lockean justifications are very closely connected to the earlier concerns surrounding the distinctiveness of labour. In addressing this, labour can encompass skill,

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<sup>387</sup> B Cwik, 'Labor as the Basis for Intellectual Property Rights' *Ethic Theory Moral Prac* (2014) 17: 681.

<sup>388</sup> B Cwik, 'Labor as the Basis for Intellectual Property Rights' *Ethic Theory Moral Prac* (2014) 17: 681, 693.

<sup>389</sup> A D Moore, 'Intellectual Property and Copyright' (Working Papers Series, Dec 2012). Available at SSRN: <<http://ssrn.com/abstract=2194729>> 10.

<sup>390</sup> B Cwik, 'Labor as the Basis for Intellectual Property Rights' *Ethic Theory Moral Prac* (2014) 17: 681, 693.

resources and time, and Lockean theory suggests rewarding this with proprietary interests rather than some other form of reward. Addressing the issue of labour reward largely through the connection between proprietary interests and trade connects labour to markets, which in turn offers justifications under a Lockean interpretation. This would seemingly differ from the suggestion advanced by Mossoff that the misinterpretations of Lockean justifications have proved problematic. There are however, close parallels between proprietary claims and the third area of criticism: the social produce proposition of Lockean theory.

#### *2.6.1.4. Lockean Theory and the 'Social Produce' Proposition.*

The third strand of criticism levied at Lockean justifications arises from the so-called 'social produce' proposition. This proposition builds heavily on the previous criticism, questioning why proprietary interests form the reward under Lockean justifications. The social produce proposition however, takes the critique further, and suggests that individual claims to proprietary interests are undermined because of the social product aspects of labour:

“Invention, writing and thought in general do not operate in a vacuum: intellectual creation is not creation...Given this vital dependence of a person's thoughts on the ideas of those who came before her, intellectual products are fundamentally social products. Thus even if one assumes that the value of these products is entirely the result of human labour, this value is not entirely attributable to *any particular labourer* (or small group of labourers).”<sup>391</sup>

In other words, Hettinger's assertion is that no novel, song, design, scientific formula, play, performance can be created from scratch, and that every creation is based on something which has gone before it. As such, there can be no individual claims to, or rights over any of these creations because they are all fundamentally based on combined human labours. Such an interpretation is heavily premised on the notion that each person who adds will gain no specific interests, and will instead contribute to the wider social produce. This is in some respects directly contradictory to the basis of Lockean justifications as it undermines the claims to title that may arise. However, it can be interpreted to mean that there is a shared social right to the produce.

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<sup>391</sup> E C Hettinger, 'Justifying IP' (Winter 1989) *Philosophy and Public Affairs*, 18(1) 31, 38 (emphasis added).

Such an approach would suggest that each person who contributes to the item would be entitled to share in its value. Interestingly, Moore advances a different perspective, and suggests that whilst ideas are built upon pre-existing ideas, or inspired by them, this does not mean that there will be no reward for such labour. Instead, it is argued that what happens is that social produce grows, but as it does, so do proprietary interests, so that there is an expansion of both together: “[W]e each own our labour, and when that labour is mixed with objects in the commons, our rights are expanded.”<sup>392</sup>

The social produce aspect of Lockean justifications suggests that contrary to there being a justification for proprietary interests arising from labour, there is in fact no right for individuals. Social produce is fundamentally something requiring the contribution of more than one person. As such, to suggest that Lockean theory provides justifications for interests in such produce poses one significant question concerning how these interests are to be attributed. This is very similar to the criticisms levied at Lockean justifications (and discussed earlier) under not only the issue of distinctiveness but also the allocation of rights. Consequently, the social produce proposition advances a different interpretation of Lockean theory entirely, and suggests that to rely upon such claims undermines any claims to title which may arise in the item or items produced.<sup>393</sup>

To expand upon this, consider that the item produced had been produced using skills, tools and inventions that are all part of the commons, and are therefore available for society as a whole. If this is the situation, and the skills that have been used in the labour stem from a wide-ranging group, it would undermine the efforts involved to suggest (under Lockean theory) that there was anything other than a social product. Grant for example, suggests that in such a situation, individual claims to title will have been significantly undermined.<sup>394</sup> This is therefore a significant critique of Lockean justifications, and one that would seem to weaken them. However, this could be said to fall within the Lockean proviso concerning appropriation. If, as the proviso suggests, there would be a weakening of the position of those not claiming title to prevent them from enjoying the object or item, then the Lockean justifications cannot be used to sustain a claim to title. In effect, the proviso prevents claims, although as Nozick highlights, the proviso does not

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<sup>392</sup> A D Moore, ‘Intellectual Property and Copyright’ (Working Papers Series, Dec 2012). Available at SSRN: <<http://ssrn.com/abstract=2194729>> 9.

<sup>393</sup> A D Moore, ‘Intellectual Property and Copyright’ (Working Papers Series, Dec 2012). Available at SSRN: <<http://ssrn.com/abstract=2194729>> 9.

<sup>394</sup> R Grant, *John Locke’s Liberalism* (University of Chicago Press 1987).

do so exhaustively;<sup>395</sup> – it merely limits the instances where the proviso would be entirely inappropriate. For example, if a situation arises where the appropriation would violate the proviso, it is possible that this will be alleviated by the issuing of compensation to those who would have suffered had the proviso been violated without such a remedy.<sup>396</sup> This does not however mean that Lockean theory cannot be used to support claims to title, only that the claims to title cannot be in violation of the proviso – in this way, it is possible to perceive the social produce proposition as failing within the Lockean proviso, and thereby not undermining Lockean justifications.

### 2.6.2. Lockean Justification?

The Lockean justifications offer a number of interpretations for proprietary interests but they are far from critique-free. Whilst a number of theoretical and philosophical considerations have been discussed, there is one further element to this discussion. It is uncommon today for the exertion of skill and labour to give rise to ownership, and it is possible that game users and developers may not wish to be burdened by such justifications. Whilst this may be true, it is submitted that the paradigm of online gaming is one which is based upon capitalist notions.<sup>397</sup> The environments themselves encourage such capitalist notions, and this work considers proprietary issues including notions of control and ownership within the existing accepted paradigm. The consideration in this work is one of the relationships between copyright and contract, and this considers potential proprietary claims of game users, as well as the displacement of such claims. Where there has been an exertion of labour, there is often a return of some kind. However, in online games, the return for the subscription payment is access to the features of the gaming environment – any further exertion does not receive a return, and is met with a displacement of proprietary interests in the in-game items, and therefore a waiver of value for the users. In considering the copyright provisions later in this work, the philosophical justifications for intellectual property rights are a necessary precursor to this. However, in considering the critique of Lockean theory, there is a strong suggestion that the basis of such a theory is one that rests upon exchangeable value. As such, it is a notion, which under Lockean theory can justify proprietary interests – labour, which

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<sup>395</sup> R Nozick, *Anarchy, State and Utopia* (Basic Books 1974), 155.

<sup>396</sup> R Nozick, *Anarchy, State and Utopia* (Basic Books 1974), 156.

<sup>397</sup> T Boellstorff et al, *Ethnography and Virtual Worlds: A Handbook of Method* (Princeton University Press 2012) 19.

includes more than exertion – can produce value, and it is this value that attracts a market interest.

Consequently, in producing items – including items in online games – Lockean justifications suggest that proprietary interests are justified because of the social interest in tradable commodities. Value stems from this but also from the labour undertaken to create this value. The tradable value derived from labour justifies proprietary interests in intangible items, including in-game items, and it is suggested that the rationale and critique of Lockean justifications is applicable here. It is therefore justifiable under the limitations and critique of Locke’s theory to consider the claims to title of both users and developers of online games.

#### *2.6.2.1. Developers Claim.*

Game and Virtual World developers have a substantial claim to proprietary interests under Lockean Theory. Developers create the gaming platform or Virtual Worlds in which users can seek to develop a game persona and engage in virtual activities. If developers did not create the MMORPGs or Virtual Worlds, there would be no users and therefore there would not be any objects for users to develop or claim rights to. In examining the creation of virtual spaces, developers would seem to have the strongest claims under Lockean Theory. Horowitz poses the question, “what constitutes the commons from which virtual property might be drawn?”<sup>398</sup> This implies that in order for the creation of any virtual space - MMORPG or Virtual World - there needs to be some kind of common set of resources or raw materials. Obviously, in cyberspace, raw materials are unlikely but, a commons must exist in order for distinct spaces or items to be developed.

In establishing a new virtual space, developers may be required to share their proprietary claims with users because there is an equal claim to the common resources that are used in order to develop a distinct space. However, in entering an established world, the claims users could make for proprietary interests in in-game items are somewhat limited<sup>399</sup> given that most of the developmental stages will have been completed. Consequently, in pre-existing virtual spaces, it

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<sup>398</sup> S J Horowitz, ‘Competing Lockean Claims to Virtual Property’ (2007) 20 Harv J L & Tech 443, 451.

<sup>399</sup> S J Horowitz, ‘Competing Lockean Claims to Virtual Property’ (2007) 20 Harv J L & Tech 443, 450.

is arguable that the developers have the strongest claims because they have already established the world or MMORPG. At some point, none of the MMORPGs or Virtual Worlds existed, and all had to be created. Accordingly, in applying Lockean Theory to such situations, it would seem sensible to suggest that whoever laboured to create the world should therefore own it. However, that would suggest that if users labour to develop items and characters, and they originated from the commons rather a pre-existing virtual space, they should be able to control, and claim interests in such items. Equally, if there has been a contribution post-creation, interests should still be granted to the users concerned.

Given that developers establish virtual worlds, and their rules, structure and software code to allow in-game objects to be created, they have the strongest claims to the in-game items. If developers own the resources and framework of a Virtual World or MMORPG, they can arguably exclude users from claiming proprietary interests in such spaces. In making such a claim, developers would be formulating support for EULAs,<sup>400</sup> and their proprietary displacements.<sup>401</sup>

#### 2.6.2.2. *Users Claim.*

Under Lockean analysis, users also have a basis for their proprietary interests in the objects they have generated through interaction in a Virtual World or MMORPG because they employ labour in developing their game character,<sup>402</sup> and under Locke's theory, such labour ought to be rewarded. Avatars would arguably also have a claim for proprietary interests in in-game items, but for the fact that without the input of the user, the avatar would not exist and would have no attributes;<sup>403</sup> avatars are the representations of real people in online games<sup>404</sup> and lack autonomy, but also lack a separate legal identity which could allow them to benefit from proprietary interests.<sup>405</sup> A user has created his or her avatar – or at least been instrumental in contributing to the development of the avatar – and, improved its skills and its reputation through the gradual

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<sup>400</sup> S J Horowitz, 'Competing Lockean Claims to Virtual Property' (2007) 20 Harv J L & Tech 443, 452.

<sup>401</sup> See generally: Chapter 5 - Contractual Displacement of Proprietary Interests: EULAw?

<sup>402</sup> F G Lastowka and D Hunter, 'The Laws of Virtual Worlds' [2004] 92 Cal L Rev 1, 46.

<sup>403</sup> T Westbrook, 'Owned: Finding A Place for Virtual World Property Rights' (2006) Mich St L Rev 779, 791; M Stephens, 'Sale of In-Game Assets: An Illustration of the Continuing Failure of Intellectual Property Law to Protect Digital Content Creators' [2001-2002] 80 Tex L Rev 1513, 1532.

<sup>404</sup> R Koster, Declaration of the Rights of Avatars' (27 August 2000) available online: <<http://www.raphkoster.com/gaming/playerrights.shtml>> retrieved 13 May 2010.

<sup>405</sup> *Salomon v A Salomon & Co Ltd* [1897] AC 22.

‘grinding’ process, often involving repeatedly carrying out certain activities so as to gain experience points and progress to the next level. Users’ claims revolve around the creation and control of the avatar, and the development of the game account which ‘possesses’ the game persona. Without the user to manipulate and control the avatar, to direct the avatar and to enter transactions, avatars would have no game presence. Similar claims can also arise where users have created content and added to the environment.

One strength for the Lockean claims of users rests on the characteristics of Virtual Worlds and MMORPGs. By their very definition, Virtual Worlds and MMORPGs are persistent, evolving and interactive.<sup>406</sup> All of these characteristics point towards continual development and in order for development to continue, developers must rely upon the creativity and labour of users. Without such input, the games and Virtual Worlds would not develop and would not remain attractive.<sup>407</sup> Users, in this sense, are not just ‘using’ the environment, and have developed into authors, creators and conduces through their contributions.<sup>408</sup> As such, it is possible to conclude that users may be able to claim limited and specific proprietary interests in certain objects but not in the MMORPG or Virtual World as a whole entity.<sup>409</sup>

### **2.6.3. Lockean Conclusions.**

The Lockean analysis provides a justification for the various entities that have proprietary interests in the in-game items. There are difficulties surrounding the rights that form the central issue; against whom are these proprietary rights enforceable, and does payment of a participation fee count as labour under Lockean Theory?<sup>410</sup> Such questions suggest that perhaps there ought to be different allocations of rights for different levels and categories of users e.g. for those users who are involved solely for recreational use, proprietary claims could be limited whereas for users

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<sup>406</sup> M Bell, ‘Toward a Definition of Virtual Worlds’ (2008) J V W R 1(1); K Barker, ‘MMORPGing - The Legalities of Game Play.’ (2012) European Journal for Law and Technology, Vol. 3, No.1; R Kennedy, ‘Virtual Rights? Property in Online Game objects and Characters’ (June 2008) Information & Communication Technology Law Vol 17(2), 95, 97.

<sup>407</sup> R Kennedy, ‘Virtual Rights? Property in Online Game objects and Characters’ (June 2008) Information & Communication Technology Law Vol 17(2), 95.

<sup>408</sup> E Reuveni, ‘Authorship in the Age of the Conducer’ (2007) Journal of Copyright Society of the USA, Vol. 54 (218) 1801, 1821; M Garlick, ‘Player, Pirate or Conducer? A Consideration of the Rights of Online Gamers’ (2004-2005) Yale Jou of Law & Tech 424.

<sup>409</sup> F G Lastowka and D Hunter, ‘The Laws of Virtual Worlds’ [2004] 92 Cal L Rev 1, 47.

<sup>410</sup> T Westbrook, ‘Owned: Finding A Place for Virtual World Property Rights’ (2006) Mich St L Rev 779, 793.

that are employing labour for business purposes or in order to trade with other users through Real Money Trading,<sup>411</sup> they could be granted stronger levels of rights to reflect their distinct purposes and different levels of labour.

Alternatively, it is possible that users do not ‘earn’ their items in Virtual Worlds and MMORPGs – instead, they win them through battles or purchase them from other users or developers. This would imply that items that are bought or won are not items that have been laboured for under Lockean Theory. However, if labour and effort is required to earn gold and experience points in a particular world or game in order to be able to purchase and trade items, there is still some form of labour involved and the purchases / trades are essentially the result of the labour. In the real world, people do not always create items but do purchase them and are said to own these items, and are then free to modify, sell, or destroy them. It would seem strange to say that there is a difference between the real and the Virtual Worlds in relation to how people acquire and own objects when in the real world people work and are rewarded financially for their labour. Perhaps it would be appropriate to make a distinction between proprietary claims in MMORPGs where users are unable to script, and Virtual Worlds where users are able to script and upload their own content.

A related issue with Lockean Theory is the distinct lack of consideration that is given to the question of whether in-game items are capable of ownership. As Westbrook points out, Lockean Theory presupposes that items such as in-game items, are capable of ownership.<sup>412</sup> Given this presupposition, Locke’s theory is predominantly concerned with who can own what. These questions contribute to a larger question concerning what counts as ‘labour’ under the Lockean Theory. If labour cannot be defined, and proves controversial, it will be difficult for users – and potentially developers – to claim that they are engaged in labour intensive activity when they are developing their game presence. A definition of labour is something that could prove to be distracting from the main issues of control and possession of items in virtual worlds, and the most apt definition relating to virtual labour focuses on labour as a method of making an object or item distinctive.<sup>413</sup>

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<sup>411</sup> Which is a process whereby users can seek to sell their game items for money in the offline world for example.

<sup>412</sup> T Westbrook, ‘Owned: Finding A Place for Virtual World Property Rights’ (2006) Mich St L Rev 779, 795.

<sup>413</sup> S J Horowitz, ‘Rethinking Lockean Copyright and Fair Use’ (2005) 10 Deakin L Rev 209, 219.



Whilst Lockean Labour Theory provides justification for proprietary interests for various parties, some parties – namely developers – have stronger claims and justifications than others, but this does not mean that the strongest claim is the only claim. Lockean Labour Theory provides justification for users’ claims too, and this can be closely related to the value users hold in their in-game items and efforts. Whilst developers’ claims are perhaps stronger overall, users do have a stronger claim than developers to certain objects and items in the game world.<sup>414</sup> In applying the same analysis to Virtual Worlds and MMORPGs, developers claim rights to the world or game as a whole, but perhaps ought not to claim the entire interests over every single game item created in their online space.

Developers and users both employ labour in developing different aspects of a Virtual World or MMORPG, and as such, often seek different proprietary rewards. Users will often seek to use objects or even trade them with other users, whereas developers may seek to deprive users of value in previously scarce items, or replicate them by replicating the source code. Whilst these are potentially conflicting, they are still concerned with the proprietary interests associated with the objects and items. If developers try to claim that they own all of the items arising out of in-game or in-world interaction, this could potentially be far-fetched. Microsoft for example, claim the copyright associated with their software yet they do not seek to claim copyright over every document that is produced in every copy of Microsoft Office.<sup>415</sup> Equally, Crayola claim rights as to their crayon design<sup>416</sup> but do not seek to claim copyright over every single picture drawn or coloured in with their crayons.

## 2.7. Theory for Parity?

There is a further, theoretical element to the discussion of user claims to in-game items. This aspect of theory is slightly different to that of the theories which suggest that rights are a requirement for creation.<sup>417</sup> Rather than focusing on established theories and their applicability to MMORPGs and Virtual Worlds, it is also possible to construe in-game and in-world items

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<sup>414</sup> S J Horowitz, ‘Competing Lockean Claims to Virtual Property’ (2007) 20 Harv J L & Tech 443, 454.

<sup>415</sup> B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA 2008) 140.

<sup>416</sup> B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA 2008) 140.

<sup>417</sup> M B Caramore, ‘Help! My Intellectual Property is Trapped: Second Life, Conflicting Ownership Claims and the Problem of Access’ (2008) Rich J L & Tech 3 [16].

from the perspective of value. This perception concerns the value users deem their items to have, and therefore such a consideration requires that some credence be given to the claims of users that their items are valuable, and have worth. Duranske has considered this albeit with a different emphasis, and believes that users of MMORPGs and Virtual Worlds do foster expectations over the items they accrue and collect throughout the duration of their use of a particular online environment.<sup>418</sup> This would in turn indicate that the value attaches not merely to the literal code of the items, but to the representation of them as the user sees them.<sup>419</sup>

The 'Value Theory' suggests that users view the in-game items that they have created as something which is significant, attracts value, and therefore will attract rights to protect that value. This suggestion has some vociferous support, and Cheng is unequivocal in calling for a move away from viewing online items as ones which exist solely to fulfil a purpose within a particular environment and nothing more.<sup>420</sup> Similarly, Posner has suggested that what is necessary – and perhaps inevitable – is a new set of laws which will be applied to MMORPGs and Virtual Worlds.<sup>421</sup>

This differs from the position adopted by Bartle, who suggests that if gamers pay their subscription fees and play the game, they deserve little else than to play, and will not acquire proprietary interests, even if there is an assertion to the contrary.<sup>422</sup> This however, suggests that this will not be the situation with all gamers and users, and that, for some, the interaction with the game environment will involve more than merely paying and playing. This is an assertion which leaves an opportunity to differentiate between the types of gamers and users – those who pay and play, and little else, and those who pay, play and create as well. Under Bartle's statement,<sup>423</sup> the second category of gamer could justifiably claim proprietary interests. This is something Humphreys has

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<sup>418</sup> B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA Publishing 2008) 75; S Humphreys, 'Discursive constructions of MMOGs and some implications for policy and regulation.' (2009) *Media International Australia* 130: 53, 62.

<sup>419</sup> T S L Cheng, 'A Brave New World for Intellectual Property Rights' (2006) 17 *Journal of Law, Information and Science* 10.

<sup>420</sup> T S L Cheng, 'A Brave New World for Intellectual Property Rights' (2006) 17 *Journal of Law, Information and Science* 10.

<sup>421</sup> W J An, 'The *Second Life* of Judge Richard A Posner' *New World Notes* (11 December 2006) available online: <[http://nwn.blogs.com/nwn/2006/12/the\\_second\\_life.html](http://nwn.blogs.com/nwn/2006/12/the_second_life.html)> retrieved 29 November 2010.

<sup>422</sup> R A Bartle, 'Pitfalls of Virtual Property' (April 2004) <<http://www.themis-group.com/uploads/Pitfalls%20of%20Virtual%20Property.pdf>> retrieved 18 March 2010.

<sup>423</sup> R A Bartle, 'Pitfalls of Virtual Property' (April 2004) <<http://www.themis-group.com/uploads/Pitfalls%20of%20Virtual%20Property.pdf>> retrieved 18 March 2010.

also indicated, based on a changing perception of the gamer;<sup>424</sup> towards a creator or author. This is evidenced by the contributions made by users to their environments. Similarly, in the opinions of Reuveni<sup>425</sup> and Garlick, users are moving towards roles as conductors.<sup>426</sup> Such a suggestion is reflective of the fact that many online games and Virtual Worlds encourage users to become involved in the environment rather than just ‘playing’ in it. As such, the concept of how users interact with their chosen environment is changing to the point where users are no longer solely using the space. Users are also contributing to it, making them both users and consumers, and potentially also producers too.<sup>427</sup> This interpretation is not the only one. Other suggestions have indicated that users may benefit from other interests in games aside from those which are tradable<sup>428</sup> or that the emphasis should rest on the value of the components rather than legal interests.<sup>429</sup>

What is evident is that in-game items do attract value<sup>430</sup> in terms of both the potential to sell to other users – irrespective of the clauses within the EULA, and the enforcement of this – and also in terms of how users view their items. This is in addition to the justifications which can be made for interests on the basis of Lockean Labour Theory. When this is considered in terms of a code only approach – through a copyright construction – the same perceptions of value may not be apparent. Nevertheless, there is an equally compelling case to be made here for users’ proprietary interests in content based upon their efforts and the development of their game accounts. On this basis, there is an overwhelming argument for recognising that users do have claims to in-game

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<sup>424</sup> S Humphreys and Others, ‘Fan based production for computer games: User led innovation, the ‘drift of value’ and the negotiation of intellectual property rights’ (2005) *Media International Australia* incorporating Culture and Society February, Issue 114, 16; S Humphreys and J Banks, ‘The labour of user co-creation. Emerging social network markets?’ (2008) *Convergences* 14(4): 401.

<sup>425</sup> E Reuveni, ‘Authorship in the Age of the Conductor’ (2007) *Journal of Copyright Society of the USA*, Vol. 54 (218) 1801, 1821.

<sup>426</sup> M Garlick, ‘Player, Pirate or Conductor? A Consideration of the Rights of Online Gamers’ (2004-2005) *Yale Jou of Law & Tech* 424.

<sup>427</sup> E Reuveni, ‘Authorship in the Age of the Conductor’ (2007) *Journal of Copyright Society of the USA*, Vol. 54 (218) 1801, 1821; M Garlick, ‘Player, Pirate or Conductor? A Consideration of the Rights of Online Gamers’ (2004-2005) *Yale Jou of Law & Tech* 424.

<sup>428</sup> A Eriksson and K Grill, ‘Who Owns My Avatar? Rights in Virtual Property’ (Changing Views: Worlds in Play Conference, Vancouver June 16 – 20 2005) available online: <[http://www.digra.org/dl/search\\_results?general\\_search\\_index=who+owns+my+avatar&SUBMIT=Search](http://www.digra.org/dl/search_results?general_search_index=who+owns+my+avatar&SUBMIT=Search)> retrieved 27 January 2010.

<sup>429</sup> T Kujanpää, T Manninen and L Vallius, ‘What’s My Game Character Worth – The Value of Components of MMOG Characters’ (Situating Play DiGRA Conference, Tokyo 24-28 September 2007) available online: <<http://www.digra.org/dl/db/07312.35346.pdf>> retrieved 27 January 2010.

<sup>430</sup> See: N Gervassis, ‘In Search of the Value of Online Electronic Personnae: Commercial MMORPGs and the Terms of Participation in Virtual Communities’ [2004] 2 *JILT* 26, available online: <[http://www2.warwick.ac.uk/fac/soc/law2/elj/jilt/2004\\_3/gervassis/](http://www2.warwick.ac.uk/fac/soc/law2/elj/jilt/2004_3/gervassis/)> retrieved 6 May 2010.

content, especially where they have made a contribution to the wider environment through creative means. Stephens summarises the importance of this for users by stating: “Denying the player rights inherent to ownership deters the player from investing her time because the player will not realize the full benefit of the investment.”<sup>431</sup> Recognising such interests – irrespective of their justification - would indicate that some users do have parity with developers in terms of creative endeavours.

## **2.8. Conclusion.**

Part of the problem surrounding in-game items rests with the fact that different people have different ideas of what is meant by property.<sup>432</sup> One definition and approach clearly cannot meet everyone’s expectations. However, whilst there is no general consensus, users and developers seem to be in agreement about recognising game items and objects. The difficulties between users and developers surround the rights that each can derive from in-game content.

There are some significant flaws in the application of theories to Virtual Worlds and the regulatory mechanisms that are deployed to protect them. Whilst it is possible to apply each of the philosophical justifications to Virtual Worlds, none are an ideal fit. Nevertheless, they do provide some insight into the motivations of users and developers, and perhaps provide an insight into how potential regulatory mechanisms may be developed. Furthermore, as Westbrook indicates, none of the theories could undeniably allow the user to be considered as the sole owner of avatars.<sup>433</sup> This is a controversial statement for users because it is they who make each avatar distinct and control it. Without the user, the avatar would be a non-entity. This implies that users could be considered as co-owners alongside developers.

Locke’s Theory of Labour is, according to Sheldon,<sup>434</sup> Lastowka and Hunter,<sup>435</sup> the strongest theory in support of the notion that users should benefit from proprietary interests in Virtual

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<sup>431</sup> M Stephens, ‘Sale of In-Game Assets: An Illustration of the Continuing Failure of Intellectual Property Law to Protect Digital Content Creators’ [2001-2002] 80 Tex L Rev 1513, 1530.

<sup>432</sup> J W Nelson, ‘The Virtual Property Problem: What Property Rights in Virtual Resources Might Look Like, How They Might Work, and Why They Are a Bad Idea’ (2009-2010) 41 McGeorge L Rev 281, 284.

<sup>433</sup> T Westbrook, ‘Owned: Finding A Place for Virtual World Property Rights’ (2006) Mich St L Rev 779.

<sup>434</sup> D P Sheldon, ‘Claiming Ownership But Getting Owned: Contractual Limitations on Asserting Property Interests in Virtual Goods’ (2006-2007) 54 UCLA L Rev 751, 760.

<sup>435</sup> F G Lastowka and D Hunter, ‘The Laws of Virtual Worlds’ [2004] 92 Cal L Rev 1.

Worlds and MMORPGs. If, as Locke suggested, people are entitled to own the results of their labour, such a theory could potentially have serious ramifications for developers and providers of virtual environments. If developers seek all of the interests in everything created as a result of game play, such provisions seem to directly contradict Lockean Theory for users. Users will, in many examples, pay to access a game or world, and pay to develop their character / expertise. If a developer then tries to claim this through the EULA, such action contradicts the Lockean idea that a person is entitled to own the results of his labour, because the user is deprived of the results of his labour. Consequently, it would seem that Lockean Theory undermines the regulatory and contractual basis that developers rely on in MMORPG and Virtual Worlds.<sup>436</sup>

Some Virtual Worlds and MMORPGs also set limits on the liability they can be held accountable for. Sheldon<sup>437</sup> highlights that *Ultima Online*<sup>438</sup> limits its liquidated damages to the cost of the CD and the fees that have been paid for access to the service.<sup>439</sup> Such a limitation reflects the idea that most developers adhere to; that anything developed within the game for game play belongs to them and not to the user, therefore the user cannot be compensated for loss as what has been lost does not belong to him. However, if Locke's Theory of Labour is applied to proprietary claims in games and Virtual Worlds, how can it not be applied to the EULA provisions in the same way? By limiting damages to the costs a user has been subjected to, this ignores any notion of labour undertaken, and more damagingly, undermines any value the user had generated in *Ultima Online*, or equally, any other game. The limitation clause does not allow for any calculations of game wealth or items that a user may have paid for and subsequently lost. Service fees are unlikely to include any money spent in developing characters, yet this is labour under the Theory of John Locke.<sup>440</sup>

Consequently, in allowing such limitations, the Labour Theory<sup>441</sup> is not fully reflected because any work the user has undertaken in-game to develop a virtual persona is not valued or accounted for in the damages that may be payable. This is potentially a contradiction to the ideal of users'

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<sup>436</sup> R Dannenberg and Others, *Computer Games and Virtual Worlds: A New Frontier in Intellectual Property Law* (ABA Publishing 2010) 6.

<sup>437</sup> D P Sheldon, 'Claiming Ownership But Getting Owned: Contractual Limitations on Asserting Property Interests in Virtual Goods' (2006-2007) 54 UCLA L Rev 751, 772.

<sup>438</sup> *Ultima Online* (MMORPG) available online: <<http://www.uoherald.com/>> retrieved 29 November 2010.

<sup>439</sup> *Ultima Online* Terms of Service, Clause 7 'Limitation of Liability' available online: <[http://support.ea.com/app/answers/detail/a\\_id/2688](http://support.ea.com/app/answers/detail/a_id/2688)> retrieved 29 November 2010.

<sup>440</sup> P Laslett (ed), *John Locke: Two Treatises of Government* (Cambridge University Press 1988).

<sup>441</sup> P Laslett (ed), *John Locke: Two Treatises of Government* (Cambridge University Press 1988).

rights. A more balanced interpretation could arise under Locke's Theory. The liquidated damages limitation by *Ultima Online* is more likely to be seen as a reimbursement of expenses rather than as damages - for a breach of contract claim - in the traditional sense. Damages relate to losses, although questions can be raised here as to what has been 'lost.' This also challenges the object of EULAs, and the manner in which such agreements deal with concepts such as 'loss.' The general approach could be altered to reflect what would be a fairer position; incorporating recognition of the user's labour. This could also include accepting that losses may be quantified in terms of the labour expended, especially for game-related losses. This example also highlights the wider discussion within 'Property Matters: Virtually Justified?' in that theoretical justifications may be used to demonstrate imbalances and disproportion in the allocation and displacement of rights – both proprietary and contractual.

Lockean Labour Theory seems to offer the strongest claims for both users and developers. Hegel's Personality Theory justifies rights in - and of - avatars, but fails to determine how such rights solve the problem of the rights afforded to users, whereas Utilitarianism relies upon a calculation of the greatest good for the greatest number. There is a strong justification on the basis of both proprietary rights and value theory for users to benefit from interests in items in online games. Justification is, however, one aspect, and is quite different from actual copyright and contractual recognition of such interests in an environment that provides a weak and unclear system of governance through fragmented collections of rules.

The following chapter: 'Digital Copyright: 1988 or Web 2.0?' will outline some pertinent points in the development of copyright law in England and Wales. The discussion will outline the relationship between copyright protection and computer software, as it is copyright upon which MMORPGs and Virtual Worlds are reliant for legal protection. Such discussions will add to the theoretical perspectives developed in 'Property Matters: Virtually Justified?' which have indicated that there are potentially fairer ways to approach proprietary interests in MMORPGs and Virtual Worlds.

## Chapter 3

### Digital Copyright: 1988 or Web 2.0?

#### 3.1. Introduction.

Computer software in England and Wales is currently protected by copyright as a “literary work.”<sup>442</sup> The literal code of the software benefits from protection whereas the idea inherent in the program itself does not. This principle is in keeping with the idea-expression dichotomy – an expression of an idea is protected by copyright but the idea is not - which remains an underlying foundation of the copyright system.<sup>443</sup> The basis of computer software copyright protection stems from that granted to literary “works.”<sup>444</sup>

Computer programs - and online software particularly - are relatively recent developments when considered in light of the duration of existence of copyright in England and Wales. Are seventeenth century principles still relevant and appropriate for protecting new technologies three hundred years later? Can these original principles still offer protection for new media and new applications of technology including software, digital downloads, online broadcasts and live streaming?

This chapter will consider the development of copyright in England and Wales, assessing the developments, and commenting upon recent reforms. Recent reforms have altered the copyright landscape in England and Wales, seeking to align copyright and technological developments with the wishes of users and consumers.<sup>445</sup> These changes do not necessarily alter the ethos of copyright. Computer software benefits from copyright protection; this has been evident since the 1980s.<sup>446</sup> Despite the programme of reform for the digital economy, comprehensive reform of copyright has not been undertaken to include technological change and advances in capability.

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<sup>442</sup> Copyright Designs and Patents Act 1988 s 3(1)(b) and (c).

<sup>443</sup> *Hollinrake v Truswell* [1894] 3 Ch 420; *Designers Guild Ltd v Russell Williams Textiles Ltd* [2000] 1 WLR 2416.

<sup>444</sup> Copyright Designs and Patents Act 1988 s 1(1) and (2).

<sup>445</sup> HM Government, ‘Modernising Copyright: A Modern, Robust and Flexible Framework’ (Government response to a consultation on copyright exceptions and clarifying copyright law) (IPO, December 2012) available online: <<http://www.ipso.gov.uk/types/hargreaves/hargreaves-copyright/hargreaves-copyright-techreview.htm>> retrieved 7 January 2013; Intellectual Property Office, ‘New Exception for Private Copying’ 7 June 2013, available online: <<http://www.ipso.gov.uk/types/hargreaves/hargreaves-copyright/hargreaves-copyright-techreview.htm>> retrieved 7 June 2013.

<sup>446</sup> *Apple Computer Inc v Computer Edge Pty Ltd* [1984] FSR 481; Copyright (Computer Software) Copyright Amendment Act 1985.

Similarly, no comprehensive amendments have been implemented relating to statutory provisions pertaining to computer software. Copyright has developed incrementally, and the legislative background to these changes is a valuable context for the later discussions of proprietary interests in in-game items.<sup>447</sup> Incremental developments also include international developments, and this chapter will discuss the development of copyright but also the development of games, and the response of the law to such developments.

‘Digital Copyright: 1988 or Web 2.0?’ discusses copyright, and outlines the scope of the protective regime. This discussion provides a link between the theoretical justifications for proprietary interests such as copyright, and the potential contractual displacements by End User Licence Agreements<sup>448</sup> of such copyright. This chapter will consider not only the foundations of copyright protection and the development of software copyright, but will form the precursor to discussions about specific activity in online games and Virtual Worlds, necessary before copyright in Virtual Worlds is examined.

### **3.2. Copyright and Online Gaming – In context.**

The Internet was originally designed to transmit data over a network which was protected.<sup>449</sup> It is ironic then, that in dealing with the Internet on a daily basis, this position has been reversed. Since its inception, a full circle has been completed, to the point where the concerns focus on how to protect information that is disseminated and published on the World Wide Web. The current focus in legal terms seems to be how to prevent and control sharing and subsequent uses of creative works.<sup>450</sup>

The rights granted to authors and owners are a reflection of the creative effort that went into producing their items, and it is right and proper that they are able to receive some financial or economic reward for their efforts.<sup>451</sup> A failure to offer an economic reward for their works would

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<sup>447</sup> See: Chapter 5 – Contractual Displacement of Proprietary Interests: EULAw? At 5.4.1. *Ownership Issues*.

<sup>448</sup> Hereafter EULAs.

<sup>449</sup> The Internet Society, ‘A Brief History of the Internet’ available online: <<http://www.internetsociety.org/internet/what-internet/history-internet/brief-history-internet-related-networks>> retrieved 23 June 2013.

<sup>450</sup> Digital Economy Act 2010.

<sup>451</sup> J Hughes, ‘Philosophy of Intellectual Property’ (1985) Georgetown L J 77 287. See generally: Chapter 2 - Property Matters: Virtually Justified?



fail to inspire and motivate people to create works that are of value to society and worthy of recognition.<sup>452</sup> Ultimately, if this were the case, the knowledge of society would then suffer. Clearly, there is a paradox between the need to make works available to the public so that they can be enjoyed and used but, equally, there is a need to protect the rights of authors and reward them in such a way as to make it worthwhile for them to continue to add to the body of creative knowledge. One of the largest problems pervading the copyright system in the digital environment is how best to balance both of these conflicting concerns so that neither party gains an unfair advantage or suffers at the expense of others. Whilst the Internet cannot be burdened with the blame for piracy and a failure to protect the interests of authors, it is users who commit the infringing acts and poor enforcement systems which fail the system.

Online games and virtual worlds are software programs, but a specific kind of software. These multi-user environments<sup>453</sup> rely upon copyright to provide their protective framework. Copyright in England and Wales applies to these in the same way that it applies to other literary works<sup>454</sup> by virtue of the underlying code being written in a literal sense. Whilst software is protected, there is no separate category for works such as in-game items, and there is therefore no difference in the protective regime applicable to online games and virtual worlds. Despite the approach adopted by copyright law, online interactive platforms encourage users to acquire in-game items such as swords, houses and clothing, whilst simultaneously encouraging creativity within the parameters of the game. However, under the contractual licensing agreements, users do not benefit from any proprietary interests in their creative endeavours. These issues, specifically in online games have been the subject of litigation in the US on a number of occasions.<sup>455</sup> No specific provision has been introduced to protect these environments as a distinct category of work – be it digital multimedia work, or a specific category of copyright work. By their definition, these environments are different to other literary works yet benefit from the same protection under the Copyright, Designs and Patents Act 1988.<sup>456</sup>

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<sup>452</sup> S J Horowitz, 'Competing Lockean Claims to Virtual Property' (2007) 20 Harv J L & Tech 443.

<sup>453</sup> M Bell, 'Toward a Definition of Virtual Worlds' (2008) J V W R 1(1).

<sup>454</sup> Copyright Designs and Patents Act 1988 s 3(1)(b) and (c).

<sup>455</sup> *Bragg v Linden Research Inc.* (487 F.Supp 2d 593 E.D. Penn) [2007]; *Eros, LLC, et al. v Thomas Simon*, US Dist. Ct. Southern District of New York, Case No: 1:07-cv-4777 [2007]; *Evans v. Linden Research, Inc.* (E.D. Pa. Feb. 3, 2011).

<sup>456</sup> Hereafter CDPA.

Neither Hargreaves<sup>457</sup> nor Gowers<sup>458</sup> paid much attention to online games specifically in their respective reviews. Despite this, parody and pastiche have since been given legislative attention,<sup>459</sup> as have works whose authors cannot be traced.<sup>460</sup> It seems perhaps strange, that little attention has been paid to a significant creative market, whose core product is protected by a three-hundred year old system. In a revised system of intellectual property, it could be desirable to reconfigure the protective categories that exist to ensure that multi-user and multi-creator environments receive a less disproportionate, and more balanced allocation of rights for the respective authors. This is at present a potential weakness of copyright, and one which has required authors to rely upon the courts for such rights to be confirmed.

### 3.3. Copyright in England and Wales.

Copyright law has gradually evolved and expanded in its protective function since its inception in 1709.<sup>461</sup> Until 1710, there was no copyright system as such in England and Wales.<sup>462</sup> Prior to that, there was no statutory form of protection. The first ideas of copyright-type protection began to emerge because of the invention of printing presses and the erosion of privilege.<sup>463</sup> It now forms a fundamental cornerstone of the intellectual property regime in England and Wales. Originally, there was no comprehensive regime of copyright protection because there were fewer media through which information could be disseminated.

The principles laid out in the Statute of Anne have been consistently carried through copyright law implementation and reform. To this day, the CDPA 1988 still holds these principles to be central in the law of England and Wales, particularly, the idea-expression dichotomy.<sup>464</sup> This is

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<sup>457</sup> I Hargreaves, 'Digital Opportunity: A review of Intellectual Property and Growth' (2011) available online: <<http://www.ipso.gov.uk/ipreview.htm>> retrieved 14 December 2012.

<sup>458</sup> A Gowers, 'The Gowers Review of Intellectual Property: Independent Review' (December 2006) <[http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06\\_gowers\\_report\\_755.pdf](http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf)> retrieved 17 October 2009.

<sup>459</sup> HM Government, 'Modernising Copyright: Government Response to consultation on copyright exceptions and clarifying copyright law.' (IPO, December 2012), available online: <<http://www.ipso.gov.uk/response-2011-copyright-final.pdf>> retrieved 20 January 2013.

<sup>460</sup> Orphan works are those whose authors cannot be traced. Enterprise and Regulatory Reform Act 2013.

<sup>461</sup> Statute of Anne 1709.

<sup>462</sup> W R Cornish and D Llewelyn, *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights* (6th edn, Thomson Sweet & Maxwell 2007) 34; Intellectual Property Office, 'The History of Copyright' <<http://www.ipso.gov.uk/types/copy/c-about/c-history.htm>> retrieved 23 June 2013.

<sup>463</sup> S von Lewinski, *International Copyright Law and Policy* (OUP 2007) 37.

<sup>464</sup> *Hollinrake v Truswell* [1894] 3 Ch 420; *Designers Guild Ltd v Russell Williams Textiles Ltd* [2000] 1 WLR 2416.

core to the copyright system, which means that so long as a ‘work’ is recorded in writing or some other permanent format, there will be copyright protection afforded to that expression. However, the idea will not be protected by copyright law at all. This position is reiterated by European law<sup>465</sup> so at two levels it is clear that ideas will not benefit from protection under copyright; ideas are the preserve of patent law.

Other significant statutes and treaties require consideration before it is possible to see how the need for the CDPA arose. The primary consideration must be the Berne Convention of the late 1880s.<sup>466</sup> Not only did the Berne Convention contain important legislative developments in the field of copyright but also it was significant in terms of the international regulatory framework because the Berne Convention together with the earlier Paris Convention<sup>467</sup> provided for the establishment of an international bureau for the protection of works. This was the first move towards establishing any kind of international regulation for protecting creative and industrial works, and more importantly, for establishing an intergovernmental body to oversee the international treaties. The bureau established was the predecessor to the World Intellectual Property Organisation<sup>468</sup> which was introduced as a replacement in 1967.<sup>469</sup> It was WIPO that indicated in the late 1970s that copyright was a suitable mechanism through which to protect computer programs.<sup>470</sup>

### ***3.3.1. Games, Software and Copyright.***

Copyright is a well-established property right with an established historical basis,<sup>471</sup> whereas games, and online games in particular are incredibly young by comparison, with gaming booming in the late 1960s and early 1970s,<sup>472</sup> and online gaming growing rapidly throughout the late 1980s onwards. Games have developed at a much faster rate than the law has - the response of the law to gaming has not always been a speedy one. There were a number of developments during the

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<sup>465</sup> Council Directive (EC) 91/250 on the Legal Protection of Computer Programs [1992] OJ L122/9 (hereafter Computer Programs Directive 91/250), Article 1.

<sup>466</sup> The Berne Convention for the Protection of Literary and Artistic Works, 1886. (Hereafter Berne Convention).

<sup>467</sup> Paris Convention for the Protection of Industrial Property 1883.

<sup>468</sup> Hereafter WIPO.

<sup>469</sup> By the Establishing Convention of WIPO 1967.

<sup>470</sup> WIPO Model Provisions on the Protection of Computer Software 1978.

<sup>471</sup> Originating in the Statute of Anne 1709.

<sup>472</sup> Computer History Museum, ‘Inventing a New Medium’ available online:  
<<http://www.computerhistory.org/revolution/computer-games/16/187>> retrieved 8 August 2014.

1980s in the form of legislation, which show the response of the legal system to not only emerging technologies, but also computer gaming. These arise in the form of the Copyright (Computer Software) Amendment Act 1985, and the Video Recordings Act 1984, and the leading statute on copyright; Copyright Designs and Patents Act 1988. Further legislative developments directly relevant to computer software and gaming are found in the Video Recordings Act 2010, and the Digital Economy Act 2010.

### 3.3.2. *The Software Panic.*

Upon its implementation, the 1956 Copyright Act made no mention of computer programs or of computer software. Even if adequate at the time of enactment, the Act soon began to show shortcomings in light of litigious and statutory developments. Despite these shortcomings, there was no comprehensive declaration on the status of copyright for software until 1984 in Australia and 1985 in England and Wales.

The case that spread fear through the computer industry was that of *Apple Computer Inc v Computer Edge Pty Ltd*<sup>473</sup> despite clear signals from WIPO that copyright did protect computer programs from 1978 onwards.<sup>474</sup> The defendant claimed that computer programs were not works for the purposes of copyright. The trial judge panicked the computer software industry by agreeing with the defendant's claim, basing his judgment on the principle established in the English case of *Hollinrake v Truswell*<sup>475</sup> that a literary work was one which was designed to provide "information or instruction" by way of literary enjoyment. The judge held, in applying this principle, that computer program code was incapable of providing instruction or information through literary enjoyment, and therefore there was no copyright protection for computer program code. Despite the fact that this was an Australian case, panic spread through to England and Wales because of the similarities between English and Australian law.

This case<sup>476</sup> was successfully appealed, finding that even computer programs in object code format are protected under copyright as literary works. This decision by the Federal Court of Australia did not resolve the state of panic in the computer industry though, largely because of the well-

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<sup>473</sup> *Apple Computer Inc v Computer Edge Pty Ltd* [1984] FSR 481.

<sup>474</sup> WIPO Model Provisions on the Protection of Computer Software 1978.

<sup>475</sup> *Hollinrake v Truswell* (1894) 3 Ch 420.

<sup>476</sup> *Apple Computer Inc v Computer Edge Pty Ltd* [1984] FSR 481.

argued dissenting judgment that alleged literary work adaptations ought to be capable of being seen or heard.<sup>477</sup> Accordingly, the Australian government saw the still confused state of the law and reacted rapidly by enacting legislation<sup>478</sup> to protect computer programs as literary works regardless of their formats. The issue of works needing to be seen or heard is now an obsolete one – software is recognisable in various formats from computer programs such as Microsoft Office to applications such as Facebook for iPhone to custom software. The British government, despite the state of fear gripping the industry, did not replicate the position of their Australian counterparts, and instead remained indifferent to the situation. Whilst there was no rapid legislative response, there was a forthcoming reaction in 1985 because of lobbying by FAST.<sup>479</sup>

### 3.3.3. *The Copyright (Computer Software) Amendment Act 1985.*

A Private Member's Bill introduced the 1985 Amendment Act.<sup>480</sup> This was little more than a temporary measure, intended to give protection to computer programs as literary works. The startling case law, together with pressure and the recommendations of the Whitford Committee,<sup>481</sup> saw the publication of the 1986 White Paper<sup>482</sup> leading to the reformatory 1988 statute.<sup>483</sup> The 1985 Amendment Act<sup>484</sup> lasted only three years but was a necessary stopgap, filling the void in legislative provision and highlighted the need for a new piece of legislation to clarify the state of the law.

The introduction of the Copyright (Computer Software) Amendment Act in 1985 was not as swift as it could have been given the ramifications of the decision in *Apple*.<sup>485</sup> The presentation of the Copyright (Computer Software) Amendment Bill in 1984 to the House of Commons was one which, in the words of Sir Nicholas Lyell, highlighted, “for the avoidance of doubt, that computer programmes in written or electronically recorded form are covered by the Copyright Act 1956.”<sup>486</sup> This Bill was introduced in order to address a problem highlighted in the *Apple* decision

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<sup>477</sup> D Bainbridge, *Software Copyright Law* (4th edn, Butterworths 1999) 45.

<sup>478</sup> Australian Copyright Amendment Act 1984.

<sup>479</sup> Federation Against Software Theft (FAST).

<sup>480</sup> Copyright (Computer Software) Amendment Act 1985.

<sup>481</sup> Whitford Committee, ‘Copyright and Designs Law’ HC (1977).

<sup>482</sup> Government White Paper, ‘Intellectual Property and Innovation’ (Cmnd 9117, 1986).

<sup>483</sup> CDPA 1988.

<sup>484</sup> Copyright (Computer Software) Amendment Act 1985.

<sup>485</sup> *Apple Computer Inc v Computer Edge Pty Ltd* [1984] FSR 481.

<sup>486</sup> HC Deb 24 July 1984, vol 64, cols 851-852.

that suggested copyright protection would not extend to computer software. In England and Wales, such legislation was necessary, as up until this point, computer software protection was not codified. Following the passing of the 1985 Act,<sup>487</sup> the Copyright Act 1956 was altered to ensure that copyright protection *did*<sup>488</sup> extend to computer software.

This was however, nothing other than a temporary measure, as William Powell MP indicated in the debate on the replacement for the 1956 Act, "...that statute [the 1985 Act]...was intended to be a stopgap measure..."<sup>489</sup> This was a particularly significant statement, not only in the context of the replacement of the amended 1956 Copyright Act, but also in the introduction of the CDPA 1988. Support was also found for the replacement of the 1956 Act (as amended in 1985) in the House of Lords, from Viscount Colville of Colcross, who indicated in 1985 that extensions of intellectual property provisions had been recommended almost a decade earlier<sup>490</sup> by the Whitford Committee.<sup>491</sup> The 1985 Amendment Act, and the Copyright Act 1956 were repealed only a few years after the 1985 Act was passed, and these were replaced with the Copyright, Designs and Patents Act 1988. This development was one which was accepted as necessary:

"The Copyright Act 1956 is widely recognised as being in need of replacement. It has protected broadcasts since then, but that was before Telstar was launched. It restricted the circumstances in which photocopies could be made, but it predated the launch of the plan paper copier. It covered computer programs, but when it passed, a computer was virtually the size of a house and could perform only simple arithmetical tasks. So the Bill is here to replace a 32 year old Act which has done its best, labyrinthine though it may have been, to protect emerging technologies."<sup>492</sup>

This statement from Sir Geoffrey Pattie in the House of Commons in early 1988 shows the lack of longevity that both the Copyright Act 1956 had, and the short-lifespan of the amending legislation of 1985. Irrespective of this lifespan, the 1985 Act was highly significant in terms of

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<sup>487</sup> Copyright (Computer Software) Amendment Act 1985.

<sup>488</sup> Emphasis added.

<sup>489</sup> HC Deb 28 April 1988, vol 132, cols 582.

<sup>490</sup> HL Deb 10 May 1985, vol 463, cols 865.

<sup>491</sup> Whitford Committee, 'Copyright and Designs Law' HC (1977).

<sup>492</sup> Sir Geoffrey Pattie, HC Deb 28 April 1988, vol 132, cols 540-541.

computer software and by connection, gaming. The 1985 legislation performed a key role in clarifying that computer software would benefit from copyright protection as part of the literary works categorisation, and this is where it remained in the following legislation; the CDPA 1988.<sup>493</sup> Despite this odd sequence of accessions and reversal in attitudes, technology continued to boom and further amendments to the 1956 Act were soon required. The Whitford Committee stepped in to call for a “general revision”<sup>494</sup> of copyright law. Subsequently, the Whitford Committee took the first steps towards provoking enactment of the CDPA 1988 and copyright reform in England and Wales.

### *3.3.4. Legislation in the 1980s.*

The Copyright (Computer Software) Amendment Act of 1985 was the first statute in England and Wales to provide any copyright for computer programs. Technological capability suggested there would be a further development of computer program protection in statutory form in the next 24 years. However, very little specific legislation has been implemented in the sphere of computer software.

The 1988 Act<sup>495</sup> brought about a substantial reorganisation of the statutory regime,<sup>496</sup> conferring protection on creative outputs by protecting single categories of copyright works, for example literary works, and therefore clarifying that it is possible for one work to benefit from multiple copyrights.<sup>497</sup> This, together with the expansion of owners’ rights and new moral rights for authors, altered the copyright system. Despite all of the changes made to the law, it was never intended that there would be a comprehensive overhaul of the legal framework.<sup>498</sup> This was a revision of the copyright system, changing the categories of protection to account for technological developments whilst retaining the fundamental copyright principles from earlier legislation.

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<sup>493</sup> Computer software is still protected as a literary work under s3(1)(b) of the CDPA 1988.

<sup>494</sup> Whitford Committee, ‘Copyright and Designs Law’ HC (1977).

<sup>495</sup> CDPA.

<sup>496</sup> L Bently and B Sherman, *Intellectual Property Law* (2nd edn, OUP 2004) 31.

<sup>497</sup> *Electronic Techniques (Anglia) Ltd v Critchley Components Ltd* [1997] FSR 401.

<sup>498</sup> L Bently and B Sherman, *Intellectual Property Law* (2nd edn, OUP 2004) 31.

Irrespective of these changes, however, the 1988 Act and the copyright system have continued to evolve and change through a series of amendments, mainly to give effect to European Community Directives alongside other legislation. What was, initially, a good piece of legislation, is now a complex statute amended by directive and statutory instrument in a piecemeal manner. In a society where we have changed technology to meet our needs, it does not seem unreasonable that protection should be suited to that which it seeks to protect. Although this Act<sup>499</sup> is now over twenty years old, the principles embodied in it remain at the heart of the three-hundred year old copyright system.

There have been many revisions of the CDPA, and whilst this does not mean that it is inherently flawed, it does indicate that the pace of technological developments has outrun the pace with which the law has changed. This is not surprising but it does perhaps suggest that it is appropriate to question the effectiveness of an “all-encompassing” system, especially one which seeks to operate as a ‘catch all’ copyright statute. Indeed, since the CDPA was enacted in the 1980s: “The ability to adhere to the principle of legislative creation has been much enhanced by the willingness of Parliament to use ‘copyright’ as a catch-all for the protection of new subject-matter.”<sup>500</sup> To date, this seems to be the prevailing approach adopted to legislating in this area. The European Union<sup>501</sup> has implemented Directives;<sup>502</sup> and these have been added to the copyright law in England and Wales through the CDPA, rather than by individual statute. Such an approach, whilst perhaps sensible in keeping legislation contained, could also make for a rather complex piece of legislation. There is, at present, no degree of consistency let alone uniformity, in adding to, and amending, legislation. Although the Act was forward-thinking at the time of its enactment, it has not been unchanged due to the agenda imposed on the UK by the legislative arm of the EC because: “In most cases these amendments were made to give effect to obligations imposed by European Community Directives.”<sup>503</sup>

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<sup>499</sup> Copyright Designs and Patents Act 1988.

<sup>500</sup> W R Cornish and D Llewelyn, *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights* (6th edn, Thomson Sweet & Maxwell 2007) 12.

<sup>501</sup> Hereafter EU.

<sup>502</sup> Including for example: Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (in subsequent footnotes, Database Directive); Council Directive (EC) 2001/29 on Copyright in the Information Society [2001] OJ L167/10 (in subsequent footnotes, Information Society Directive 2001/29). Computer Programs Directive 91/250.

<sup>503</sup> L Bently and B Sherman, *Intellectual Property Law* (3rd edn, OUP 2009) 34.



This call for a recodification of copyright law at the very least seems to be a straightforward request, evidenced by the Lisbon Council's recent calls for a reconfigured copyright law.<sup>504</sup> There are weaknesses with the existing legislation in its current guise, not least the complicated numbering of sections that have been introduced by EU legislation. Even without consideration of reforming the principles and protection contained within the statute, there is a lot to gain from rewriting the current sections. Given that the CDPA deals with matters and intellectual property rights<sup>505</sup> other than copyright, the statute is now over one hundred<sup>506</sup> pages long, with sections being named "s296ZG." From a purely organisational point alone, it may be beneficial to reorganise the Act.

The legislation in England and Wales in 1988 did not bring to an end disputes over computer programs and software, and the suitability of copyright to protect them as literary works. In the mid-1990s, and late 2000s, several cases discussed aspects dealing with computer programs and the protection from which they would benefit under the CDPA.<sup>507</sup> More recently, the *SAS* case<sup>508</sup> has returned to the issues of copyright and computer software, thereby perhaps casting some doubts on the recommendations of recent intellectual property reviews.

### 3.3.5. *Video Recordings Legislation.*

The legal response to gaming has not only focussed upon the copyright elements and proprietary nature of computer games. Other legislative mechanisms were introduced in the mid-1980s to address this growing industry and the associated problems of classification; a growing concern due to age-related content. This particular issue was addressed in the Video Recordings Act

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<sup>504</sup> I Hargreaves and P Hugenholtz, 'Copyright Reform for Jobs and Growth: Modernising the European Copyright Framework' The Lisbon Council (May 2013) available online:

<<http://www.lisboncouncil.net/publication/publication/95-copyright-reform-for-growth-and-jobs-modernising-the-european-copyright-framework.html>> retrieved 1 June 2013.

<sup>505</sup> In subsequent footnotes, IPRs.

<sup>506</sup> In: A Christie & S Gare, *Blackstone's Statutes on Intellectual Property* (9<sup>th</sup> edn OUP 2008).

<sup>507</sup> *Ibcos v Barclays Mercantile Finance* [1994] FSR 275; *John Richardson Computers v Flanders* [1993] FSR 497; *Navitaire Inc v Easyjet Airline Co and Another* [2004] EWHC 1725 (Ch); *Nova Productions Ltd v Mazooma Games Ltd & Ors Rev 1* [2006] EWHC 24 (Ch).

<sup>508</sup> *SAS Institute Inc v World Programming Ltd* [2013] EWHC 69 (Ch). This decision is comparable to the decision of *Lotus Development Corporation v Borland International, Inc.*, 516 U.S. 233 (1996) although the latter is a decision under US copyright law. See also: P Samuelson and Others, 'Does Copyright Protection under the EU Software Directive Extend to Computer Program Behaviour, Languages and Interfaces?' (December 2011). Available at SSRN: <<http://ssrn.com/abstract=1974890>> retrieved 20 June 2013.

1984. This Act introduced a compulsory system of classification for videos<sup>509</sup> / films, and alongside this, introduced criminal liability for contravening the classifications system, and supplying restricted videos to underage persons.<sup>510</sup>

It is to be noted that there have also been amendments to the Video Recordings Act 1984. Initially, the Act was repealed and simultaneously revived in the same piece of legislation – the Video Recordings Act 2010.<sup>511</sup> This action was necessary to overcome a procedural flaw in the passing of the original 1984 Act.<sup>512</sup> As such, the 1984 Act remains in force. However, there have also been other alterations to the legislation dealing with the classification of videos – which now includes video games. The Criminal Justice & Public Order Act 1994 made some notable alterations to the legislation, requiring the classification board to pay particular attention to the tests within the 1984 Act.<sup>513</sup> This was in part a reaction to the Bulger killing,<sup>514</sup> but also to changing cultural norms, and the growth of the gaming industry. Further modifications were made through the Video Recordings Order 1995<sup>515</sup> which granted the classifications board<sup>516</sup> the power to revisit their previous classification decisions;<sup>517</sup> another indicator that the law has responded to the development of computer games.

The Video Recordings legislation now equally applies to the classifications for video games as well as to videos / films – and this was made possible as a result of changes to the definitions of video also introduced in 1994 by the Criminal Justice Act.<sup>518</sup> Further alterations to the system in 2012 saw a split arise in the classification boards, with the VSC<sup>519</sup> adopting responsibility for classifying the majority of video games. Whilst these pieces of legislation arguably do allow some

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<sup>509</sup> Video Recordings Act 1984 s4.

<sup>510</sup> Video Recordings Act 1984 s11(1).

<sup>511</sup> Video Recordings Act 2010 s1.

<sup>512</sup> T Whitehead, 'Selling illegal DVDs not illegal because of blunder' (*The Telegraph*, 24 August 2009) available online: <<http://www.telegraph.co.uk/news/uknews/law-and-order/6083182/Selling-illegal-DVDs-not-illegal-because-of-blunder.html>> retrieved 8 August 2014.

<sup>513</sup> British Board of Film Classification, 'Video Recordings Act' available online: <<http://www.bbfc.co.uk/education-resources/student-guide/legislation/video-recordings-act>> retrieved 8 August 2014.

<sup>514</sup> T Kirby and J Forster, 'Video link to Bulger murder disputed' (*The Independent*, 26 November 1993) available online: <<http://www.independent.co.uk/news/video-link-to-bulger-murder-disputed-1506766.html>> retrieved 8 August 2014.

<sup>515</sup> Video Recordings (Review of Determinations) Order 1995.

<sup>516</sup> British Board of Film Classification; hereafter BBFC.

<sup>517</sup> Video Recordings (Review of Determinations) Order 1995 s9.

<sup>518</sup> Criminal Justice & Public Order Act 1994; hereafter CJPOA. See annotated Video Recordings Act 1984, available online: <<http://www.legislation.gov.uk/ukpga/1984/39>> retrieved 8 August 2014.

<sup>519</sup> Video Standards Council; hereafter VSC.

regulation of video games, and films, these pieces of legislation do not address intellectual property rights and subsistence in games, and instead focus on the classification, and criminal liability attached to supplying games to those who are under-age.

### **3.3.6. *The Digital Economy Act and Games.***

The changes to legislation dealing with the regulation of video games continued in 2010, with the introduction of the Digital Economy Act,<sup>520</sup> which, whilst focussing predominantly on online piracy (and enforcement provisions), also contained provisions dealing with other digital media. Sections 40 and 41 of the DEA implemented amendments to the Video Recordings Act 1984 provisions, and focus on classifications for video games, and designated authorities for making such classifications respectively. These amendments focussed on altering legislative sections dealing with classification exemptions for video works, and now video games too.

Of particular significance in this respect is the new section s2A<sup>521</sup> of the Video Recordings Act 1984, which as highlighted by Mac Sithigh, changes the dividing line between exempt works and non-exempt works.<sup>522</sup> The introduction of this section into the Video Recordings Act highlights the diversity of video games, and their potential scope. This is because this section includes a much greater list of representations which will alter the exemption status for the game i.e. depictions of activities involving illegal drugs;<sup>523</sup> words or images likely to encourage the use of alcohol or tobacco;<sup>524</sup> words likely to cause offence<sup>525</sup> and words or images intended to convey a sexual meaning.<sup>526</sup> Prior to this amendment, the vast majority of video games fell within s2(1)(c),<sup>527</sup> and did not require classification unless there was a depiction or portrayal to a significant extent of human sexual activity,<sup>528</sup> acts of gross violence towards humans or animals<sup>529</sup> or activity likely to encourage the commission of criminal offences.<sup>530</sup> The amendments through the DEA have added to the list of portrayals which will require a video game to be classified.

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<sup>520</sup> Digital Economy Act 2010; hereafter DEA.

<sup>521</sup> DEA 2010 s40(5).

<sup>522</sup> D Mac Sithigh, 'The regulation of video games: past, present and future.' (2010) Ent L R 298, 299.

<sup>523</sup> Video Recordings Act 1984 s2A(2)(d).

<sup>524</sup> Video Recordings Act 1984 s2A(2)(e).

<sup>525</sup> Video Recordings Act 1984 s2A(2)(h).

<sup>526</sup> Video Recordings Act 1984 s2A(2)(f).

<sup>527</sup> Video Recordings Act 1984.

<sup>528</sup> Video Recordings Act 1984 s2(2)(a).

<sup>529</sup> Video Recordings Act 1984 s2(2)(b).

<sup>530</sup> Video Recordings Act 1984 s2(3).

Whilst these changes to the legislation reflect the concerns of Byron<sup>531</sup> – and wider society – they are largely changes focussed upon the classification of video games, rather than the intellectual rights contained within online games.

### 3.4. European Union Law.

The EU has played a significant role in the development of copyright legislation. Even before this ‘new’ issue of computer programming prompted the EU to legislate, copyright had appeared on the European horizon. The EU considered the future of copyright during the mid-1980s with the 1988 Green Paper,<sup>532</sup> acknowledging some of the problems that the soon to be widespread use of, and reliance upon, computer programs were likely to bring. In that Green Paper, the European Commission<sup>533</sup> identified computer programs as one of six areas in need of “immediate action.” This was highlighted as an area of concern in the 1980s yet 25 years later, copyright is still causing difficulties.

The Computer Programs Directive<sup>534</sup> is the first EU Directive in the field of computer programs, addressing the method of protection which should be applied to computer programs. Previously, considerable and prolonged discussions abounded over which regime ought to apply to computer programs. Whilst the Directive<sup>535</sup> has made clear that computer software is protected by copyright, debates still occur as to whether this is the most appropriate or best suited approach.<sup>536</sup> The 1992 Directive<sup>537</sup> states that ideas are not to be protected; but expression is to benefit from protection, reiterating the well-established position in English law.

The Computer Software Directive brought a degree of harmonisation to the laws of member states, particularly in terms of the requirement of originality and the protection of rights, and is

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<sup>531</sup> T Byron, ‘Safer Children in a Digital World’ (2008) available online:

<<http://webarchive.nationalarchives.gov.uk/20100202100434/http://publications.dcsf.gov.uk/eorderingdownload/dcsf-00334-2008.pdf>> retrieved 8 August 2014.

<sup>532</sup> EC Commission, ‘Green Paper on Copyright and Challenge of Technology – Copyright Issues Requiring Immediate Action’ (1988) COM/88/172.

<sup>533</sup> Hereafter EC.

<sup>534</sup> Computer Programs Directive 91/250.

<sup>535</sup> Computer Programs Directive 91/250.

<sup>536</sup> A Christie, ‘Designing Appropriate Protection for Computer Programs’ [1994] EIPR 486; L Driver, ‘Would the current ambiguities within the legal protection of software be solved by the creation of a *sui generis* right for computer programs?’ (2008) JIPL & P Vol.3 (2), 125; K Moon, ‘The nature of computer programs: tangible? Goods? Personal Property? Intellectual Property?’ (2009) EIPR 31(8), 396.

<sup>537</sup> Computer Programs Directive 91/250.

a milestone in terms of computer software protection. However, it did not result in any significant changes to the substantive law. The judiciary had already decided that computer software was capable of protection as a literary work through case law,<sup>538</sup> clearly expressing in the early 1980s that; “literary copyright is capable of subsisting in a computer program.”<sup>539</sup> In light of long-standing influences on computer software copyright,<sup>540</sup> but also the digital influences on creativity today, some elements would be better protected by giving protection to ideas as well as to expressions. In this context, it may be better for computer programs to have a new protective mechanism that takes elements from both copyright and patents so that the underlying ideas behind a computer game or piece of software would gain protection for a certain period before becoming freely available. This could be similar, for instance, to the *sui generis* rights for databases,<sup>541</sup> although with the proviso that computer software does benefit from copyright protection as a literary work; the *sui generis* database right usually applies to databases which do not benefit from copyright protection.

### 3.4.1. EU Copyright.

Few developments were forthcoming until 1991 when the Computer Programs Directive<sup>542</sup> was introduced. With the agenda for ‘immediate action’ in the 1999 Green Paper flagging by the mid-1990s, the EU had begun to develop grander plans focussing on a harmonisation of European Copyright law. This process was initiated in 1995 with another Green Paper,<sup>543</sup> a consequence of the emergence of the Internet, and a desire to introduce European harmony.<sup>544</sup> There were few developments until the 2008 Green Paper,<sup>545</sup> which, whilst having attainable targets, includes familiar phrases and generalisations that potentially undermined the ambition behind the project:

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<sup>538</sup> *Gates v Swift* [1982] RPC 339-340; *Sega Enterprises v Richards* [1983] FSR 73.

<sup>539</sup> *Thrustcode v WW Computing* [1983] FSR 502.

<sup>540</sup> See for example, WIPO Model Provisions on the Protection of Computer Software 1978.

<sup>541</sup> Database Directive 96/9/EC; A Marsoof, ‘A case for *sui generis* treatment of software under the WTO regime’ (2012) *Int J Law Info Tech* 20 (4) 291; H A Deveci, ‘Databases: is *sui generis* a stronger bet than copyright?’ (2004) *Int J Law Info Tech*, 12(2), 178.

<sup>542</sup> Information Society Directive 2001/29.

<sup>543</sup> Commission (EC), ‘Copyright and Related Rights in the Information Society’ (Green Paper) COM (95) 382 final (not published in the Official Journal).

<sup>544</sup> P Bernt Hugenholtz and Others, *Harmonizing European Copyright Law – The Challenges of Better Lawmaking* (Kluwer Law International 2009) 7.

<sup>545</sup> EC Commission, ‘Green Paper on Copyright in the Knowledge Economy’ COM (2008) 466/3.

<[http://ec.europa.eu/internal\\_market/copyright/copyright-info/copyright-info\\_en.htm](http://ec.europa.eu/internal_market/copyright/copyright-info/copyright-info_en.htm)> retrieved 7 February 2010.

“The introduction contains the familiar – although by no means accepted – mantra that ‘a high level of copyright protection is crucial for intellectual creation.’”<sup>546</sup>

Bornkamm<sup>547</sup> has concluded that the time and situation is not favourable for a European Copyright Code, which is essentially European copyright harmonisation. Despite this, Hugenholtz et al believe that an undeniable solution to the territorial issues of copyright would be to implement a Community Copyright: “Long considered taboo in copyright circles, the idea of a Community Copyright is gradually receiving the attention it deserves.”<sup>548</sup> The authors suggest that this could be a solution to the falling short of the EC to implement a harmonisation of European intellectual property law. The EC has given in on more than one occasion to the traditional principles of territoriality of copyright in member states. The EC needs to set out its strategy and position and maintain it for there to be any real degree of progress.

However, if the Community Copyright (were it to be implemented) does not completely replace the law of copyright across all member states, there seems little point in implementing such a right. After all, some current international agreements and conventions introduce a basic level of reciprocal protection, the most important of which are the Berne Convention, the WIPO Treaties and Trade Related Aspects of Intellectual Property Agreement.<sup>549</sup> The Community Copyright ought to be implemented as a significant body of legislation which clarifies EU copyright, introduces a minimum level of protection for moral rights and amalgamates all other elements of copyright that have hitherto been introduced in a staccato manner.

On the basis of this, the European Code / Community Copyright ought to be a complete replacement for all seven harmonisation directives or it could be a stand-alone measure in its own right. Secondly, either the 1988 Act ought to be given due attention in, at least renumbering the sections, or, as the Lisbon Council have advocated, a new copyright law should be enacted which

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<sup>546</sup> P Bernt Hugenholtz and others, *Harmonizing European Copyright Law – The Challenges of Better Lawmaking* (Kluwer Law International 2009) 9.

<sup>547</sup> J Bornkamm, ‘Intervention: Time for a European Copyright Code?’ (Management and Legitimate Use of IP Conference, Strasbourg July 9-11 2000)  
<[http://ec.europa.eu/internal\\_market/copyright/docs/conference/2000-07-strasbourg-proceedings\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/conference/2000-07-strasbourg-proceedings_en.pdf)>  
retrieved 6 May 2010.

<sup>548</sup> M van Eechoud and Others, *Harmonizing European Copyright Law: The Challenges of Better Law Making* (Kluwer Law International 2009) 136.

<sup>549</sup> Hereafter TRIPS Agreement 1994.

is more organised and straightforward.<sup>550</sup> This new legislative framework should be appropriately divided to deal with analogue creative works, and digital works. It could then incorporate elements from the CDPA, such as moral rights,<sup>551</sup> which are likely to be of significant importance in online games.<sup>552</sup>

Other focuses rest on particular elements of the system, highlighting specific problematic issues.<sup>553</sup> It has been suggested that, in reforming the system, there should be a new category of multimedia works<sup>554</sup> which ought to be granted specific protection. Both government and the industries have readily accepted the potential and money-making abilities of the audio-visual media;<sup>555</sup> therefore, there is a need not only for copyright protection, but also for copyright to play a founding role in the protection available to audio-visual multimedia.<sup>556</sup> This role could include a refreshed approach to for example moral rights, and intellectual property rights. Indeed, if the EU and other legislative bodies are to accept this position and afford this priority to audio-visual works because of their economic importance, online interactive platforms must either be included in the audio-visual multimedia category or must benefit from the receipt of their own individual protective category.

### 3.5. The Digital Challenge.

The digital society, the digital environment, cyberspace, the information superhighway, online society and the second world are all terms that have become commonplace, and represent challenges to the regime charged with protecting the rights of authors and owners of intangible

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<sup>550</sup> I Hargreaves and P Hugenholtz, 'Copyright Reform for Jobs and Growth: Modernising the European Copyright Framework' The Lisbon Council (May 2013) available online:

<<http://www.lisboncouncil.net/publication/publication/95-copyright-reform-for-growth-and-jobs-modernising-the-european-copyright-framework.html>> retrieved 1 June 2013.

<sup>551</sup> CDPA 1988 Chapter IV.

<sup>552</sup> See: Chapter 4 - MMORPGing & Copyright. At 4.7. *Moral Rights*.

<sup>553</sup> For example, the need for a balance between copyright and contract, and the potential for users to claim moral rights in online games;

<sup>554</sup> T Aplin, 'Copyright Law in the Digital Society: The Challenges of Multimedia' (Hart Publishing 2005) 217.

<sup>555</sup> I Livingstone and A Hope, 'Next Gen: Transforming the UK into the world's leading talent hub for the video games and creative effects industries' NESTA (February 2011) available online:

<[http://www.nesta.org.uk/home1/assets/features/next\\_gen](http://www.nesta.org.uk/home1/assets/features/next_gen)> retrieved 20 November 2012, 4; Department for Culture, Media and Sport, 'Skills Review of Video Game and Visual Effects Industries' (DCMS News) 1 February 2011, available online: <[http://www.culture.gov.uk/news/news\\_stories/7754.aspx](http://www.culture.gov.uk/news/news_stories/7754.aspx)> retrieved 20 November 2012.

<sup>556</sup> N Geach, 'The Future of Copyright in the Age of Convergence: Is A New Approach Needed for the New Media World?' [2009] *International Review of Law, Computers and Technology* 23:1, 133.

items. The digital society empowers us to become creators, sharing vast amounts of information with ever-growing ease across a wide range of outlets. Sharing encourages us to disseminate works which have been created, from photographs, to songs, to videos and stories. All of these are capable of attracting intellectual protection yet the difficulty in ever-increasing sharing comes with tracking uses of our creative material.

Primarily, the largest concerns are how to stop or reduce the number of people copying materials illegally and then profiting from such a venture. The Open Source Software<sup>557</sup> movement and CopyLeft<sup>558</sup> movement and their proponents including Lessig<sup>559</sup> argue that the restrictions are too great, and are too heavily in favour of the industry and big business, which leads to people not obeying the copyright and licensing restrictions. Proponents of alternative regulatory methods<sup>560</sup> and stronger protective mechanisms<sup>561</sup> to copyright argue that there should be strict protection for the rights of owners and authors because that is needed to provide the economic incentive to ensure that creativity continues; England and Wales employ the model of economic incentive when it comes to copyright.

It is possible to consider all of the issues associated with protecting rights under one large heading of enforcement. The leading concern is protecting the rights of creators – whilst such rights exist, difficulties become apparent in protecting these rights from infringing activities. The digital economy is consistently challenged by this. In relation to online games, however, there are similar, but distinct issues. The issues in online gaming are focussed on the rights of users, and how they protect their intangible proprietary interests. This is, of course, a wider symptom of the digital environment. Interestingly, although debate is prevalent in terms of copyright reform generally,<sup>562</sup> in the area of computer software and online gaming, which has had coverage in the

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<sup>557</sup> L Rosen, *Open Source Licensing: Software Freedom and Intellectual Property Law* (Prentice Hall 2004).

<sup>558</sup> The GNU Operating System, 'What is CopyLeft?' (2009) available online: <<https://www.gnu.org/copyleft/>> retrieved 12 January 2013.

<sup>559</sup> L Lessig, *Free Culture* (Penguin Press 2004) 283.

<sup>560</sup> G Davies, *Copyright and the Public Interest* (2<sup>nd</sup> edn Thomson, Sweet & Maxwell 2002) 306.

<sup>561</sup> Federation Against Software Theft, Federation Against Copyright Theft.

<sup>562</sup> T Cvetkovski, *Copyright and Popular Media* (Palgrave MacMillan 2013) 223; The Intellectual Property Office, 'Copyright in Europe: Call for Views' (July 2013) available online: <<http://www.ipo.gov.uk/consult-2013-copyrighteurope.pdf>> retrieved 20 July 2013; The Intellectual Property Office, 'Hargreaves Implementation: Copyright' available online: <<http://www.ipo.gov.uk/types/hargreaves/hargreaves-copyright.htm>> retrieved 12 July 2013. See also, K O'Rourke, 'Integrity on the web' (2012) EIPR 34(12), 815.



news in other jurisdictions<sup>563</sup> and more recently, digital transactions,<sup>564</sup> there has been little call for specific reform.

### 3.5.1. *Reviewing Intellectual Property: Gaming?*

Alongside the EU initiatives aimed at harmonizing EU copyright law, and domestic ‘tinkering’ with the legislation as a result, there have been two significant reviews of intellectual property in England and Wales since 2006. Gowers was charged with conducting a full review of the intellectual property system in England and Wales in 2006.<sup>565</sup> This was followed in 2010 by the announcement of a further, independent review of the ways in which intellectual property supports innovation and growth.<sup>566</sup> Perhaps the most disappointing element of the so-called comprehensive review by Andrew Gowers is that only 25 of his 54 recommendations have been implemented,<sup>567</sup> the most significant of which has resulted in the Digital Economy Act.<sup>568</sup> Whilst the DEA has been one of the implementations, its success has been limited, as it has endured lengthy judicial review proceedings,<sup>569</sup> with the enforcement provisions already having been delayed and seemingly now postponed indefinitely.<sup>570</sup> The Hargreaves Review compounds this, highlighting the shortcomings of the implementation, but the aftermath has also been disappointing. Hargreaves indicated a number of difficulties with the system in supporting

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<sup>563</sup> K Craig, ‘Second Life Land Deal Goes Sour’ (*Wired News*, 18 May 2006) available online: <<http://www.wired.com/gaming/virtualworlds/news/2006/05/70909>> retrieved 20 November 2011. See also: M Masnick, ‘Second Life dragged into legal dispute over copyright of virtual horses and virtual bunnies’ (*Techdirt News*, 6 January 2011) available online:

<<http://www.techdirt.com/articles/20110103/12254512499/second-life-dragged-into-legal-dispute-over-copyright-virtual-horses-virtual-bunnies.shtml>> retrieved 23 June 2013; *R v Mitchell* (February 2011), Unreported; T Brewster, ‘British Hacker jailed for two years’ (*ITPro*, 21 March 2011), available online: <<http://www.itpro.co.uk/632056/british-zynga-hacker-jailed-for-two-years>> retrieved 26 May 2011.

<sup>564</sup> Amazon, ‘Introducing Amazon Coins: A New Virtual Currency for Kindle Fire’ (5 February 2013) available online: <<http://www.amazonappstoredev.com/2013/02/introducing-amazon-coins.html>> retrieved 16 February 2013.

<sup>565</sup> A Gowers, ‘The Gowers Review of Intellectual Property: Independent Review’ (December 2006) <[http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06\\_gowers\\_report\\_755.pdf](http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf)> retrieved 17 October 2009.

<sup>566</sup> I Hargreaves, ‘Digital Opportunity: A review of Intellectual Property and Growth’ (2011) available online: <<http://www.ipo.gov.uk/ipreview.htm>> retrieved 14 December 2012.

<sup>567</sup> I Hargreaves, ‘Digital Opportunity: A review of Intellectual Property and Growth’ (2011) available online: <<http://www.ipo.gov.uk/ipreview.htm>> retrieved 14 December 2012, 6.

<sup>568</sup> 2010.

<sup>569</sup> *British Telecommunications Plc & Anor, R (on the application of) v The Secretary of State for Business, Innovation and Skills* [2011] EWHC 1021 (Admin).

<sup>570</sup> B Challis, ‘No UK “Three Strikes” until 2017, perhaps never?’ (*1709 Blog*, 1 June 2013) available online: <<http://the1709blog.blogspot.co.uk/2013/06/no-uk-three-strikes-until-2017-perhaps.html>> retrieved 2 June 2013.

innovation, the result of which has been a recommendation for a copyright exchange system,<sup>571</sup> which, three years later, is still in development.<sup>572</sup>

Both the Hargreaves and Gowers reviews have paid little attention to game-related copyright specifically. The discussions have only briefly lingered on games, and this is rather disappointing, especially given the detailed legislation focussing on the classification of game content.

### 3.5.2. *The Gowers Review.*

The Gowers Review made several important recommendations that could have changed the immediate future of the copyright system in England and Wales, advocating that there should be amendments to legislation in terms of the exceptions and enforcement of rights.<sup>573</sup> The review committee were to focus on the intellectual property system as a whole. Emphasis fell on online downloads and file-sharing – and resulted in the Digital Economy Act<sup>574</sup> – rather than the broader system, despite the changing perceptions of economic damage caused by file-sharing.<sup>575</sup> This was restrictive in its approach to wider digital media because it failed to consider online gaming, despite the fact that gaming is now a valuable business commodity.<sup>576</sup>

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<sup>571</sup> I Hargreaves, 'Digital Opportunity: A review of Intellectual Property and Growth' (2011) available online: <<http://www.ipo.gov.uk/ipreview.htm>> retrieved 14 December 2012, 3.

<sup>572</sup> R Hooper and R Lynch, 'Copyright works – Streamlining copyright licensing for the digital age' IPO, July 2012, available online: <<http://www.ipo.gov.uk/dce-report-phase2.pdf>> retrieved 12 August 2012.

<sup>573</sup> A Gowers, 'The Gowers Review of Intellectual Property: Independent Review' (December 2006) <[http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/pbr06\\_gowers\\_report\\_755.pdf](http://webarchive.nationalarchives.gov.uk/+/http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf)> retrieved 17 October 2009, 8; HM Government, 'Modernising Copyright: Government Response to consultation on copyright exceptions and clarifying copyright law.' (IPO, December 2012), available online: <<http://www.ipo.gov.uk/response-2011-copyright-final.pdf>> retrieved 20 January 2013.

<sup>574</sup> Digital Economy Act 2010; which has since encountered significant setbacks. See for example: N Cusack, 'Is the Digital Economy Act 2010 the most effective and proportionate way to reduce online piracy?' (2011) EIPR 33(9), 559.

<sup>575</sup> R Camerani and Others, 'Private Copying' IPO (2013) available online: <<http://www.ipo.gov.uk/ipresearch-private-150313.pdf>> retrieved 30 March 2013.

<sup>576</sup> I Livingstone and A Hope, 'Next Gen: Transforming the UK into the world's leading talent hub for the video games and creative effects industries' NESTA (February 2011) available online: <[http://www.nesta.org.uk/home1/assets/features/next\\_gen](http://www.nesta.org.uk/home1/assets/features/next_gen)> retrieved 20 November 2012, 4; Department for Culture, Media and Sport, 'Skills Review of Video Game and Visual Effects Industries' (DCMS News) 1 February 2011, available online: <[http://www.culture.gov.uk/news/news\\_stories/7754.aspx](http://www.culture.gov.uk/news/news_stories/7754.aspx)> retrieved 20 November 2012

In the Gowers Review, for example, considerations of games largely arise in the piracy context, where games are bundled alongside films and music for the discussion.<sup>577</sup> This is in stark contrast to the short case study concerning The Sims Collaboration, where the intellectual property, and the inter-play between players and developers was highlighted.<sup>578</sup> This is an express recognition in the report that some users of The Sims are both players and developers, but that the intellectual property allocations may not recognise this. Whilst this is encouraging, it is also rather lacking, and again indicates that the legal response to the development of games has rested on either classification of content, or of piracy concerns. As such, no further exploration nor comment was offered on the ideas, “that flow back and forth, among the players, and between the players and the company.”<sup>579</sup>

The Gowers Review seemed to be the catalyst for the debate and discussion over changes to the system of copyright protection in English law. Indeed, Bently and Sherman seem hopeful that the Gowers Review, instigated by the government, will induce parliament to make time in the legislative calendar for a new Copyright Act to include all of the previous amendments and codify the law in this area so that it is more comprehensible.<sup>580</sup> Nevertheless, the Gowers recommendations were scarcely acted upon, which led to a further review of intellectual property in 2010, less than four years later.

### 3.5.3. *The Hargreaves Review.*

The leading recommendation from Hargreaves was that there ought to be some form of copyright exchange established as a method of ensuring a balance between creativity and economic reward. This has since been developed by Hooper, who has suggested that this form a ‘copyright hub.’<sup>581</sup> The overwhelming focus of this review centred on copyright, but a specific form of copyright

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<sup>577</sup> A Gowers, ‘The Gowers Review of Intellectual Property: Independent Review’ (December 2006) <[http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06\\_gowers\\_report\\_755.pdf](http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf)> retrieved 17 October 2009, 27.

<sup>578</sup> A Gowers, ‘The Gowers Review of Intellectual Property: Independent Review’ (December 2006) <[http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06\\_gowers\\_report\\_755.pdf](http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf)> retrieved 17 October 2009, 32.

<sup>579</sup> A Gowers, ‘The Gowers Review of Intellectual Property: Independent Review’ (December 2006) <[http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06\\_gowers\\_report\\_755.pdf](http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf)> retrieved 17 October 2009, 32.

<sup>580</sup> L Bently and B Sherman, *Intellectual Property Law* (3<sup>rd</sup> edn OUP 2009) 51.

<sup>581</sup> R Hooper and R Lynch, ‘Copyright works – Streamlining copyright licensing for the digital age’ IPO (July 2012) available online: <<http://www.ipo.gov.uk/dce-report-phase2.pdf>> retrieved 12 August 2012.

dealing with online file-sharing and the need to redress the damage of this activity. Alongside this, there is a clear indication from Hargreaves that the copyright system is falling far behind that which is required in the digital economy.<sup>582</sup>

Similarly, in the Hargreaves Review, whilst the leading recommendation was a ‘Copyright Exchange,’ there was little direct discussion of games, and associated intellectual property concerns. The overwhelming focus of the Review considered, “recent failings in, for instance, the sphere of music commercialisation.”<sup>583</sup> This was alongside a suggestion that new models of copyright be considered – although there was no specific focus on appropriate models for games. This is largely due to the market challenges that have faced music works, but which have so far not challenged games, film and television in the same manner.<sup>584</sup> In contrast, the submissions by industry stakeholders mentioned games more frequently, whilst applauding the strong system of intellectual property in the UK. For example, the UKIE<sup>585</sup> applauded the Review for “championing” the video games industry, and highlighting the potential for growth.<sup>586</sup> Evidently there is some disconnect between the championing of a copyright-reliant industry and the recommendation that other models of copyright be considered, although, as highlighted by the ERA, this may not be the situation. The ERA<sup>587</sup> identified the so-called, ‘sting in the tail’<sup>588</sup> of the Hargreaves Review in that it highlighted the focus on piracy and the alleged damage done to creative industry, but questioned whether the evidence could be relied upon.<sup>589</sup> This theme was something highlighted by ACID<sup>590</sup> in its submission to the Hargreaves Review, where it indicated that, “The protection afforded by the Digital Economy Act is necessary to keep the status quo but more should be done to find an enforcement model which will provide a level playing field

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<sup>582</sup> I Hargreaves, ‘Digital Opportunity: A review of Intellectual Property and Growth’ (2011) available online: <<http://www.ipo.gov.uk/ipreview.htm>> retrieved 14 December 2012, 1.

<sup>583</sup> I Hargreaves, ‘Digital Opportunity: A review of Intellectual Property and Growth’ (2011) available online: <<http://www.ipo.gov.uk/ipreview.htm>> retrieved 14 December 2012, 24.

<sup>584</sup> Business, Skills & Innovation Committee, ‘The Hargreaves Review of Intellectual Property: Where Next?’ (2012-13) HC 367-1, 24.

<sup>585</sup> UK Interactive Entertainment Association; hereafter UKIE.

<sup>586</sup> UKIE, ‘UKIE comments on Hargreaves Review into Intellectual Property’ (18 May 2011) available online: <<http://ukie.org.uk/content/ukie-comments-hargreaves-review-intellectual-property>> retrieved 8 August 2014.

<sup>587</sup> Entertainment Retailers Association; hereafter ERA.

<sup>588</sup> ERA, ‘The Sting in the Tail of the Hargreaves Review’ (19 May 2011) available online: <<http://www.eraltd.org/news/era-blog/blog/2011/may/the-sting-in-the-tail-of-the-hargreaves-review.aspx>> retrieved 8 August 2014.

<sup>589</sup> I Hargreaves, ‘Digital Opportunity: A review of Intellectual Property and Growth’ (2011) available online: <<http://www.ipo.gov.uk/ipreview.htm>> retrieved 14 December 2012, 69; 73.

<sup>590</sup> Anti-Copying in Design Lobby; hereafter ACID.

for all stakeholders.”<sup>591</sup> This opinion, suggesting that there is a need for wider considerations of intellectual property stakeholders, runs contrary to the stance adopted by the UKIE, which was seemingly satisfied with the comments made in the Review, albeit not resulting in game-industry specific changes to legislation or even legislative focus.

Moreover, there have been a number of changes envisioned through the Enterprise and Regulatory Reform Act 2013. This Act contains provisions for dealing with – amongst other things - orphan works, so that they can be used without needing to seek the original author’s permission.<sup>592</sup> Such a system would allow the use of works if a search has been carried out to attempt to identify the author, and where the author cannot be traced, a licence may be issued by a Government agency. This scheme is designed to allow the use of works and reward the author, but has not been controversy-free.<sup>593</sup>

### **3.6. Reform Potential.**

Despite two significant reviews of intellectual property in England and Wales in the last decade, there has been little consensus on the need to overhaul the system categorically. Neither report has indicated that there must be a revised and refreshed system, or even a statute to clarify the legislation. Neither of these reviews assessed a wide-ranging collection of media, neither did they assess the need to consider a different mechanism for protection. Neither of these reviews offered a detailed consideration of online gaming.

There are mixed opinions from prominent authors in the field about the future of the copyright system in England and Wales, and what its future will hold. There are two main “camps” of opinion. Christie,<sup>594</sup> Ginsburg<sup>595</sup> and Fitzgerald<sup>596</sup> call for reform, believing that change is needed in order to protect the technology and other developments that we have benefitted from.

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<sup>591</sup> ACID Lobby, ‘Submission to the Hargreaves Review March 2011’ (March 2011) available online: <<http://www.ipo.gov.uk/ipreview-c4e-sub-acid.pdf>> retrieved 8 August 2014.

<sup>592</sup> IPO, ‘The Enterprise and Regulatory Reform Act 2013 – Your Photos and You’ (May 2013) available online: <<http://www.ipo.gov.uk/hargreaves-orphanmyth.pdf>> retrieved 10 June 2013.

<sup>593</sup> S Anderson, “Instagram Act” could see social media users lose control of their photos’ *The Telegraph* (London 30 April 2013) available online: <<http://www.telegraph.co.uk/technology/social-media/10028168/Instagram-Act-could-see-social-media-users-lose-ownership-of-their-own-photos.html>> retrieved 1 June 2013.

<sup>594</sup> A Christie, ‘Reconceptualising Copyright in the Digital Age’ [1995] EIPR 522.

<sup>595</sup> H C Hansen (eds), *Intellectual Property Law and Policy* (Vol 10, Hart Publishing 2008) 30.

<sup>596</sup> B P Fitzgerald, ‘Copyright 2010: The Future of Copyright’ [2008] EIPR 30(2), 48 - 49.

Contrastingly, Leuder,<sup>597</sup> Lessig,<sup>598</sup> Aplin<sup>599</sup> and Perlmutter<sup>600</sup> believe that the system has managed to adapt itself quite well thus far when faced with new technologies and the dilemmas they raise.

The current copyright system has two main strands to its effectiveness. Primarily, the current law focuses on prevention i.e. the law and high profile examples are used with deterrent intention. This works conjunctively with the second element – enforcement against alleged infringers. This is clearly a structured approach, but, it must be questioned when a majority of potential and alleged infringers slip through the system, and only prolific ones are challenged: “The question must be asked however, as to whether this really is the most appropriate approach. Is there not a better way of giving protection without continually strengthening protection and increasing deterrence?”<sup>601</sup>

Within the question of copyright reform, a number of elements put greater pressure on a system that already tries perhaps to do too much. There are not only questions concerning how rights should be protected, but also what kind of protection there should be. The prevailing consensus indicates copyright has proven capable thus far of affording the best protection to valuable rights in intangible creations. Hugenholtz<sup>602</sup> is one of the ardent supporters of the current copyright system, and copyright in general, believing it to have coped consistently well thus far: “The existing copyright system has proven to be flexible enough in the past. There is no need for radical changes in the future; never change a winning team.”<sup>603</sup> This stance is strongly supported by Bainbridge<sup>604</sup> on the whole, as he believes that copyright plays an important role and manages to strike a fair balance between the competing interests of the authors in seeking economic reward, and society at large in seeking to benefit and enjoy the work that has been created: “By limiting the legal protection in time and scope, knowledge is disseminated and made available to the public

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<sup>597</sup> H C Hansen (eds), *Intellectual Property Law and Policy* (Vol 10, Hart Publishing 2008) 31.

<sup>598</sup> L Lessig, *Free Culture* (Penguin Press 2004) 283.

<sup>599</sup> T Aplin, ‘Copyright Law in the Digital Society: The Challenges of Multimedia’ (Hart Publishing 2005) vii.

<sup>600</sup> H C Hansen (eds), *Intellectual Property Law and Policy* (Vol 10, Hart Publishing 2008) 33.

<sup>601</sup> N Geach, ‘The Future of Copyright in the Age of Convergence: Is A New Approach Needed for the New Media World?’ *International Review of Law, Computers and Technology* [2009] 23:1 133.

<sup>602</sup> P Bernt Hugenholtz, ‘Adapting Copyright to the Information Superhighway’ in P Bernt Hugenholtz (eds), *The Future of Copyright in a Digital Environment* (Kluwer Law International 1996) 82.

<sup>603</sup> P Bernt Hugenholtz, ‘Adapting Copyright to the Information Superhighway’ in P Bernt Hugenholtz (eds), *The Future of Copyright in a Digital Environment* (Kluwer Law International 1996) 82.

<sup>604</sup> D Bainbridge, *Software Copyright Law* (4th edn, Butterworths 1999) 10.

at large.”<sup>605</sup> Despite this, there are also questions of a new multimedia category<sup>606</sup> within the copyright system. This would not add anything new to the copyright system per se but it could offer protection as a single right to items such as online games, which contain a range of other works. At present, these are all recorded separately and therefore are protected separately.

Part of the perceived problem with copyright, includes the general misconception and misunderstanding of the dividing line between copyright and contract, and their respective roles in both the protective and enforcement areas. Generally, copyright is believed to operate in conjunction with other doctrines, such as contract and licensing. It has also been suggested that copyright cannot act in a vacuum; contract has the teeth but copyright is the giver of power: “A confusion between the natural scope of copyright, as a right protecting the intellectual property, and the subsidiary role of contract and / or property rules as the normal framework...has added to the conceptual mistake.”<sup>607</sup> In attempting to correct the conceptual mistake, the legislatures have turned, firstly to contract law and, secondly, to technology, using the latter as a method to control and develop copyright when faced with the challenges posed by the digital society but, in doing so, technology has essentially been used in such a way as to predict the end of copyright.<sup>608</sup> This can be seen quite clearly through the use of technical protection measures, which are more frequently being used as replacements for copyright despite the fact that: “They are still broadly advertised as mere complements to it [copyright].”<sup>609</sup> If such measures are effective, perhaps it would be suitable to implement these as a supportive and complementary mechanism to copyright, rather than as a replacement.

Replacing copyright with initiatives such as technical protection measures alters the relationship between intellectual properties and contractual controls, as technical measures may be supported by contractual licensing agreements. Significantly, copyright and contract have different approaches; copyright is negative, restricting the use of works and placing parameters on rights.

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<sup>605</sup> D Bainbridge, *Software Copyright Law* (4th edn, Butterworths 1999) 10.

<sup>606</sup> I Stamatoudi, *Copyright and Multimedia Works* (CUP 2002).

<sup>607</sup> S Dussolier, ‘Technology as an Imperative for Regulating Copyright: From the Public Exploitation to the Private Use of the Work’ [2005] EIPR 201, 202; SABIP, ‘The Relationship between Copyright and Contract Law’ (July 2010) available online <<http://www.sabip.org.uk>> retrieved 1 August 2010.

<sup>608</sup> S Dussolier, ‘Technology as an Imperative for Regulating Copyright: From the Public Exploitation to the Private Use of the Work’ [2005] EIPR 201, 204.

<sup>609</sup> S Dussolier, ‘Technology as an Imperative for Regulating Copyright: From the Public Exploitation to the Private Use of the Work’ [2005] EIPR 201, 203.

There is however, a recognised need for a balance to arise in relation to copyright.<sup>610</sup> Contract, in contrast, is positive, creating rights for all the parties concerned and allowing the uses of works in exchange for – usually – payment.<sup>611</sup> There is, naturally, a balance to be found between negative copyright and positive contract, and this is where licensing arises, creating contractual agreements.<sup>612</sup> It is these agreements which indicate what is and is not lawful through the specific terms contained within them.<sup>613</sup> However, the balance between the positive and the negative is not always perfect in some agreements, and online game contracts arguably fall short of the balance required. Theoretical justifications indicate that there are some imbalances between the parties involved in MMORPGs and Virtual Worlds,<sup>614</sup> and these are perhaps reflected in the disproportionate allocation of rights in in-game items and content.<sup>615</sup>

When the extent of the impact that computers and technology have had was revealed, legislative reforms turned to technology itself in an attempt to ensure that there was a more effective regulatory system in place. In turning to technology, there has been a tendency to let it dictate, and the legislatures are now in danger of not being able to regain control unless the law is put back into copyright. For this to happen effectively, it is important that technical protection measures regain their place as a substitute or subsidiary element of the copyright system, but that an appreciation of other means is retained, especially if copyright is to remain a stalwart property right in the digital society.

### 3.7. The Future.

In European intellectual property: “There are still some possible candidates for future harmonisation; these include moral rights, copyright contracts and collective administration.”<sup>616</sup> These areas are, however, likely to prove problematic because they are closely linked to other

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<sup>610</sup> *Sayre v Moore* (1785) 102 ER 139; J Griffin, ‘The Interface Between Copyright and Contract: Suggestions for the Future’ (2011) EJLT Vol 2(1).

<sup>611</sup> M S Nadel, ‘How Current Copyright Law Discourages Creative Output: The Overlooked Impact of Marketing’ (Spring 2004) Berkeley Tech L J, Vol. 19, 785.

<sup>612</sup> M O’Rourke, ‘Drawing the Boundary Between Copyright and Contract: Copyright Pre-Emption of Software Licence Terms’ (1995) Duke L J 45(3), 479, 484.

<sup>613</sup> R D Atkins, ‘Copyright, contract and the protection of computer programs.’ *International Review of Law, Computers & Technology* [2009] 23(1), 143, 144.

<sup>614</sup> See above: Chapter 2 - Property Matters: Virtually Justified? At 2.7. *Theory for Parity?*

<sup>615</sup> See generally: Chapter 4 – MMORPGing & Copyright. See also: Chapter 5 - Contractual Displacement of Proprietary Interests: EULAw? At 5.5. *Standard terms – Fairness and Balance?*

<sup>616</sup> L Bently and B Sherman, *Intellectual Property Law* (3<sup>rd</sup> edn OUP 2009) 56.



areas of national laws including contract law, and to a lesser extent, labour law.<sup>617</sup> There are also discussions of a greater level of harmonisation that will see national copyright laws in their current guise fall out of favour, being replaced instead with a European Copyright Code. Such a code, if ever implemented could potentially: “Fill in many of the gaps, but would not cover aspects of copyright that did not affect the operation of the internal market.”<sup>618</sup> It would arguably be desirable that any reforms to the copyright system at a European level pay due credence to the dominance of licensing agreements and the balance required between contract and copyright in relation to digital creations.

The European Union will be unable to implement a completely comprehensive mechanism of copyright protection because of the restrictions placed on it by its other policies. It would be sensible then, to suggest that member states focus on creating a more effective system of protection at national level that does not conflict with the principles laid down in the Computer Software Directive in the early 1990s. In doing this, it would pave the way for a future European Code should that be desirable at some point in the future - because there would be a two-tier system of protection in that the primary protection would be at a national level, and where there are gaps because of other restraints, the member state systems of protection would theoretically cover the omissions and support the weaknesses, complementing the approach outlined in the Berne Convention.

A new approach may abolish copyright completely and focus on technical protection measures or, it may abolish the literary form of protection as far as it applies to computer software and games, creating a new right with new restrictions. This would go some way to addressing concerns that copyright is an old right, which still seems to be relied upon to protect a diverse range of works. Perhaps a combination of these together with contracts and licensing arrangements offer the opportunity to move into a world of digital protection and enforcement rather than a world of digital interaction with analogue enforcement and remedial action.

With the advent of the digital community<sup>619</sup> and a more interactive internet; Web 2.0 – interactive websites and internet communities - ideas and creations are put forward and spread

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<sup>617</sup> L Bently and B Sherman, *Intellectual Property Law* (3<sup>rd</sup> edn OUP 2009) 56.

<sup>618</sup> L Bently and B Sherman, *Intellectual Property Law* (3<sup>rd</sup> edn OUP 2009) 56 - 57.

<sup>619</sup> J B Ohler, *Digital Community, Digital Citizen* (Sage, 2010) 4.

in a matter of seconds for predominantly non-commercial gain. Furthermore, with Web 2.0 comes greater interaction with other web users to the point where disputes can and do arise over ownership of collaborative works. This can be especially true for joint authorship<sup>620</sup> or software developments, or even in-game items as used in MMORPGs<sup>621</sup> or MMOGs.<sup>622</sup> Despite the original and unintended commercial use of the creations initially, corporations inevitably seize upon them wherever the opportunity presents itself, and use the ideas to generate profits. If this happens, what gain/recompense does the creator have if he knows little of the commercialization of his creativity until he sees it in the marketplace, be it online or otherwise? Fitzgerald amongst others, calls for a reconsideration of copyright in light of the demanding challenges placed upon it by the advent of Web 2.0:

“Large-scale implementation of social activity along with the commercial consumption of entertainment in an online digital world where reproduction and communication is both ubiquitous and automated by use brings the need for fundamental rethinking of copyright law.”<sup>623</sup>

Fitzgerald explores what he refers to as eleven elements of copyright law that need attention, provide opportunities to reform and develop the legal position.<sup>624</sup> Consideration of each element, whilst academically useful, is not particularly helpful or constructive in developing a new approach to copyright law, but does allow him to end his argument with a strong and clear call for an urgent reconceptualization of copyright because of the technological age: “By 2010 we should be moving beyond the limited conceptual framework of copyright to a legal framework that looks more closely at the relationships any individual or entity has with information, knowledge, culture or creativity.”<sup>625</sup> This is not, however, the only suggestion that copyright – and moral rights – require some attention. Rajan for example, indicates that when dealing with information technology, and especially creativity of expression, it may be necessary to include such rights albeit in a different format.<sup>626</sup> This argument is also considered by Reuveni who

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<sup>620</sup> E Uribe-Jongbloed and Others, ‘Authorship and Copyright in Virtual Worlds – From the Death of the Author and the Disempowerment of User to the Revival of Rights?’ J V W R (forthcoming, 2013).

<sup>621</sup> Massively Multiplayer Online Role Playing Games.

<sup>622</sup> Massively Multiplayer Online Games.

<sup>623</sup> B P Fitzgerald, ‘Copyright 2010: The Future of Copyright’ [2008] EIPR 30(2) 45.

<sup>624</sup> B P Fitzgerald, ‘Copyright 2010: The Future of Copyright’ [2008] EIPR 30(2) 45.

<sup>625</sup> B P Fitzgerald, ‘Copyright 2010: The Future of Copyright’ [2008] EIPR 30(2) 48, 49.

<sup>626</sup> M T S Rajan, ‘Moral Rights in Information Technology: A New Kind of Personal Right?’ (2004) Int’l J L & Info Tech 12(1) 32, 35.

indicates that in the digital era, authorship is something that is important.<sup>627</sup> These arguments are broadly supportive of the indication that users in online games and Virtual Worlds could potentially be seen as those who benefit from moral rights, and should potentially have greater entitlement to intellectual proprietary interests such as copyright,<sup>628</sup> but this would necessarily involve reconsidering the balances struck between copyright and contract.

It is apparent that there must be a shift in concept and how we view copyright but also a change in the understanding of how we relate to - and interact with – technology. Unfortunately, we have not made the conceptual leap that Fitzgerald called for in 2008<sup>629</sup> but nevertheless changes are being made. Most recently, draft legislation dealing with private copying and parody has been published.<sup>630</sup> This demonstrates the belief that minor changes are required to update the system but that, fundamentally, it retains its integrity.

### 3.8. Conclusion.

The lack of a ‘conceptual leap’ called for by Fitzgerald<sup>631</sup> is unsurprising because the prevailing attitude is one in which the copyright system remains at its optimal effectiveness; that the system as it stands has worked well so far, and will continue to do so. However, this is not a good position to be in when it is evaluated in an historical context and the influences and developments in technology are added to the mix. Influential changes to technological systems and our interaction with machines and the internet in the digital age will continue.<sup>632</sup> As such, we should already be thinking about how we can implement a new system that protects the interests of rights holders. Where this involves a licensing arrangement, a balance between each parties’ rights must be reached. Any new system must also allow society to benefit from knowledge and creativity whilst simultaneously ensuring provisions are flexible enough and anticipate new technology and new

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<sup>627</sup> E Reuveni, ‘Authorship in the Age of the Conductor’ (2007) *Journal of Copyright Society of the USA* Vol 54 (218) 1801, 1821 <<http://ssrn.com/abstract=1113491>>. See also: E Reuveni, ‘On Virtual Worlds: Copyright and Contract Law At the Dawn of the Virtual Age’ [2007] 82 *Indiana L J* 261.

<sup>628</sup> See: Chapter 4 - MMORPGing & Copyright. At 4.10. *In-Game Copyrights*.

<sup>629</sup> B P Fitzgerald, ‘Copyright 2010: The Future of Copyright’ [2008] *EIPR* 30(2) 45.

<sup>630</sup> Intellectual Property Office, ‘New Exception for Parody; New Exception for Private Copying; New Exception for Quotation’ 7 June 2013, available online: <<http://www.ipo.gov.uk/types/hargreaves/hargreaves-copyright/hargreaves-copyright-techreview.htm>> retrieved 7 June 2013.

<sup>631</sup> B P Fitzgerald, ‘Copyright 2010: The Future of Copyright’ [2008] *EIPR* 30(2) 45.

<sup>632</sup> See for example 3D Printing, and Gene Patenting. See also: S Bradshaw, A Bowyer and P Haufe, ‘The Intellectual Property implications of low-cost 3D printing.’ *SCRIPTed*, (2010) 7 (1), 5; *Association for Molecular Pathology v. Myriad Genetics*, 569 U.S. 12-398 (2013).

uses of existing technology so that there will be no need for a great debate on the same issues in the near future. The system, if it is to be changed, must be changed in such a way as to ensure that it will work effectively now and in the future. Change for the short-term is not the final solution, and will not be the most comprehensive solution.

Ultimately, if the copyright system remains the central method of protection of creative works, then there is still potentially a need to reform the infringement and enforcement arrangements in the England and Wales. At present, it seems that the government is happy to set the rules that punish people who are not responsible for copyright infringements online – the ISPs – to make such third parties carry out the work of dealing with the infringers so as to remove the culpability with which they are faced. This is essentially the government pointing out that illegal downloading is wrong and then passing the job of detection, enforcement and punishment onto the parties with the most to lose i.e. big business, which lobbied for the change in the law to start with. This is symptomatic of the inadequacy in the field of digital copyright; those with the power to change the system do not do so; they make third parties responsible.<sup>633</sup>

This chapter has outlined the situation regarding the protection of computer software and the regulation of video games in England and Wales. The research here demonstrates that copyright has changed significantly since its inception in 1709 and now protects a wide range of creative works. The discussion here has also commented upon recent challenges to the copyright framework, and discussed some recent reviews of intellectual property. Whilst the intellectual property system – and copyright in particular – is undergoing some reform, the digital society still poses challenges to copyright. The research in this chapter has built upon the discussions from Chapters 1 and 2, and has outlined the copyright paradigm within which online games as whole products, and items within MMORPGs and Virtual Worlds are protected. This chapter has added to our understanding of the protective system which operates for software, and has questioned the suitability of such a framework. This chapter therefore provides a basis for further discussions of copyright through the use of practical examples in the following chapter, Chapter 4: ‘MMORPGing & Copyright.’

The next chapter: ‘MMORPGing & Copyright’ will consider in greater detail elements of online gaming that may be subject to copyright protection. This will involve copyright in two different

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<sup>633</sup> DEA 2010.

contexts. In Chapter 4 - 'MMORPGing & Copyright' firstly, copyright in an online game as a whole will be considered. Secondly, copyright applicable to elements of online gaming will be considered, as will alternative interpretations such as those supporting the claim of users that they are the holders of proprietary rights. This will build upon the discussion contained within this chapter – Chapter 3 - 'Digital Copyright: 1988 or Web 2.0?' and will highlight the issues to be discussed in the following chapters. Chapter 5: 'Contractual Displacement of Proprietary Interests: EULAw?' will examine EULA clauses for fairness and balance, whilst Chapter 6 – 'Governance Structures and the Alternatives?' which will focus on the governance framework of online games, and seek to consider how challenges to proprietary interests identified in Chapters 4 and 5 could be addressed through alternative governance approaches.

## Chapter 4

### MMORPGing & Copyright

#### 4.1. Introduction.

This chapter will consider the subsistence of copyright as a proprietary interest in in-game items. The initial examination will be of copyright law as it is applicable to games as individual software products. Subsequent consideration will be given to an alternative perspective whereby the nature of game specific activities and items is considered, alongside the potential implications for the copyright interests of users. Copyright is therefore to be considered in two forms; as a broad right protecting online games generically, and as applied to specific in-game items to consider the potential interests for users.

Copyright will be considered under the guise of derivative works, joint works and authorship arguments. This chapter will consider the systems of ownership presented by the reliance on contract and copyright in MMORPGs and Virtual Worlds, building on alternative perspectives including property theory. It will also develop arguments surrounding the imbalances between users and developers to provide a different position in terms of copyright ownership of in-game content for users. Part of this discussion will also highlight the moral rights position in relation to users of online games. For the purposes of this discussion, copyright will for the most part be considered in a focused manner relating to online games and Virtual Worlds, albeit in isolation. However, it is necessary to remember that copyright does not and cannot operate in a vacuum - it is inextricably connected to creativity.<sup>634</sup> The discussion in this chapter cannot be undertaken without due consideration being paid to the issue of proprietary rights in the form of copyright for users, and the overarching question of whether there ought to be such rights for users?

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<sup>634</sup> K Idris, *Intellectual Property: A Power Tool for Economic Growth* (WIPO 2003) 8; L Lessig, *Free Culture* (Penguin Press 2004).

The advent of social media copyright cases, including those involving contractual disputes<sup>635</sup> and controversial legislation<sup>636</sup> further adds to the discussion relating to the rights of users and consumers of online content. Social-media related cases include not just issues of defamation or privacy but also questions of proprietary interests and ownership claims. In this context it is possible to view social media as inclusive of gaming, both for social purposes and for gaming, which can include MMORPGs<sup>637</sup> and Virtual Worlds. Social gaming though is very different to games involving role-play in the way that MMORPGs do – whilst there is no perfect definition of social gaming, industry leaders suggest that it refers predominantly to games played through social media platforms such as Facebook.<sup>638</sup> There is now a growing body of both case law and commentary relating to problematic aspects of gaming, encompassing games of all varieties and genres.<sup>639</sup>

The research within this chapter will add to the knowledge relating to the role of contract in displacing copyright and will seek to apply fragmented rules to practical examples of activity in MMORPGs and Virtual Worlds. This will form a foundation for the discussion of the contractual imbalances and potential disproportionate interests in the following chapters.<sup>640</sup> The practical examples which will be discussed from a copyright perspective will highlight how the current system of contractual allocation and displacement of rights applies. This research will also indicate the scope of the challenge faced by copyright, particularly in light of the potential copyright claims.

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<sup>635</sup> See for example, W Davis, 'Courtroom Sketch Artist Sues Getty Images for Copyright Violations' (*MediaPost*, 21 June 2013) available online:

<<http://www.mediapost.com/publications/article/203059/gettycopyright.html#axzz2ZOMK0Gkb>> retrieved 22 June 2013; D McCullagh, 'Instagram says it now has the right to sell your photos' (*CNETNews*, 18 December 2012) available online: <[http://news.cnet.com/8301-13578\\_3-57559710-38/instagram-says-it-now-has-the-right-to-sell-your-photos/](http://news.cnet.com/8301-13578_3-57559710-38/instagram-says-it-now-has-the-right-to-sell-your-photos/)> retrieved 22 June 2013.

<sup>636</sup> For example: S Anderson, 'Instagram Act' could see social media users lose control of their photos' *The Telegraph* (London, 30 April 2013) available online: <<http://www.telegraph.co.uk/technology/social-media/10028168/Instagram-Act-could-see-social-media-users-lose-ownership-of-their-own-photos.html>> retrieved 1 June 2013.

<sup>637</sup> Massively Multiplayer Online Role Playing Games; hereafter MMORPGs.

<sup>638</sup> N Lovell, 'What is a social game?' (*GamesBrief*, 11 January 2011) available online:

<<http://www.gamesbrief.com/2011/01/what-is-a-social-game/>> retrieved 11 June 2012.

<sup>639</sup> See for example: Duranske B T, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA 2008); F G Lastowka and D Hunter, 'The Laws of Virtual Worlds' [2004] 92 Cal L Rev 1; U Yoon, 'A Quest for the Legal Identity of MMORPGs - From a Computer Game, Back to a Play Association' (Fall 2005) *Journal of Game Industry & Culture*, Vol. 10; D P Sheldon, 'Claiming Ownership But Getting Owned: Contractual Limitations on Asserting Property Interests in Virtual Goods' (2006-2007) 54 UCLA L Rev 751.

<sup>640</sup> See generally: Chapter 5 - Contractual Displacement of Proprietary Interests: EULAw?

#### 4.2. Copyright & Contract: The Gaming Context.

One aspect of online gaming and virtual worlds concerns the issue of ownership claims to in-game items in online game spaces. The current regulation of online games and Virtual Worlds is based almost exclusively on contractual agreements. Online games rely upon copyright as the dominant proprietary interest in these environments, with game developers relying on their contractual arrangements to assign and displace automatic proprietary interests.<sup>641</sup> Whilst the contractual allocation may be the formal element, the types of activity and the behaviour of users within games represents something different to what the legal situation represents. The predominant proprietary right that is of relevance here is copyright, and the scope that copyright takes is something which is essential in understanding the limitations of such an interest when applied through a contractual 'lens' to online creativity. Given the digital netizen society in which we now live, copyright law continues to be a topic attracting a vast amount of attention and discussion,<sup>642</sup> particularly in terms of the required changes and amendments that such an important and relied upon right may need in a digital era.

The inter-dependence of copyright and contract<sup>643</sup> in online games and virtual worlds is compounded by the alleged difficulties in reading the End User Licence Agreements.<sup>644</sup> The challenges with the readership of such contractual rules and documents,<sup>645</sup> and the void between what is contractually permitted, and actual activity, suggest that there are numerous areas which need considering in light of the contract-copyright strictures. Contracts tend to be formed in such a way that focuses upon immediate obligations rather than planning ahead for situations where something could go wrong, and this "contract planning"<sup>646</sup> approach does not seem to be one

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<sup>641</sup> D C Miller, 'Determining Ownership in Virtual Worlds: Copyright and Licence Agreements' [2003] 22 Rev Litig 435.

<sup>642</sup> HM Government, 'The Government Response to the Hargreaves Review of Intellectual Property and Growth' (August 2011) available online: <<http://www.ipo.gov.uk/ipresponse-full.pdf>> retrieved 1 October 2012; K Garstka, 'The Amended Digital Economy Act 2010 as an Unsuccessful Attempt to Solve the Stand-Alone Complex of Piracy' (2012) IIC 43(2), 158; The Intellectual Property Office, 'Hargreaves Implementation: Copyright' available online: <<http://www.ipo.gov.uk/types/hargreaves/hargreaves-copyright.htm>> retrieved 12 July 2013.

<sup>643</sup> SABIP, 'The Relationship between Copyright and Contract Law' (July 2010) available online: <<http://www.sabip.org.uk>>.

<sup>644</sup> Hereafter EULA.

<sup>645</sup> Y Bakos and others, 'Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts' (October 6, 2009). CELS 2009 4th Annual Conference on Empirical Legal Studies Paper; NYU Law and Economics Research Paper No. 09-40. Available at SSRN: <<http://ssrn.com/abstract=1443256>>.

<sup>646</sup> S Macaulay, 'Non-contractual Relations in Business: A Preliminary Study' (1963) 28 Am Soc Rev 55; H Beale and T Dugdale, 'Contracts between Businessmen: Planning and the Use of Contractual Remedies' (1975) 2 Brit J Law & Soc 45.



adopted by game developers. Each game and environment is slightly different in terms of its characteristics, roles, requirements, items, environments and acceptable behaviours. Within this, there are numerous variables, all of which make for a potentially dispute-ridden and disagreement-filled environment, and some examples of activity which impact upon the copyright position will be considered. Essentially, there is a disparity between what the contract permits, and the behaviour and activities that are undertaken. A consideration of this disparity will highlight, from the perspective of users, the potential deficiencies and inefficiencies of copyright remaining the dominant proprietary interest and the reliance of game developers on contractual allocation and displacement of copyright.

Whilst it is true that the games themselves will attract a range of copyright protections for different categories of works,<sup>647</sup> there is also the issue of copyright of the game itself, as well as copyright for different elements of the game. This is a somewhat abstract idea, but it is perfectly possible that for example, an avatar can attract copyright in its own right.<sup>648</sup> The stance adopted in the EULAs is that copyright is a singular right, attaching to the creation of the gaming environment and everything within it. This is a very simplistic interpretation of the rights paradigm, and when a broader consideration of copyright and neighbouring rights is made, there are a number of potential aspects which are relevant to the wider issue of user based copyright in online interactive environments. Such aspects include copyright interests of users in MMORPGs and Virtual Worlds, the implications of gaming activity upon potential copyright interests – which is considered through a number of practical examples - moral rights, and potential alternative approaches to copyright protections including derivative works and multimedia categories.

#### **4.3. Copyright – CDPA.<sup>649</sup>**

The traditional approach to protecting rights in computer productions and associated computational elements focuses on protection through a framework of contracts, specifically

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<sup>647</sup> For example, dramatic, literary, artistic works are protected, but so too are performances, broadcasts and typographical arrangements. CDPA 1988 s1.

<sup>648</sup> A W M Louie, 'Designing Avatars in Virtual Worlds: How Free Are We to Play Superman?' (2007) *Journal of Internet Law*, 3. See also: T D Marcus, 'Fostering Creativity in Virtual Worlds: Easing the Restrictiveness of Copyright for User-Created Content; (2007-2008) 52 *N Y L Sch L Rev* 67.

<sup>649</sup> Copyright, Designs and Patents Act 1988. Hereafter CDPA.

licence agreements.<sup>650</sup> There are however, numerous difficulties in doing this, as SABIP have noted.<sup>651</sup> Cornish and Llewellyn highlight that whilst contract has remained an important legal mechanism in providing protection to computer programs, it has been necessary to fundamentally support it through the use of copyright in software.<sup>652</sup> This has led to a greater dependency on intellectual properties and recognition of intellectual assets. Unfortunately, it has not readily solved the associated problems of regulation and enforcement of rights such as copyright.<sup>653</sup>

Computer software in England and Wales is protected as a copyright work under the Copyright, Designs and Patents Act 1988. Computer software is protected as a literary work under s3(1)(b). MMORPGs are commonly referred to as computer games, and therefore form part of computer software rather than computer hardware. This means that there will be copyright in the programming code of the MMORPG, as this is what is protected under s3(1)(b).<sup>654</sup>

It may be the case that more than copyright will subsist in a particular MMORPG at any given time as different copyrights can exist at the same time in one piece of work.<sup>655</sup> The commonly cited example is that of a film or computer game - whereby there are different constituent elements that are combined to produce one multimedia work.<sup>656</sup> In a computer game for example, there may be several diverse and distinct copyrights that subsist in the same piece of work. The music will attract musical copyright;<sup>657</sup> the underlying program code will attract another copyright,<sup>658</sup> as will the graphics,<sup>659</sup> or any still images that are taken of the game play.<sup>660</sup> Consequently, there is the potential for several different copyright holders to 'own' pieces of the same work. This is a rather superficial examination of the 'usual' and resolved copyright issues that arise in MMORPGs and Virtual Worlds. Other issues arise in relation to these specific

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<sup>650</sup> For a detailed discussion of elements of such licence agreements, see: Chapter 5 - Contractual Displacement of Proprietary Interests: EULAw? At 5.4. *EULA Case Studies*, and 5.6. *UTCCR Schedule 2 and EULA Clauses*.

<sup>651</sup> SABIP, 'The Relationship between Copyright and Contract Law' (July 2010) available online: <<http://www.sabip.org.uk>>.

<sup>652</sup> W R Cornish and D Llewellyn, *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights* (6<sup>th</sup> edn, Thomson Sweet & Maxwell 2007), 806.

<sup>653</sup> J Gallegos, 'New Role for Tortious Interference in the Digital Age: A Model to Enforce End User Licence Agreements' (2010-2011) 38 Fla St U L Rev 411.

<sup>654</sup> CDPA 1988.

<sup>655</sup> T Aplin, *Copyright Law in the Digital Society - The Challenges of Multimedia* (Hart Publishing 2005); A Adrian, 'Who Owns the Copyright In Multi-Author Interactive Works?' [2003] Ent L R 35, 36.

<sup>656</sup> M Turner, 'Do Old Legal Categories fit new Multimedia Products? A Multimedia CD-ROM as a film.' (1995) EIPR 17(3), 107.

<sup>657</sup> CDPA 1988 s3(1).

<sup>658</sup> CDPA 1988 s3(1)(b).

<sup>659</sup> CDPA 1988 s4(1)(c).

<sup>660</sup> CDPA 1988 s4(1)(c).

computer programs, including questions of copyright in items that are created, and developed by users both inside and outside the gaming environment.

#### 4.4. Computer Software and Computer Games.

Copyright protects the expression of an idea rather than the idea itself,<sup>661</sup> and this is the rationale behind protecting computer software as literary works. Jacob J in the *Ibcos* case<sup>662</sup> stated that “whilst a general idea might not be protected, a detailed idea would be and this holds true whether the work is functional or not, and whether visual or literary.”<sup>663</sup> Interestingly, the suggestion in the *Ibcos* case that ‘detailed’ ideas may be protected seems to contradict the Directive on the Legal Protection of Computer Software<sup>664</sup> which grants protection to computer programs but which states no protection will be granted to underlying ideas.<sup>665</sup> When this is considered in light of MMORPGs – from a purely legal rather than technical perspective – MMORPGs are more than basic computer programs, and embody a series of ideas.<sup>666</sup> The expression of these interconnected ideas is incredibly detailed. Moreover, with the online nature of these gaming environments, another layer is added which requires software to run simultaneously on two terminals rather than one.<sup>667</sup> It is possible that under the decision in *Ibcos*,<sup>668</sup> MMORPGs could be protected through the underlying idea irrespective of the idea / expression dichotomy<sup>669</sup> which is the basis of copyright protection.<sup>670</sup>

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<sup>661</sup> *Designer Guild Limited v Russell Williams (Textiles)* [2000] UKHL 58 per Hoffmann LJ, para 6.

<sup>662</sup> *Ibcos Computers Ltd v Barclays Mercantile Highland Finance Ltd* [1994] FSR 275 at 291.

<sup>663</sup> D Bainbridge, *Legal Protection of Computer Software* (5<sup>th</sup> edn, Tottel Publishing 2008) 58.

<sup>664</sup> Directive 2009/24/EC on the Legal Protection of Computer Programs (23 April 2009).

<sup>665</sup> Directive 2009/24/EC on the Legal Protection of Computer Programs (23 April 2009) Recital 11 and Article 1(2).

<sup>666</sup> L Indvik, ‘The Fascinating History of Online Role Playing Games’ (*Mashable*, 14 November 2012) available online: <<http://mashable.com/2012/11/14/mmorpgs-history/>> retrieved 12 December 2012.

<sup>667</sup> A Adrian, ‘Who Owns the Copyright In Multi-Author Interactive Works?’ [2003] Ent L R 35, 36; C Fitch, ‘Cyberspace in the 21<sup>st</sup> Century: Part One, Mapping the Future of Multiplayer Games’ (*GamaSutra* 20 January 2000) available online: <[http://www.gamasutra.com/view/feature/3421/cyberspace\\_in\\_the\\_21st\\_century\\_.php](http://www.gamasutra.com/view/feature/3421/cyberspace_in_the_21st_century_.php)> retrieved 11 June 2012.

<sup>668</sup> *Ibcos v Barclays Mercantile Finance* [1994] FSR 275.

<sup>669</sup> *Hollinrake v Truswell* [1894] 3 Ch 420; *Designers Guild Ltd v Russell Williams Textiles Ltd* [2000] 1 WLR 2416.

<sup>670</sup> Although Masiyakurima suggests that the idea / expression dichotomy is not as useful as it may appear: P Masiyakurima, ‘The futility of the idea / expression dichotomy in UK Copyright law’ (2007) IIC 38(5), 548.

The courts in England & Wales have not yet had to face a significant legal complaint arising out of the activity of online gaming, albeit they have faced an online gaming case.<sup>671</sup> The case of *R v Mitchell*,<sup>672</sup> whilst focused on criminal offences relating to financial criminality, did not include or address issues related to the interests of gamers in relation to copyright. In fact, this case was dealt with under the Computer Misuse legislation rather than intellectual property provisions<sup>673</sup> because Mitchell was using false social media accounts to generate virtual currency which he then converted into pounds sterling. Irrespective of this, courts in England and Wales have faced questions relating to both video games and copyright.<sup>674</sup> Whilst these games are very different to MMORPGs and virtual worlds, fundamentally the starting point of copyright protection remains the same. Therefore, the decisions and reasoning in cases involving aspects of computer games can be applicable to MMORPGs. Considering elements of these decisions in light of MMORPGing practices highlights the potential challenges faced by the current copyright system when it is confronted with sophisticated technological entities which perhaps do not fit comfortably within any of the pre-existing categories of works.<sup>675</sup> This is problematic - if such creations do not 'fit' within categories, how are they protected?

#### 4.5. Games, CDPA & Temporary Copies.

The courts have had several opportunities to address issues relating to copyright appearing in the reproduction of something on a screen, and in the first instance, the discussion of copyright here relates to copyright within the game as a whole, and is distinct from copyright in the second sense, which addresses issues of in-game copyright for users. The issue raised in *Gilham v R*<sup>676</sup> concerned copyright in the first sense; that is, copyright relating to products as whole entities, and more specifically the use of modchips<sup>677</sup> to facilitate the circumvention of protective measures. The

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<sup>671</sup> T Brewster, 'British Hacker jailed for two years' (*ITPro*, 21 March 2011) available online:

<<http://www.itpro.co.uk/632056/british-zynga-hacker-jailed-for-two-years>> retrieved 26 May 2011.

<sup>672</sup> *R v Mitchell* (February 2011), Unreported; T Brewster, 'British Hacker jailed for two years' (*ITPro*, 21 March 2011) available online: <<http://www.itpro.co.uk/632056/british-zynga-hacker-jailed-for-two-years>> retrieved 26 May 2011.

<sup>673</sup> Computer Misuse Act 1990. See: N MacEwan, 'The Computer Misuse Act 1990: lessons from its past and predictions for its future' (2008) *Crim L R* 955.

<sup>674</sup> *Ibcos v Barclays Mercantile Finance* [1994] FSR 275; *John Richardson Computers v Flanders* [1993] FSR 497; *Navitaire Inc v Easyjet Airline Co and Another* [2004] EWHC 1725 (Ch); *Nova Productions Ltd v Mazooma Games Ltd & Ors* Rev 1 [2006] EWHC 24 (Ch).

<sup>675</sup> CDPA 1988 s1(1); J Pila, 'Copyright and its Categories of Original Works' (2010) *OJLS* 30(2): 229.

<sup>676</sup> *Gilham v R* [2009] EWCA Crim 2293. Hereafter *Gilham*.

<sup>677</sup> Nintendo, 'Modchips' available online: <<http://www.nintendo.co.uk/Legal/Nintendo-s-Anti-Piracy-Programme/Hardware-Piracy/Mod-Chips/Mod-Chips-732253.html>> retrieved 10 July 2013.

defendant in this case was found guilty of criminal offences for the circumvention of technological measures under s296ZB of the CDPA 1988. This section makes it a criminal offence to either sell or distribute anything that is capable of circumventing or rendering ineffective technical and electronic protection measures. In this case, the defendant had been selling mod-chips which allowed such circumvention.

In *Gilham*, the court stated that the defendant would be guilty if five criteria were met:

- a) The game is itself - or contains - copyright works
- b) The playing of any counterfeit discs on games consoles involves the copying of copyright work or works
- c) Such copying is the “whole or a substantial part of the copyright works or works” under s16(3)(a)
- d) The consoles include technical protection measures within the meaning of s296 ZF which are designed to afford protection to the copyright works
- e) That, irrelevant of intention, the alleged offender sold or made available for hire, products to circumvent technical protective measures in the course of a business, which was, in this instance, mod-chips.<sup>678</sup>

Modchips are related to hardware piracy, but they also indirectly relate to software piracy as well due to the use of Random Access Memory;<sup>679</sup> the decision in *Gilham* reiterates this as the position under the law of England and Wales. The *Gilham* decision followed that of an earlier case dealing with a very similar issue - with one significant difference. The 2008 case of *R v Higgs*<sup>680</sup> also considered the issue of mod-chips and circumvention. However, in *Higgs*, the prosecution failed to prove that during the playing of any disc, there is copying of data. This was a significant omission - and an error that was not repeated in the later *Gilham* decision. In *Gilham* the prosecution proved that during the playing of a disc - be it a DVD or a game - copying of data from the disc to the RAM of the console itself occurs. Under the rationale adopted in *Gilham*, if there is therefore some attempt to circumvent the protection measure, there must also be

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<sup>678</sup> *Gilham v R* [2009] EWCA Crim 2293, per Burton LJ at 14.

<sup>679</sup> Hereafter RAM.

<sup>680</sup> *R v Higgs* [2008] EWCA Crim 1324. Hereafter *Higgs*.

copyright infringement. This situation would be compounded if there was also a counterfeit disc involved.

The decisions in *Gilham v R*<sup>681</sup> and *R v Higgs*<sup>682</sup> follow the reasoning of the earlier case of *Sony* from 2004.<sup>683</sup> In this case, the court considered the copying that takes place when a disc is inserted into a disc drive on a PC or a games console. Laddie J stated that when discs are placed into disc drives, the programs or games contained within them (and probably substantial parts of them) are ‘read’ by the hardware.<sup>684</sup> As a result of this, the programs are copied into the RAM of the console or PC. There has been no doubt by any of the courts that have considered this issue that this process results in a reproduction of the contents of the disc. Such a reproduction without permission is likely to result in copyright infringement. In the *Sony* case, counsel disputed this on the basis that the copy made is too short-lived to turn the RAM into an infringing article.<sup>685</sup> The court disagreed, stating that any copy, regardless of how long it is a copy for, is capable of becoming an infringing copy.

These three cases indicate that in England and Wales, where there is some form of reading of a disc by a computer, this will amount to some form of copying, even if it is only temporary. This also occurs when a window or program is opened. By extension, when a viewer or portal to a game is opened on a PC, each user sees something slightly different. Given that the majority of software programs operate through the use of RAM, it is probable that there may be infringement at some point during their use, especially if copies of software are made. For MMORPGs, such as *World of Warcraft* or Virtual Worlds such as *Second Life*, the use of a particular piece of software to access the game will most likely involve some form of copying of the software. Without a licence to do this, each user would be an infringer of the copyright in the software as a whole entity. Similarly, where users create copies of the game that are more than temporary, that too could constitute infringement. However, there will be common elements to each user’s view, and the RAM must therefore make a copy of it.

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<sup>681</sup> *Gilham v R* [2009] EWCA Crim 2293.

<sup>682</sup> *R v Higgs* [2008] EWCA Crim 1324.

<sup>683</sup> *Kabushiki Kaisha Sony Computer Entertainment Inc and Others v Ball and Others* [2004] All ER (D) 334 (Jul).

Hereafter *Sony*.

<sup>684</sup> *Kabushiki Kaisha Sony Computer Entertainment Inc and Others v Ball and Others* [2004] All ER (D) 334 (Jul) per Laddie J at 13.

<sup>685</sup> *Kabushiki Kaisha Sony Computer Entertainment Inc and Others v Ball and Others* [2004] All ER (D) 334 (Jul) para 13.

#### 4.6. Games, CDPA and Nova.

Temporary copying and the use of hardware to instigate software copying is one element of copyright in relation to online games. A second element relates to the copying of part of a game or part of a program. This still relates to copyright in the product overall, but is difficult to establish and can be problematic in determining. In England and Wales, the Court of Appeal has categorically issued its judgment relating to the protection of computer programs and games in the case of *Nova Productions v Mazooma Games Ltd & Others*.<sup>686</sup> This case concerned the copyright of an arcade video game that was developed by Nova. *Nova Productions* issued proceedings against two adversaries; *Mazooma Games Ltd* and *Bell Fruit Games Limited* on the basis of copyright infringement of the game 'Pocket Money.' This game was designed to replicate a game of snooker where the players of the game manipulate a cue and the power settings in order to pot balls. In this particular game, each pocket represented a different monetary value. Both of the defendants had created similar games on a similar basis, both based on snooker or pool. Both of the games *Nova* was challenging were visually similar to 'Pocket Money.'

The claimant submitted that the defendants had infringed the copyright in 'Pocket Money' in three ways; the dramatic work, various artistic works and various literary works.<sup>687</sup> *Nova* contended that the game was a dramatic work in itself, that the images and frames that were created and displayed to the user as the game was played were sufficient to make a claim for various artistic works, and finally that copyright subsists in the various literary works of the game including the software code itself. As such, this case involves elements of copyright in the overall product as a whole, but also copyright claims in relation to constituent works of the overall game. An important distinguishing factor here is that in *Nova*, none of the claims for in-game proprietary rights were made by users. This is because of the nature of the game – 'Pocket Money' is a social game rather than a MMORPG and has vastly different characteristics, but nevertheless the decision has important potential ramifications for aspects of copyright in MMORPGs. The judgment of the High Court in *Nova* indicated that there had been no copyright infringement on any of the allegations made against *Bell* and *Mazooma*. On this basis, the claimant appealed.

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<sup>686</sup> *Nova Productions Ltd v Mazooma Games Ltd and Others; Nova Productions Ltd v Bell Fruit Games Ltd* [2007] EWCA Civ 219. Hereafter *Nova*.

<sup>687</sup> B Allgrove and P MacGrath, 'Pool Cues and Computer Games: The 'look and feel' Debate Played Out in the Court of Appeal' *Magazine of the Society for Computers & the Law* (June / July 2007) 18(2) 28.

The Court of Appeal did not have to determine the issue of dramatic works as the claimant withdrew this from the challenge. *Nova* suggested that there was a set of graphical images which were used to show to the user the cue movement and power, and that the creation of these involved a significant degree of skill and labour beyond creating individual frames. On this basis, *Nova* argued that the individual frames ought to be protected by copyright. In relation to the literary works claim, *Nova* submitted that primarily, there was a dichotomy between the idea and the expression, and such a dichotomy was, “intended to apply only to ideas which underlie an ‘element’ of a program. Therefore only ideas that were an element of a program were excluded from protection.”<sup>688</sup> Secondly, the claimant contended that preparatory works should benefit from protection, even if they consisted only of ideas relating to what a program ought to do.<sup>689</sup> Jacob LJ dismissed the second claim for literary works on the basis that the claimant had submitted that there ought to be two claims for copyright rather than one which covered the program and the preparatory work – as was stated in the Directive itself.<sup>690</sup> This decision highlights the difficulties in assessing multiple copyright claims in the same creative endeavour, and this case involved a relatively simplistic embodiment of computer code when compared to that required to produce and run a MMORPG or Virtual World. The first claim in this case that there were graphic works also failed because there had not been any copying of the graphic works in the game ‘Pocket Money.’<sup>691</sup> Jacob J went on to add that where there was evidence of copying, that this was the starting point in assessing whether or not there had been copying of a substantial part rather than a foregone conclusion.<sup>692</sup> This is an important element as it suggests that the court must assess whether there is evidence of copying before concluding that there had been copying of a substantial part of the work in question. This principle, if applied to cases involving in-game copyright disputes arising out of MMORPGs could be significant in determining the proprietary claims to copyright in game items that may not necessarily have been copied.

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<sup>688</sup> B Allgrove and P MacGrath, ‘Pool Cues and Computer Games: The ‘look and feel’ Debate Played Out in the Court of Appeal’ Magazine of the Society for Computers & the Law (June / July 2007) 18(2) 29. A similar argument was raised in the earlier software case of *Ibcos v Barclays Mercantile Finance* [1994] FSR 275.

<sup>689</sup> *Nova Productions Ltd v Mazooma Games Ltd and Others; Nova Productions Ltd v Bell Fruit Games Ltd* [2007] EWCA Civ 219 para 27 per Jacob LJ.

<sup>690</sup> *Nova Productions Ltd v Mazooma Games Ltd and Others; Nova Productions Ltd v Bell Fruit Games Ltd* [2007] EWCA Civ 219 para 28 per Jacob LJ; Directive 91/250/EEC Art 1(1).

<sup>691</sup> *Nova Productions Ltd v Mazooma Games Ltd and Others; Nova Productions Ltd v Bell Fruit Games Ltd* [2007] EWCA Civ 219 para 18 per Jacob LJ.

<sup>692</sup> B Allgrove and P MacGrath, ‘Pool Cues and Computer Games: The ‘look and feel’ Debate Played Out in the Court of Appeal’ Magazine of the Society for Computers & the Law (June / July 2007) 18(2) 29.



This case<sup>693</sup> demonstrates that it is not easy to prove that there has been copying or infringement of copyright in the game.<sup>694</sup> The Court of Appeal has categorically reiterated the notion that the expression of an idea which is embodied in the software is the code underlying the software, and not the output of the code.<sup>695</sup> Essentially therefore, the expression is in the software code rather than anything else and it is the expression of the idea which is protected rather than the software code itself – this is a fundamental tenet of copyright law.<sup>696</sup> This is somewhat problematic for anyone seeking to protect their software, including gamers and users. The critical factor in this case is the nature of the games concerned – ‘Pocket Money’ was not a MMORPG or virtual world and neither were ‘Jackpot Pool’ nor ‘Trick Shot.’ This does not necessarily indicate that a different outcome may occur were a MMORPG to be the subject of litigation, especially were two users to claim copyright in a particular graphic image or shot of gameplay. An added, complicating factor is the ability of individual users in MMORPGs to contribute to the environment by generating items from software code, and the associated copyright that they may seek to claim as a result of their items being present.

The decision in favour of *Mazooma* and *Bell*, “emphatically endorses the principles expressed”<sup>697</sup> in the *Navitaire* judgment of three years earlier.<sup>698</sup> In this case, Pumfrey J was asked to consider that the functions of a piece of computer software were the equivalent of the plot in a novel. He disagreed with this analogy on the basis that completely different pieces of software are capable of producing the same result even if the programmer – and author – only had access to the results.<sup>699</sup> This was reiterated in the *Nova* case in the High Court, when it was considered that there is a difference between the creation of something, and the instructions to follow in creating that item.<sup>700</sup> The *Navitaire* case concerned the copyright of a booking system. *Navitaire* contended that there were distinct copyrights in the command set, the screen displays and the graphical user

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<sup>693</sup> *Nova Productions Ltd v Mazooma Games Ltd and Others; Nova Productions Ltd v Bell Fruit Games Ltd* [2007] EWCA Civ 219.

<sup>694</sup> E Derclaye, ‘Software Copyright Protection: Can Europe learn from American case law? Part 2’ (2000) EIPR 56.

<sup>695</sup> *Nova Productions Ltd v Mazooma Games Ltd and Others; Nova Productions Ltd v Bell Fruit Games Ltd* [2007] EWCA Civ 219.

<sup>696</sup> *Hollinrake v Truswell* [1894] 3 Ch 420; *Designers Guild Ltd v Russell Williams Textiles Ltd* [2000] 1 WLR 2416; *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601; *Apple Computer Inc v Computer Edge Pty Ltd* [1984] FSR 481; *Ibcos v Barclays Mercantile Finance* [1994] FSR 275; *John Richardson Computers v Flanders* [1993] FSR 497.

<sup>697</sup> S Miles and E Stoker, ‘*Nova Productions Ltd v Mazooma Games Ltd* – Case Comment’ [2006] Ent L R 181, 183.

<sup>698</sup> *Navitaire Inc v Easyjet Airline Co* [2004] EWHC 1725 (Ch); hereafter *Navitaire*.

<sup>699</sup> *Navitaire Inc v Easyjet Airline Co* [2004] EWHC 1725 (Ch) per Pumfrey J at 30.

<sup>700</sup> S Miles and E Stoker, ‘*Nova Productions Ltd v Mazooma Games Ltd* – Case Comment’ [2006] Ent L R 181, 183.

interface, raising a similar argument to that of Aplin and Adrian, who have suggested that multimedia works will contain a range of different works and therefore different copyrights.<sup>701</sup> The most interesting aspect of this judgment concerns the decision made in relation to the screen displays – the Court held that some of the screen displays were copyright works and thus protected as they formed part of the user interface<sup>702</sup> whereas others were only characters and did not benefit from protection as they merely expressed the underlying idea.<sup>703</sup> Such a decision has significant ramifications for MMORPGs, for both users and developers if copyright can be said to subsist in graphical displays. The decision in relation to graphical user interfaces is significant because of the statement where in his judgment; Pumfrey J accepts that graphical user interfaces (GUI) can be artistic works:

“...the GUI screens are artistic works. They are recorded as such only in the complex code that displays them, but I think that this is strictly analogous to more simple digital representations of graphic works. The code constructs the screen from basic elements, and is so arranged to give a consistent appearance to the individual elements. I think, nonetheless, that to arrange a screen certainly affords the opportunity for the exercise of sufficient skill and labour for the result to amount to an artistic work.”<sup>704</sup>

This is significant for users of MMORPGs and Virtual Worlds. Not only do users under the EULAs, very rarely benefit from any form of copyright, they are also unlikely to benefit from any attribution rights for their contribution.<sup>705</sup> Nevertheless, if there is a screen display which represents some of the creative work of a particular user, it may be possible that the screen display will in itself be the beneficiary of copyright protection, thereby giving a user some form of claim to rights in the creative efforts expended.<sup>706</sup> Bainbridge supports this position, reiterating that copyright protects artistic works as long as they meet the requirements for originality,<sup>707</sup> and accordingly, the vast majority of computer graphics will have copyright protection as artistic works. Reed and Angel consider the *Navitaire* decision to be a move towards a more limited scope for using copyright to protect rights holders from non-literal copying,<sup>708</sup> especially when the

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<sup>701</sup> T Aplin, *Copyright Law in the Digital Society - The Challenges of Multimedia* (Hart Publishing 2005); A Adrian, ‘Who Owns the Copyright In Multi-Author Interactive Works?’ [2003] Ent L R 35, 36.

<sup>702</sup> *Navitaire Inc v Easyjet Airline Co* [2004] EWHC 1725 (Ch) paras 95-99 per Pumfrey J.

<sup>703</sup> Stokes S, ‘The Development of UK Software Copyright Law: From John Richardson Computers to Navitaire’ [2005] CTLR 129, 132.

<sup>704</sup> *Navitaire Inc v Easyjet Airline Co* [2004] EWHC 1725 (Ch) paras 97 and 98 per Pumfrey J.

<sup>705</sup> These rights are excluded from applying to computer programs under the CDPA 1988 s81(2).

<sup>706</sup> See: Chapter 2 - Property Matters: Virtually Justified? At 2.7. *Theory for Parity?*

<sup>707</sup> D Bainbridge, *Legal Protection of Computer Software* (5<sup>th</sup> edn, Tottel Publishing 2008) 238.

<sup>708</sup> C Reed and J Angel (eds), *Computer Law* (6<sup>th</sup> edn, OUP 2007) 386.

Court refused to entertain any notion of protecting ‘business logic.’<sup>709</sup> This stance is viewed as a “highly unsympathetic” one in comparison to the attitudes of the courts in the US.<sup>710</sup>

The *Navitaire* decision has provoked other comments, with Stokes suggesting that the decision is significant because the Court reiterated that whilst skill and labour of a programmer ought to be rewarded, not all skill and labour ought to benefit from copyright protection otherwise copyright would be stretched too wide.<sup>711</sup> This is a very different situation to that where software has been individually commissioned, albeit some similar arguments may arise in respect of moral rights and joint authorship of works.<sup>712</sup> The statement of the court in *Navitaire* broadly encompasses the idea that the law needs to set boundaries in terms of what is copyright infringement, but this must be balanced with an appropriate level of protection for those involved who have demonstrated the requisite skill and labour. Whilst the law is traditionally reactive,<sup>713</sup> this can prove challenging in situations where technology is developing quickly.

The *Nova* case is, however, problematic because it fails to give due attention to the nature of literary works – and the different natures of each type of literary works. Computer software is ‘the odd one out’ when all of the literary works are considered; it is a literary work which does something rather than is something,<sup>714</sup> especially as literary works were originally intended to provide literary enjoyment.<sup>715</sup> The Court of Appeal overlooked this – and such an omission may prove to be a significant point of discussion with wide-ranging implications for any future litigation concerning MMORPGs. This is due to the evolution of MMORPGs and Virtual Worlds, and the question over how long they can remain in the same category as non-multiplayer games, books and magazines. The diverse range of works protected under the category of ‘literary works’<sup>716</sup> is one which is being challenged by technological innovation.

Consequently, whilst there are indications of how the law deals with computer program copyright, there remains some doubt about the precise treatment of various aspects of computer

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<sup>709</sup> *Navitaire Inc v Easyjet Airline Co* [2004] EWHC 1725 (Ch) para 130 per Pumfrey J.

<sup>710</sup> C Reed and J Angel (eds), *Computer Law* (6<sup>th</sup> edn, OUP 2007) 386.

<sup>711</sup> S Stokes, ‘The Development of UK Software Copyright Law: From John Richardson Computers to Navitaire’ [2005] CTLR 129, 133.

<sup>712</sup> T J McIntyre, ‘Copyright in Custom Code: Who Owns Commissioned Software?’ (2007) *JIPLP* 2(7) 473.

<sup>713</sup> H T Markey, ‘Science and Law – Toward A Happier Marriage’ (1977) 59 *J Pat Off Soc’y* 343, 346.

<sup>714</sup> B Allgrove and P MacGrath, ‘Pool Cues and Computer Games: The ‘look and feel’ Debate Played Out in the Court of Appeal’ *Magazine of the Society for Computers & the Law* (June / July 2007) 18(2) 30.

<sup>715</sup> *Hollinrake v Truswell* [1894] 3 Ch 420.

<sup>716</sup> CDPA 1988 s1(1).

software. The cases discussed above<sup>717</sup> suggest that there is copyright protection in England and Wales for graphical displays. However, not all graphical displays will benefit from that protection. Whilst there is supposedly no threshold for determining originality, it appears that at present the determination of copyright protection in graphical displays of computer software is based on labour, skill and judgment, and these have to be judged in line with the statute.

There is little guidance within the CDPA on determining matters such as graphical user interface copyright. Equally, whilst there is precedent dealing with computer program copyright, there is no precedent dealing with copyright in the context of online games and virtual worlds. Perhaps this is a significant design of the legislation, to provide for flexibility and technological developments. There is at present, no dedicated provision for such issues, and whilst copyright is applicable to both the game as an entity, and to elements within the game, this is limited by both the extent of copyright protection, and more restrictively, EULAs.<sup>718</sup> This is then compounded by the difficulty of enforcing rights in online games and regulation of such spaces more generally. The current legal framework provides little specific guidance – analogies to prior computer software cases is the closest guidance but there are significant differences between such software and MMORPGs.

#### **4.7. Moral Rights.**

The current – although much amended – legislation provides for protection of works in both economic<sup>719</sup> and moral<sup>720</sup> terms. Whilst the question of the protection afforded to computer software and to online-gaming property has yet to be definitively resolved in England and Wales, there are important indicators from other jurisdictions<sup>721</sup> in terms of the issues that need to be considered; namely the willingness of courts to examine clauses of the EULA<sup>722</sup> and the readiness to find in favour of a wronged user so as to restore their proprietary interests.<sup>723</sup> The discussion

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<sup>717</sup> *Nova Productions Ltd v Mazooma Games Ltd and Others; Nova Productions Ltd v Bell Fruit Games Ltd* [2007] EWCA Civ 219; *Navitaire Inc v Easyjet Airline Co* [2004] EWHC 1725 (Ch).

<sup>718</sup> See: Chapter 5 - Contractual Displacement of Proprietary Interests: EULAw? At 5.4.1. *Ownership Issues*.

<sup>719</sup> CDPA 1988 s16.

<sup>720</sup> CDPA 1988 Chapter IV.

<sup>721</sup> For example, the US, South Korea and China.

<sup>722</sup> *Bragg v Linden Research Inc.* (487 F.Supp 2d 593 E.D. Penn) [2007].

<sup>723</sup> TechSecurityChina.com Editor, 'Court Grants Online Chinese Gamer Virtual Property' (23 December 2006) <<http://www.techsecuritychina.com/2003/12/23/628-court-grants-online-chinese-gamer-virtual-property/>> retrieved 11 May 2010.

here will involve copyright – and related rights - in the second sense; copyright relating to items and objects within a MMORPG or Virtual World rather than the environment itself.

One of the related rights to copyright is encompassed within the copyright framework but consists of a distinct area; that of moral rights.<sup>724</sup> Whilst the CDPA 1988 does not provide a definition of moral rights, and what they constitute, the Act does contain provisions that allow for moral rights to be given their due place under copyright law.<sup>725</sup> Despite the absence of a definition, the 1971 text of the Berne Convention, includes a definition of moral rights:

“Independently of author’s economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any deliberate distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.”<sup>726</sup>

The notion of moral rights in England and Wales is one which has proved challenging – especially in light of Article 6*bis*<sup>727</sup> – for domestic copyright to accept. This flows predominantly from the focus of copyright, which rests on economic rights, rather than rights concerned with the treatment of works,<sup>728</sup> although Dworkin suggests that there is no such economic focus.<sup>729</sup> The literal meaning of moral rights translates from ‘droit moral’ and refers to non-pecuniary rights rather than morality.<sup>730</sup> The lack of economic or pecuniary concerns is therefore the root of the challenge for copyright in England and Wales in accepting and protecting moral rights. This has attracted astute criticism, with this model being described as a, “poor model” because of the, “emphases on economic reward and social exchange rationales”<sup>731</sup> that form the basis of the current legal landscape.

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<sup>724</sup> CDPA 1988 Chapter IV.

<sup>725</sup> CDPA 1988 s2.

<sup>726</sup> Berne Convention for the Protection of Literary and Artistic Works (1886) to which the UK is signatory, Article 6*bis*; hereafter Berne Convention.

<sup>727</sup> Berne Convention 1886.

<sup>728</sup> B Rosenblatt, ‘Moral Rights Primer’ (1998) available online:

<<http://cyber.law.harvard.edu/property/library/moralprimer.html>> retrieved 18 August 2014.

<sup>729</sup> G Dworkin, ‘The Moral Right of the Author: Moral Rights and the Common Law Countries’ (1994-1995) 19 Colum.-VLA J L & Arts 229.

<sup>730</sup> J Ginsburg, ‘Moral rights in Common Law systems’ [1990] Ent L R 121, 122.

<sup>731</sup> J Ginsburg, ‘Moral rights in Common Law systems’ [1990] Ent L R 121, 122.

Whilst the Berne Convention and translations provide the basis for moral rights, Adeney, suggests that defining moral rights in a single term is fraught with difficulties because of the differences between legal cultures.<sup>732</sup> This implies an inherent tension between the signatory states in relation to moral rights, and could explain why there is a distinct ambivalence towards moral rights in England and Wales.<sup>733</sup> Indeed, one of the foremost criticisms of moral rights is that they are fundamentally unsuited to common law systems.<sup>734</sup> Further difficulties concerning moral rights are evident in the wording itself, especially because of the use of the word ‘moral’ which Nocella<sup>735</sup> and Vever<sup>736</sup> suggest leads to a conclusion that moral rights have no legal entitlement or basis. These issues, whilst pertaining to the definition and terminology surrounding moral rights do not prevent the operation of such rights, although the qualifications and exceptions imposed by the CDPA provisions,<sup>737</sup> which are not contained within the Berne Convention,<sup>738</sup> leave little doubt that moral rights are regarded as rights of a lesser significance under domestic law.

Nevertheless, moral rights are significant because under the current contractual paradigm, users are not entitled to claim copyright in the game items, irrespective of how much effort they have expended or how much they have spent developing them. In other categories of copyright works, moral rights cannot be excluded or transferred,<sup>739</sup> yet this is not the scenario for computer software.<sup>740</sup> This leaves users in the unusual – and potentially disproportionate – situation of not benefitting from proprietary interests, especially copyright, or moral rights in their in-game items. The imbalances between the interests of users and developers are compounded by the situation relating to moral rights, and this is particularly relevant where user creativity and scripting of game items is concerned.

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<sup>732</sup> E Adeney, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (OUP 2006).

<sup>733</sup> J Ginsburg, ‘Moral rights in Common Law systems’ [1990] Ent L R 121, 129; L Bently and B Sherman, *Intellectual Property Law* (4<sup>th</sup> edn, OUP 2014) 273.

<sup>734</sup> L Bently and B Sherman, *Intellectual Property Law* (4<sup>th</sup> edn, OUP 2014) 274.

<sup>735</sup> L Nocella, ‘Copyright and moral rights versus author’s right and droit moral: a convergence or divergence?’ [2008] Ent L R 151, 152.

<sup>736</sup> D Vaver, ‘Moral Rights, Yesterday, Today and Tomorrow’ [1999] 7(3) IJL & IT 270.

<sup>737</sup> CDPA 1988, Chapter IV. The provisions here are much more detailed than Article 6bis of the Berne Convention.

<sup>738</sup> L Bently and B Sherman, *Intellectual Property Law* (4<sup>th</sup> edn, OUP 2014) 273.

<sup>739</sup> CDPA 1988 s2(2).

<sup>740</sup> CDPA 1988 s81(2).

Moral rights have been recognised in the law of England and Wales since 1988, and as Australia has accepted that moral rights can arise in online gaming situations,<sup>741</sup> it seems logical that moral rights also arise for gamers and users in England and Wales as well, especially given the similarities of both copyright systems. However, this would be an imprecise statement of the law as it stands. The CDPA 1988 contains provisions relating to moral rights in copyright works, specifically stating that authors and developers have the right to be identified as such in relation to the works that they have authored or directed.<sup>742</sup> Furthermore, if this right is asserted correctly, a failure to comply is an infringement of the moral right.<sup>743</sup> The law states that moral rights apply to copyright works, and therefore, it is logical to assert that they apply to computer programs because computer programs are protected by copyright as literary works.<sup>744</sup> However, that is where the similarities with Australian copyright law end. In England and Wales, the same statute expressly prohibits moral rights from applying to computer programs<sup>745</sup> or computer-generated works.<sup>746</sup> From a theoretical perspective of proprietary interests,<sup>747</sup> especially under a Lockean interpretation,<sup>748</sup> this seems to be unjust, and potentially unfair. The statute expressly excludes computer programs from the moral rights regime, and is akin to the EULAs excluding users from having copyright in game content which they may have generated. The essential difference between the potential unfairness of excluding moral rights, and the potential unfairness of contractually excluding the copyright claims of users rests with the Unfair Terms regime,<sup>749</sup> although such contractual clauses may fall foul of the legislation.<sup>750</sup> Nevertheless, from the perspective of gamers, they potentially suffer losses, and displacements of rights under contract law and under copyright law.

The domestic statute is not the only instrument that is unsatisfactory in its recognition of moral rights. The Berne Convention for example, allows programs to be protected as literary works, and grants copyright protection to a wide range of works. Furthermore, Article 6 of the Berne

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<sup>741</sup> Y F Lim, 'Is It Really Just A Game? Copyright and Online Role-Playing Games' [2006] JIPL&P 1(7) 481.

<sup>742</sup> CDPA 1988 s77.

<sup>743</sup> CDPA s77(1).

<sup>744</sup> CDPA s3(1)(b).

<sup>745</sup> CDPA s79(2)(a).

<sup>746</sup> CDPA s79(2)(c).

<sup>747</sup> See generally: Chapter 2 - Property Matters: Virtually Justified?

<sup>748</sup> P Laslett (ed), *John Locke: Two Treatises of Government* (Cambridge University Press 1988); S J Horowitz, 'Competing Lockean Claims to Virtual Property' (2007) 20(2) Harvard J L & Tech 444.

<sup>749</sup> Unfair Contract Terms Act 1977; Unfair Terms in Consumer Contracts Regulations 1999.

<sup>750</sup> See: Chapter 5 - Contractual Displacement of Proprietary Interests: EULAw? At 5.7. *Are EULA Clauses Imbalanced?*

Convention states that moral rights are also applicable to copyright works. Despite this, there is no dedicated provision for moral rights in computer programs.<sup>751</sup> This is perhaps due to the contradictory nature between economic rights and moral rights, with moral rights seeking to ensure that the author retains respect for his efforts. Laun has explored this idea, and suggests that there is a pragmatic reason for not allowing moral rights in computer software.<sup>752</sup> The suggestion is that computer software is too economically valuable and short-lived to allow the retention of moral rights as these could potentially be used to remove the software from the market.<sup>753</sup> McIntyre adds to this supposition, indicating that there are potentially issues of restricting the exploitation of computer software if moral rights are allowed to be upheld in such works.<sup>754</sup> Whilst this is an extreme interpretation of the reasoning, there is some merit in this argument, and this is because computer programs tend to be frequently amended and updated, and allowing moral rights to be sustained within them could be a large task to undertake. Nevertheless, the situation is slightly different when it comes to the contributions of individuals to a MMORPG, whereby the contribution can be identifiable, and significant. In this regard, the justification for depriving users - and creators – of moral rights seems difficult to sustain.

Contrastingly, the Trade Related Aspects of Intellectual Property Rights Agreement<sup>755</sup> adopts a general approach whereby moral rights are excluded from applying to copyright works.<sup>756</sup> Given that MMORPGs and Virtual Worlds are not physical, and exist solely through online servers and computers, there seems to be no possibility that gamers or virtual world residents are entitled to benefit from the moral rights contained within the CDPA 1988 because of the nature of computer-generated works.<sup>757</sup> This situation again indicates the potential unfairness of this situation for users and creators; they are not entitled to moral rights in the products of their labour because of the category of work. This implies that authorship in computer programs is not valued.<sup>758</sup>

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<sup>751</sup> M T S Rajan, 'Moral Rights in Information Technology: A New Kind of 'Personal Right' (2004) *Int'l J L & Info Tech* 12(1) 32, 46.

<sup>752</sup> M W Laun, 'Improving the International Framework for the Protection of Computer Software' (1986-1987) 48 *U Pitt L Rev* 1151.

<sup>753</sup> M W Laun, 'Improving the International Framework for the Protection of Computer Software' (1986-1987) 48 *U Pitt L Rev* 1151, 1177.

<sup>754</sup> T J McIntyre, 'Copyright in Custom Code: Who Owns Commissioned Software?' *JIP&P* (2007) 2(7) 473, 486.

<sup>755</sup> Trade Related Aspects of Intellectual Property Rights Agreement 1994. Hereafter TRIPS Agreement.

<sup>756</sup> M T S Rajan, 'Moral Rights in Information Technology: A New Kind of 'Personal Right' (2004) *Int'l J L & Info Tech* 12(1) 32, 46.

<sup>757</sup> CDPA 1988 s81(2).

<sup>758</sup> For example: E Uribe-Jongbloed and Others, 'Authorship and Copyright in Virtual Worlds – From the Death of the Author and the Disempowerment of User to the Revival of Rights?' *J V W R* (forthcoming, 2013).



Users and players of MMORPGs and Virtual Worlds are contribute to the creative development of the game or virtual world. This is especially the case in virtual worlds where residents are free to script. Such a position is not so different to the status of inventions created by employees in the course of their employment.<sup>759</sup> Unless there is a separate agreement to the contrary, it is probable that the employer will be the owner of any and all rights developed in the course of employment.<sup>760</sup> The critical difference between gamers and employees however, is in who is paying for the development. In MMORPGs and Virtual Worlds, the user is paying to develop something he or she will not be able to assert proprietary interests in, whereas in the course of employment, the employee receives remuneration for his or her efforts, and this is broadly aligned with theories of property, which indicate that there ought to be reward for some form of endeavour.<sup>761</sup> Scripting is essentially game development albeit unpaid and unrecognised; users and residents script yet the fruits of their labours remain the preserve of the game developers.<sup>762</sup> It would seem that developers benefit from allowing people to play or reside in their world, and offer no returns on such investments.

Whilst much of the previous discussion has dealt with users and moral rights, there is also a distinct argument to be made on behalf of developers in respect of moral rights. Where users could claim moral rights in the works they develop as part of the online game experience, the developers too could have a similar argument. Ignoring temporarily, – for this discussion – the exclusion of computer programs from moral rights,<sup>763</sup> developers arguably have a more persuasive argument for moral rights in gaming platforms than users do. The developers produce the entire platform, without which, the users could not engage in, or contribute to, the environment. In this way, the developers, whilst primarily concerned with protecting their pecuniary and economic interests, would also be concerned with protecting their neighbouring rights such as integrity.<sup>764</sup> If moral rights were applicable to computer programs and software, it is arguable that under Article 6*bis*,<sup>765</sup> developers may seek to use their moral rights – such as the right to object to any distortion or modification of their work – to further prevent users from claiming proprietary interests in their contributions and modifications. Stern suggests that this

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<sup>759</sup> CDPA 1988 s11(2).

<sup>760</sup> CDPA 1988 s11; CDPA s11(2); Patents Act 1977 s39.

<sup>761</sup> See: Chapter 2 - Property Matters: Virtually Justified? At 2.6. *Lockean Theory of Labour*.

<sup>762</sup> See: Chapter 5 - Contractual Displacement of Proprietary Interests: EULaw? At 5.4.1. *Ownership Issues*.

<sup>763</sup> CDPA 1988 s79(2)(a); s81(2).

<sup>764</sup> CDPA 1988 s80(1).

<sup>765</sup> Berne Convention 1886.

would be unlikely given that most game developers do not object to things which improve the game itself<sup>766</sup> but nevertheless it could hypothetically be possible to justifiably grant moral rights to developers. Similarly, given that moral rights are concerned with the protection of the non-pecuniary interests,<sup>767</sup> they are of significant importance in protecting creativity. Developers in the first instance produce the environment, the elements to it and all of the creative aspects. Such creativity, in the opinion of Ginsburg, is protectable on the basis that offering such protection will in turn improve future creativity.<sup>768</sup> In this respect, the economic and moral rights are of equal importance.

Developers, through the production of creative environments, are equally deprived of moral rights in computer software – this is by virtue of the legislation itself.<sup>769</sup> The exclusion of computer software from moral rights is seemingly unfair on all producers of, and contributors to computer software. Game developers for example, produce creative works consisting of a number of different copyright works<sup>770</sup> – it is therefore imbalanced for the legislation to prejudice moral rights in musical and dramatic aspects of the game environment simply because it forms part of computer software. It also seems contradictory for the national legislation to exclude protection for non-pecuniary rights in works which are creative on such a scale, given the emphasis on economic reward which underpins intellectual property rights in England and Wales. The respect for the efforts of developers should extend to moral rights – and moral rights in turn should extend to computer software. Given that moral rights are concerned predominantly with the integrity and paternity of copyright works, and are therefore not premised on pecuniary bases, the developers are being deprived of the ability to object to treatment of the game environments which maybe derogatory or prejudicial to reputation.<sup>771</sup> Online games are highly customised, unique environments which require significant creative effort to produce.<sup>772</sup> Whilst

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<sup>766</sup> R H Stern, 'The Game Genie Case: Copyright in Derivative Works Versus Users' Rights' (1992) Ent L R 3(3), 104.

<sup>767</sup> J Ginsburg, 'Moral rights in Common Law systems' [1990] Ent L R 121, 122.

<sup>768</sup> J Ginsburg, 'Moral rights in Common Law systems' [1990] Ent L R 121, 122.

<sup>769</sup> CDPA 1988 s79(2)(a); s81(2).

<sup>770</sup> Classified under the CDPA 1988 as for example, literary, musical, and artistic works which are combined to produce the game environment.

<sup>771</sup> CDPA s81(2). Although the provision in s81(2) is questionable in relation to derogatory treatment for software, because in order to be able to object, there must first be an author yet s79(2)(a) makes it clear that computer programs are excluded from the paternity right – or right to be identified as author.

<sup>772</sup> The average cost of a game now extends into hundreds of millions of dollars. The Economist, 'Why video games are so expensive to develop' (*The Economist*, 24 September 2014) available online: <<http://www.economist.com/blogs/economist-explains/2014/09/economist-explains-15>> retrieved 24 September 2014.

this situation is identical for users, an individual user in many respects contributes less to the environment as a whole – and whilst quantity of contribution is not a factor in moral rights claims – both developers and users could potentially be allied in their arguments for extending moral rights protection to computer software by removing the legislative exclusions.

The practical arguments against extending moral rights, advanced by Laun<sup>773</sup> and McIntyre<sup>774</sup> imply that allowing moral rights in computer programs would interfere with the marketability of such products. These practical objections could potentially be resolved by time-limited protections for products with such limited life-span and are therefore not insurmountable. Developers invest time and resources into their commercial gaming environments yet cannot assert their claims as authors under the paternity rights.<sup>775</sup> Similarly, the same developers are unable to object to derogatory treatment of the work.<sup>776</sup> Both limitations are absent from the original wording in the Berne Convention yet appear in national law.<sup>777</sup> Such limitations are detrimental to both the users and the developers of online games alike. Both groups lose their moral rights under the legislation in England and Wales, yet the developers still seek to contractually claim any and all proprietary rights in the content of the environments, contractually displacing proprietary rights.<sup>778</sup> Indeed, if moral rights were applicable to online games, the situation for users would most likely be no different – users would still be required to assert their moral rights under the CDPA, and the developers would still be in a dominant position by requiring contractual waivers of these rights too. Phillips suggests contractual waivers of moral rights are ridiculous given that the function of such rights is to ensure that attribution and integrity rights cannot be contractually excluded, and “making moral rights waivable negates this sole function.”<sup>779</sup> Nevertheless, it seems that this is one area which is detrimental to the interests of developers and users alike, but where there is a compelling argument for an alteration to the legislative exclusion.

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<sup>773</sup> M W Laun, ‘Improving the International Framework for the Protection of Computer Software’ (1986-1987) 48 U Pitt L Rev 1151.

<sup>774</sup> T J McIntyre, ‘Copyright in Custom Code: Who Owns Commissioned Software?’ (2007) JIPL&P 2(7) 473.

<sup>775</sup> CDPA 1988 s77(1), excluded by s79(2)(a) for computer programs.

<sup>776</sup> CDPA 1988 s80(1), excluded by s81(2) for computer programs.

<sup>777</sup> Article 6bis Berne Convention 1886; L Bently and B Sherman, *Intellectual Property Law* (4<sup>th</sup> edn, OUP 2014) 273.

<sup>778</sup> See: Chapter 5 - Contractual Displacement of Proprietary Interests: EULaw? At 5.4. *EULA Case Studies*, and 5.6. *UTCCR Schedule 2 and EULA Clauses*.

<sup>779</sup> J Phillips, ‘Moral rights: no grey areas’ (The IPKat, 23 March 2010) available online: <<http://ipkitten.blogspot.co.uk/2010/03/moral-rights-no-grey-areas.html>> retrieved 17 February 2013.

Game developers object to the use of real world law in regulating items in virtual spaces,<sup>780</sup> yet when their interests are at stake, the very same developers cannot be persuaded that copyright laws do not apply. Rather than arguing for recognition of moral rights in computer software, game developers and providers may accept the status quo given that users will also not benefit from moral rights in any user-generated content.<sup>781</sup> It is possible that whilst moral rights are not recognised for software, developers do not see this as problematic, especially given that developers are reliant upon EULAs, and therefore will benefit contractual waivers of users' rights. As such, it is possible that the moral rights issue is of limited concern for developers, because of the potential for contractual waivers should the legislative exclusion be removed – despite the reservations of Phillips.<sup>782</sup> This argument is extended by Ondrejka's suggestion that developers are not concerned with copyright limitations because they favour contractual controls.<sup>783</sup>

Game developers appear to be seeking to rely on law only when it suits their needs<sup>784</sup> as opposed to when it is applicable. Indeed, as McKendrick points out, it goes against public policy for parties to try and oust the jurisdiction of the courts yet it is acceptable to include a contractual clause stating that the agreement does not amount to one with contractual obligations in law.<sup>785</sup> Moreover, EULAs are drafted in such a way so that the developers and providers themselves have a choice over whether to enforce terms against a potentially infringing user<sup>786</sup> or not.

#### 4.8. Subsets of Creativity – A new context for user creativity?

Copyright subsists in the game as an overall entity – of this there is little doubt, even if there are questions over how appropriate and effective this protection is, and possibilities for reforming it. Despite this, considering copyright from a slightly different perspective – that of users – requires a consideration of potential copyrights but also of potential categories in which such user-rights

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<sup>780</sup> S F Kane, 'Virtual Judgment: Legal Implications of Online Gaming' (May / June 2009) IEEE Computer and Reliability Societies, Vol 7(3), 23 <<http://www.computer.org/portal/web/csd/doi/10.1109/MSP.2009.81>> retrieved 16 March 2010, 26.

<sup>781</sup> CDPA 1988 s79(2)(a); s81(2) excluding the paternity and integrity rights for computer programs.

<sup>782</sup> J Phillips, 'Moral rights: no grey areas' (The IPKat, 23 March 2010) available online: <<http://ipkitten.blogspot.co.uk/2010/03/moral-rights-no-grey-areas.html>> retrieved 17 February 2013.

<sup>783</sup> C Ondrejka, 'Changing Realities' (The Themis Group, 2005) <<http://www.themisgroup.com/uploads/Changing%20Realities.pdf>> retrieved 18 May 2010.

<sup>784</sup> B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA 2008) 130.

<sup>785</sup> E McKendrick, *Contract Law: Texts, Cases and Materials* (3<sup>rd</sup> edn, OUP 2008) 289.

<sup>786</sup> B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA 2008) 130.

could be granted, especially works of joint authorship,<sup>787</sup> and claims for copyright in gaming items as derivative works.

#### 4.8.1. *Derivative Works.*

Derivative works are copyright works which are not per se original.<sup>788</sup> For example, for songs, there are likely to be multiple copyrights in the creative work. The initial copyright is likely to be the lyrics as a written work, but there will also be the sound recording for example, and this is, in the opinion of Torremans, likely to consist of a derivative work.<sup>789</sup> This is because the sound recording of the song would not be possible if there were no lyrics to base it on. It is an important principle of copyright that authors should be given due credit and should receive rewards for their efforts, even if that means that they are credited in having built upon a pre-existing work.<sup>790</sup> It is also possible for copyright to subsist in a derivative work regardless of whether that derivative work infringes the copyright in the original work upon which it is based.<sup>791</sup> For users, this is unlikely to be a significant concern because whilst they will usually require the permission of the copyright owner in the underlying original work (in this instance this would be the game developer) the EULAs which all users are required to agree to contain a licence allowing them to use the game). A further point to note here is that even if such a licence does not grant permission to use the underlying code – again, unlikely in environments which encourage user creativity such as *Second Life* – game developers will probably not act against a user from the simple point of economics. By acting against a user who is potentially a copyright infringer, the game developer could be losing income by losing a subscription. Most EULAs expressly state that users have no claim to any proprietary rights in any of the content so from the developer's perspective, anything a user adds to the environment belongs to the developer rather than to the user who created or amended something.

In the context of MMORPGs and Virtual Worlds, it is possible that users are the creators of derivative works. This is especially the scenario when users create or alter in some way the

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<sup>787</sup> For example: M Perry and T Margoni, 'Ownership in complex authorship: a comparative study of joint works' (2012) EIPR 34(1) 22.

<sup>788</sup> CDPA 1988 s1; L Bently and B Sherman, *Intellectual Property Law* (3<sup>rd</sup> edn, OUP 2009) 98. See also: A Rahmatian, 'Originality in UK law: the old "skill and labour" doctrine under pressure' (2013) IIC 44(1), 4.

<sup>789</sup> P Torremans, *Hollyoak and Torremans Intellectual Property Law* (7<sup>th</sup> edn, OUP 2013) 227.

<sup>790</sup> L Bently and B Sherman, *Intellectual Property Law* (3<sup>rd</sup> edn, OUP 2009) 99.

<sup>791</sup> *Redwood Music v Chappell* [1982] RPC 109, 120.

underlying software code of the game, or add to it, to include additional items not previously contained within a particular game environment. In adding to, or amending the code, users are relying upon an underlying copyright work to develop their creative endeavours. This would strongly suggest that users acting in this way are the creators of derivative works, and should be rewarded with a concurrent proprietary interest – as copyright – as long as they are able to meet the originality criteria for derivative works.

The originality criteria has three strands to it for derivative works;

- (i) The author must expend the right kind of skill and labour;
- (ii) The labour must create a material change in the work;
- (iii) That material change must be of the right kind.<sup>792</sup>

Firstly, the author of the potential derivative work must expend the right kind of labour. Lord Oliver indicated that a considerable amount of labour can be shown but this will not necessarily be sufficient to demonstrate originality.<sup>793</sup> This is not the only indication of what is required to meet the first criterion. There has been some confusion in determining the correct skill and labour, as in the contradictory decision of *Walter v Lane*,<sup>794</sup> where a newspaper report which was transcribed was held to be protected by copyright. When applied to the MMORPG context, this indicates that users, in amending or adding to the game environment, must deploy a significant level of skill and labour, but that it must be the right kind of skill and labour. This is unclear in the gaming context, as there is no authority on this precise issue. Nevertheless it is possible that this could mean that users will expend the correct kind of skill and labour in altering a portion of the software code, or in creating a new part of it.

Secondly the labour must create a material change in the work, and precedent has indicated that the labour and skill used must have been used to make the product different from the ‘raw material.’<sup>795</sup> This is perhaps one way of ensuring that the derivative creation is sufficiently different and distinct from the original copyright work to allow a separate copyright to exist. The material change is the essential element here; if a change is made but it is not a material change

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<sup>792</sup> L Bently and B Sherman, *Intellectual Property Law* (3<sup>rd</sup> edn, OUP 2009) 99.

<sup>793</sup> *Interlego AG v Tyco Industries* [1989] AC 217, 268 per Lord Oliver.

<sup>794</sup> *Walter v Lane* [1900] AC 53, albeit this decision was decided under the 1842 Copyright Act which did not include a requirement of originality.

<sup>795</sup> *Macmillan v Cooper* (1924) 40 TLR 186.

then originality will be denied. Originality has been conferred on works such as translations<sup>796</sup> and adaptations of existing material,<sup>797</sup> which could be significant for MMORPGs and users who have worked on software code, or added to the game environment. This is because a change to the software code may not have a discernible impact upon the game or the game environment, but a significant change such as correcting a part of the software code, or writing new parts to introduce new game items or game areas is more likely to constitute a change which is material, although it is difficult to determine when such a change has occurred. Lord Oliver has indicated that there needs to be some form of significant alteration which makes the total work an original one.<sup>798</sup>

Thirdly, that material change must be of the right kind. It is important under the third limb of the test for originality in derivative works that the efforts of the author corresponds to the protection which is being sought. This was explained in *Interlego*,<sup>799</sup> to mean that the labour and effort must be such as to produce a change which is of relevance to the work under consideration. The courts have approached this third limb from a different perspective, adopting the test outlined in *University of London Press*, considering that, “what is worth copying is prima facie worth protecting.”<sup>800</sup> This criterion has proved problematic, and only a limited number of situations have given rise to originality in derivative works. Where this has been found, it is usually applied to things involving the selection of materials to be included in the works that are compilations.<sup>801</sup> In the MMORPG context, this third limb may prove problematic, mainly as there is little guidance on what will constitute the ‘right kind’ of material change. Nevertheless, as the approach adopted by the courts suggests, if something is worth copying then it is worth protecting,<sup>802</sup> then this may be sufficient to satisfy the third limb of the test. Furthermore, if traditionally, originality in derivative works has been applied to compilations,<sup>803</sup> it is possible to view MMORPGs as such works because they necessarily involve numerous people involved in writing the software code.

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<sup>796</sup> *Cummins v Bond* [1927] 1 Ch 167.

<sup>797</sup> *Warwick Films v Eisinger* [1969] 1 Ch 508.

<sup>798</sup> *Interlego AG v Tyco Industries* [1989] AC 217 per Lord Oliver.

<sup>799</sup> *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601.

<sup>800</sup> *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601, per Petersen J at 609-610.

<sup>801</sup> L Bently and B Sherman, *Intellectual Property Law* (3<sup>rd</sup> edn, OUP 2009) 106.

<sup>802</sup> *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601.

<sup>803</sup> L Bently and B Sherman, *Intellectual Property Law* (3<sup>rd</sup> edn, OUP 2009) 106.

The court in *Galoob*<sup>804</sup> indicated strongly that there were several competing interests at stake, especially where users had modified the games concerned. The *Galoob* court were keen to highlight that there was a need for balancing, “a fair return on an author’s creative labour against the need for ‘broad public availability of literature, music and the arts.’”<sup>805</sup> Whilst the court in *Galoob* did not find that there was a derivative work in the modified version of the games, Stern vociferously disagrees with this decision, and strongly suggests that because the copyright owner of the game had already received payment, the user was free to modify the game for his enjoyment and as a result, sales would not be affected, whilst also strongly advocating recognition of end-user rights.<sup>806</sup>

Whilst the decision in *Galoob* is one made under US law, and therefore based upon a different set of copyright principles, the reasoning remains interesting for games. The argument Stern advances<sup>807</sup> in favour of end-user rights is persuasive on account of the consumer stance. If a user of a MMORPG is paying a subscription, and identifies that there is something which could improve his or her experience as an end-user, and has the skill to implement such a change, it seems fair that such a step be taken. When a tangible, physical item is purchased, the owner can modify its use in a way he or she sees fit to improve the enjoyment derived from it. The medium should not change the options available to the consumer. In MMORPGs, there may also be a wider benefit to the gaming environment of such a change, and such an interpretation produces an even stronger justification for users’ proprietary interests in the in-game content. Lastowka highlights this issue more broadly in the context of user-generated content, highlighting that it is driving the need for a change in the way intellectual property law – especially copyright – deals with such creative endeavours, stating it: “should lead us to revisit and revise our laws of intellectual property.”<sup>808</sup>

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<sup>804</sup> *Lewis Galoob Toys Inc v Nintendo of America Inc* (1991) 780 F. Supp. 1283. Hereafter *Galoob*.

<sup>805</sup> R H Stern, ‘The Game Genie Case: Copyright in Derivative Works Versus Users’ Rights’ (1992) Ent L R 3(3), 104, 107.

<sup>806</sup> R H Stern, ‘The Game Genie Case: Copyright in Derivative Works Versus Users’ Rights’ (1992) Ent L R 3(3), 104, 107 - 108.

<sup>807</sup> R H Stern, ‘The Game Genie Case: Copyright in Derivative Works Versus Users’ Rights’ Ent. L. R. (1992) 3(3), 104, 107.

<sup>808</sup> G Lastowka, ‘User-Generated Content and Virtual Worlds’ (2007-2008) 10 Vand J Ent & Tech L 893, 899. See also: W J Nichols, ‘Painting Through Pixels: The Case for Copyright in Videogame Play’ (2006-2007) 30 Colum J L & Arts 10; T Scassa, ‘Acknowledging Copyright’s Illegitimate Offspring: User-Generated Content and Canadian Copyright Law’ in M Geist (Ed), *The Copyright Pentology* (Ottawa University Press 2012) 431.



#### 4.8.2. *Joint Works.*

Joint works are works in which copyright vests in more than one author. For example, the default position in relation to films is that the film will be a work of joint authorship unless the producer and director are the same person.<sup>809</sup> It is usual for literary, dramatic, musical and artistic works to be works of joint authorship, although Bently & Sherman highlight that any category of work can be one of a joint authoring.<sup>810</sup> It is therefore possible that games can be works of joint authorship. Where a user of a MMORPG amends or adds to the underlying software code, whilst this contribution may not necessarily be an equal division of labour, or match the labour by the game developer, it is still a division of labour, and in theory, it is possible that a user who has made a contribution could be regarded as a joint author of the work.

However, the most significant hurdle to this claim on behalf of users is that where there are multiple authors, it must be impossible to distinguish between the contributions of each author.<sup>811</sup> When software code is amended, it may be possible that this can be identified, even if the person who amended it cannot be. A work of joint authorship has certain criteria that must be met, and these include:

- (i) contributions from each author;<sup>812</sup>
- (ii) which must be in the form of a collaborative effort;<sup>813</sup>
- (iii) and which must be without any method of identifying each individual contribution.<sup>814</sup>

The contributions from each author must be significant contributions,<sup>815</sup> and mere suggestions are not enough to be considered contributions<sup>816</sup> under the first criteria. The requirement that a contribution be a significant one has proved problematic,<sup>817</sup> and Blackburne J has indicated his preference for referring to this as ‘non-trivial’ rather than significant.<sup>818</sup> Whilst the contribution from each of the potential joint authors must be significant, or non-trivial, it does not have to be

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<sup>809</sup> CDPA 1988 s9(1) and s10(1A).

<sup>810</sup> L Bently and B Sherman, *Intellectual Property Law* (3<sup>rd</sup> edn, OUP 2009) 125.

<sup>811</sup> CDPA 1988 s10(1A).

<sup>812</sup> *Pamela Dallas Brighton & Dubbeljoint Co. Ltd v Marie Jones* [2005] FSR 16.

<sup>813</sup> *Beckingham v Hodgins* [2003] EMLR 18 (CA).

<sup>814</sup> *Beckingham v Hodgins* [2003] EMLR 18 (CA).

<sup>815</sup> *Godfrey v Lees* [1995] EMLR 307.

<sup>816</sup> *Fylde Microsystems v Key Radio Systems* [1998] FSR 449.

<sup>817</sup> See for example, L Bently, ‘Authorship of Popular Music in UK Copyright Law’ (2008) Information, Communication and Society.

<sup>818</sup> *Fisher v Brooker and Onward Music Ltd* [2007] FSR (12) 255 per Blackburne J at 46.

in equal shares<sup>819</sup> which is important for users of MMORPGs who are also potential authors. In a similar test to that of originality for derivative works however, the contribution – equal or otherwise – must be of the ‘right kind.’ For users and contributors to MMORPGs, this is significant because as long as there is a non-trivial contribution to the work, it is possible that recognition as a joint author for copyright purposes will be forthcoming.

The second element of the test for joint authorship requires that there be a process of collaboration through which the significant contribution has been made. The collaborative process means that there must have been some common idea or plan for the work, regardless of how vague it was.<sup>820</sup> This collaboration does not need to be face-to-face but there does need to have been some form of common aim. This is potentially problematic for users of MMORPGs as it is unlikely that they will meet this collaboration requirement unless they have been involved in the developmental stages of a particular game. It may be possible for users to contribute in a collaborative manner if they are involved with the beta testing<sup>821</sup> of a game.

The third element of the test for joint authorship requires that it is not possible to identify the separate contributions of each author.<sup>822</sup> This is clarified in the CDPA,<sup>823</sup> and it means that if the contributions of two authors are merged in such a way that it is impossible to identify who wrote which parts, this will be a work of joint-authorship. Again this could prove potentially problematic for users of MMORPGs because it may be possible through the gamer ‘tag’ of a particular user to identify him or her if the software code has been altered or added to in a distinctive manner. The distinctive manner may be necessary in order to benefit from other rights, such as for example, moral rights whilst simultaneously removing the possibility of benefitting from joint authorship rights.

Ultimately, it seems as though the precise requirements for works of joint authorship are too stringent to be of benefit to users in their quest for rights in game content. It is possible that some gamers could be successful in such claims, but nevertheless there is a much stronger claim for derivative works in software code and content.

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<sup>819</sup> *Bamgboye v Reed* [2004] EMLR (5) 61, 86.

<sup>820</sup> *Cala Homes (South) v Alfred McAlpine Homes East* [1995] FSR 818.

<sup>821</sup> Beta Testing occurs when the game opens for testing to a restricted number of users before it is made widely available.

<sup>822</sup> *Beckingham v Hodgins* [2003] EMLR 18 (CA).

<sup>823</sup> CDPA 1988 s10.

#### 4.9. Multimedia Works?

There are arguments both for and against the idea of a multimedia work as a mechanism designed to protect the game as a single entity under a single protective category. Aplin states that the first hurdle to be considered relates to the definition of multimedia itself.<sup>824</sup> In a debate resonant of the disparity in defining online games and Virtual Worlds, there are similar difficulties relating to exactly what a multimedia work could be or could include, with Turner indicating that multimedia is easy to define, albeit slightly more problematic to deal with in terms of categorization.<sup>825</sup> There is some hint of agreement however, as commentators seem to, “agree that an essential characteristic of multimedia is that it is interactive, and that it may come in offline form...or online form.”<sup>826</sup> Interestingly, the criticisms and difficulties in defining ‘multimedia works’ do not appear to have been replicated when considering a much more significant omission from the copyright statute. There is no definition of ‘computer program’ in the CDPA 1988.<sup>827</sup> There have been suggestions that a definition was deliberately omitted from the Act so that it was not overtaken by the pace of technological development, and therefore did not become obsolete rapidly.<sup>828</sup> Perhaps if this had been rectified, there would be less debate concerning the meaning of both ‘online games’ and ‘multimedia works.’ Consequently, the issue has been left for the courts to address amongst suggestions that they will feel compelled to squeeze multimedia works into pre-existing categories<sup>829</sup> if there is a decision that something worth copying is worth protecting.<sup>830</sup>

The question of multimedia protection assumes that multimedia works can be appropriately defined.<sup>831</sup> If multimedia works were to be recognized as another expansion of copyright law, the copyright in a multimedia work, where there are potentially multiple authors, would raise further challenges for regulators to resolve.<sup>832</sup> The critical element that differentiates online games from

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<sup>824</sup> T Aplin, *Copyright Law in the Digital Society - The Challenges of Multimedia* (Hart Publishing 2005) 2.

<sup>825</sup> M Turner, ‘Do Old Legal Categories fit new Multimedia Products? A Multimedia CD-ROM as a film.’ (1995) EIPR 17(3), 107, 109.

<sup>826</sup> T Aplin, *Copyright Law in the Digital Society - The Challenges of Multimedia* (Hart Publishing 2005) 9.

<sup>827</sup> T Aplin, *Copyright Law in the Digital Society - The Challenges of Multimedia* (Hart Publishing 2005) 39.

<sup>828</sup> H MacQueen and Others, *Contemporary Intellectual Property Law and Policy* (2<sup>nd</sup> edn, OUP 2011) 64.

<sup>829</sup> M Turner, ‘Do Old Legal Categories fit new Multimedia Products? A Multimedia CD-ROM as a film.’ (1995) EIPR 17(3), 107, 110.

<sup>830</sup> *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601, per Petersen J at 609-610.

<sup>831</sup> M Turner, ‘Do Old Legal Categories fit new Multimedia Products? A Multimedia CD-ROM as a film.’ (1995) EIPR 17(3), 107.

<sup>832</sup> Which is in part why authorship rights are so important. See: E Uribe-Jongbloed and Others, ‘Authorship and Copyright in Virtual Worlds – From the Death of the Author and the Disempowerment of User to the Revival of Rights?’ J V W R (forthcoming, 2013).

films as another form of media, is the requirement of input from the user. Adrian summarizes this position in a thought-provoking manner when she states, “The designers, far from being authors, have to act more like urban planners, or local politicians.”<sup>833</sup> Such a statement implies that the users will not be just merely consumers; they will actively contribute,<sup>834</sup> and in doing so they will have a vested interest not only in the success of the environment itself, but also an interest in the items with which they have connected and control.

Any number of multiple yet simultaneous copyrights can exist in the same game or world at the same time. Whilst this undoubtedly has advantages where different people or corporations own different parts of the game, it is also less than efficient where the same corporation owns every element of the constituent parts that comprise the online game or world. Consider that games comprise different forms of media – if this is the situation then the game will consist of multiple copyrights rather than just one. Admittedly there is a licensing rationale behind distinguishing between the copyright in the music, and the copyright in the video cut-scenes. However, if the example of *World of Warcraft* is considered, *Blizzard Entertainment* is the game developer and platform provider responsible for the creation, updating and maintenance of this online game. Seemingly - and according to the EULA - *Blizzard Entertainment* benefits from all of the proprietary interests in all of the content that is combined to make the gaming environment.<sup>835</sup> *Blizzard* therefore has copyright in at least the game code as a literary work, the music as a musical work and the graphics and videos. A multimedia category would arguably be beneficial for creative endeavours such as MMORPGs which span a wealth of different copyright categories. In allowing an overarching copyright, it could theoretically be possible to allow for some attribution rights for users and creators which are not currently recognized.

Creating a new category of multimedia work could go some way to addressing the difficulties in reforming copyright.<sup>836</sup> Any new category would theoretically protect the current categorizations and protect them from further expansion. Whilst this is a balanced reason, a more convincing argument focuses on the so-called ‘gaps’ in protection under the current legislative framework. In England and Wales for example, there is no distinct category granting protection to audiovisual works or multimedia works. In the US, there is a specific category which provides protection for

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<sup>833</sup> A Adrian, ‘Who Owns the Copyright In Multi-Author Interactive Works?’ [2003] Ent L R 35, 38.

<sup>834</sup> Giving rise to expectations of some interest and reward.

<sup>835</sup> *World of Warcraft* EULA, Clause 4(A).

<sup>836</sup> See: Chapter 3 - Digital Copyright: 1988 or Web 2.0? At 3.6. *Reform Potential*.

audiovisual works. As has been indicated, there is a gap in protection which can pose a threat to the creation of multimedia works.<sup>837</sup> Nevertheless, counter-arguments are readily available, with the most obvious criticism being that there would not necessarily be better protection – rather, the protection would be more tailored. Cameron has stated that copyright principles themselves will be the instigators of solutions for creations arising out of new media,<sup>838</sup> whereas Aplin suggests that the problem with an approach of creating a more-tailored category of protection would potentially protect features stemming from the underlying software and code itself.<sup>839</sup> However, the courts have examined issues relating to packages and works that consist of more than one work. In *Ibcos*,<sup>840</sup> the court held that a software package was protected as a compilation because it consisted of a suite of over 100 programs, and in addition to this, each program benefitted separately from protection as a literary work. This is broadly the position advocated by Cifuentes and Fitzgerald, who have indicated that the changing combinations of works have altered how we interact.<sup>841</sup> As such, the protective regime should also change to remain compatible with the changing interactions and uses of media content and media platforms.

The issue of multimedia protection, and perhaps a multimedia copyright, is one which does indicate a wider difficulty in this area. Perhaps the idea of copyright protection for in-game items, and the game itself, rests on the notion of appropriate categorization. Presently under the current copyright legislation, games do not receive protection in one category. MMORPGs consist of a number of copyright works, and therefore are categorized as such, rather than under a distinct category of games, unlike the situation for databases.<sup>842</sup> This seems to indicate that the prevailing issue for MMORPGs is one of categorization, and receives greater support from the analogy with films.<sup>843</sup> A film can also contain a number of copyright works, but receives copyright protection as a whole product in addition to the diverse rights subsisting within the overall work itself. Such a scheme could be applied to MMORPGs in a similar way as it is currently applied to films. Similarly, some form of *sui generis* protection – that is a general protective category for a specific form of work not protected by other copyright classifications – could be applied in a manner akin

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<sup>837</sup> T Aplin, *Copyright Law in the Digital Society - The Challenges of Multimedia* (Hart Publishing 2005) 217.

<sup>838</sup> J Cameron, 'Approaches to the problems of multimedia' (1996) EIPR 18(3) 115, 119.

<sup>839</sup> T Aplin, *Copyright Law in the Digital Society - The Challenges of Multimedia* (Hart Publishing 2005) 246.

<sup>840</sup> *Ibcos Computers Ltd v Barclays Mercantile Highland Finance Ltd* [1994] FSR 275.

<sup>841</sup> C Cifuentes and A Fitzgerald, 'Copyright protection for digital multimedia works' (1999) Ent L R 10(2) 23, 27.

<sup>842</sup> CDPA 1988, s3A, which protects databases under a *sui generis* copyright category.

<sup>843</sup> M Turner, 'Do Old Legal Categories fit new Multimedia Products? A Multimedia CD-ROM as a film.' E.I.P.R. 17(3) 1995, 107.

to the protection provided to databases.<sup>844</sup> Irrespective of such a reclassification, this would not address the issue of proprietary interests, especially copyright in in-game items.

#### 4.10. In-Game Copyrights?

MMORPGs differ from other games because they include an element of individuality for each of the users. Within a driving game - for example, *Colin McRae Rally 3* - the player is able to choose certain things from a finite list of options e.g. the colour of the car or the helmet design he wishes to have. This therefore allows for a degree of customization but does not allow a player to create his own avatar, whereas in an environment such as *Second Life* or *Guild Wars 2*<sup>845</sup> any given player can customise almost any element of his appearance. In the latter, for example, it is entirely possible for a user to customize numerous elements of a waistcoat, or even to create his own. This creative element is missing in offline or traditionally single-player games.<sup>846</sup>

Consequently, as real-world transactions are afforded protection under real-world legal mechanisms, from the perspective of equal treatment, if a transaction involving items of value is being conducted in an online game, protection should be available for it, especially when real currency is used to purchase a game object.<sup>847</sup> Such value was accepted in the *Bragg* litigation<sup>848</sup> and treating real money transactions for game items differently to real money transactions for physical goods makes little sense, especially when compared to online media such as music downloads, film downloads and online software purchases.<sup>849</sup> There is a growing acceptance of the need to extend consumer protection to cover online media sales for goods such as music and films<sup>850</sup> but the current situation reflects imbalances and disproportionality between users and

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<sup>844</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (hereafter Database Directive); A Marsoof, 'A case for *sui generis* treatment of software under the WTO regime' (2012) Int J Law Info Tech 20 (4) 291; H A Deveci, 'Databases: is *sui generis* a stronger bet than copyright?' (2004) Int J Law Info Tech, 12(2), 178.

<sup>845</sup> *Guild Wars 2* was open for pre-registered beta testing in late April 2012.

<sup>846</sup> M Kaelin, 'Playing a MMORPG is not all fun and games, you better have the right vocabulary' (*TechRepublic*, 3 May 2006) available online: <<http://www.techrepublic.com/article/playing-a-mmorpg-is-not-all-fun-and-games-you-better-have-the-right-vocabulary/>> retrieved 12 June 2012.

<sup>847</sup> In a similar way, to perhaps the protections afforded to purchases made with credit cards.

<sup>848</sup> *Bragg v Linden Research Inc.* (487 F.Supp 2d 593 E.D. Penn) [2007].

<sup>849</sup> Amazon for example now allows you transfer MP3 copies of music you purchased on a CD into an online music system; see Huffpost Tech, 'Amazon Autorip UK Launch: Free Digital Copies of Every CD Bought since 1999' (Huffington Post, 26 June 2013) available online: <[http://www.huffingtonpost.co.uk/2013/06/27/amazon-autorip-uk-launch\\_n\\_3508044.html](http://www.huffingtonpost.co.uk/2013/06/27/amazon-autorip-uk-launch_n_3508044.html)> retrieved 1 July 2013.

<sup>850</sup> R Bradgate, 'Consumer Rights in Digital Products' (September 2010) available online: <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31837/10-1125-consumer-](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31837/10-1125-consumer-)

developers. However there is little discernible difference between this and gaming items, so perhaps these transactions should also be included in consumer protection. Virtual transactions should also be protected, as should the associated proprietary interests in the game content which is being transacted. Much of this activity is not permitted by the EULAs of particular games, yet nevertheless there is a thriving market for such activity. It seems that developers seek to ‘shut down’ any claims by users of rights in the content, yet when they have the opportunity to enforce their EULA provisions, they do not seek to do so.<sup>851</sup>

Users seem to have little protection for their interests in game accounts which is arguably contradictory to theoretical justifications.<sup>852</sup> Secondly, where users contribute to the environment, through coding or creativity, there is usually very little recognition of this by developers, and this is reflected through the EULA clauses.<sup>853</sup> There are a number of gaming activities and examples which challenge the current contractual displacement of proprietary interests. These will now be examined from a practical perspective to highlight the potential claims users may have to proprietary interests in-game items.

#### 4.10.1. *Scarcity.*

A key defining element of MMORPG game play and popularity is the need to constantly challenge for resources.<sup>854</sup> This seems to be the paramount requirement in order for a majority of gaming enthusiasts to derive any level of satisfaction from the games they play. This is particularly prevalent in *Sony’s EverQuest* for example, where the main focus of the game is to explore the fictional world, undertaking quests, collecting treasures, battling with monsters and interacting

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rights-in-digital-products.pdf> retrieved 12 June 2011; Draft Consumer Rights Bill (June 2013) available online: <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/206367/bis-19-925-draft-consumer-rights-bill.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/206367/bis-19-925-draft-consumer-rights-bill.pdf)> retrieved 1 July 2013; Department for Business, Innovation and Skills, ‘Enhancing Consumer Confidence by Clarifying Consumer Law: Consultation on the supply of goods, services and digital content’ (July 2012) available online: <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31864/12-937-enhancing-consumer-consultation-supply-of-goods-services-digital.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31864/12-937-enhancing-consumer-consultation-supply-of-goods-services-digital.pdf)> retrieved 1 October 2012; M B M Loos and Others, ‘Digital Content Contracts for Consumers’ (CESCL Working Paper Series No 2012-05) available online: <<http://ssrn.com/abstract=2081918>> retrieved 1 July 2013.

<sup>851</sup> K Barker, ‘MMORPGing - The Legalities of Game Play.’ (2012) *European Journal for Law and Technology*, Vol. 3, No.1, 7.

<sup>852</sup> See generally: Chapter 2 - Property Matters: Virtually Justified?

<sup>853</sup> See above: Chapter 5 - Contractual Displacement of Proprietary Interests: EULAw? At 5.4. *EULA Case Studies*.

<sup>854</sup> R Kennedy, ‘Virtual Rights? Property in Online Game objects and Characters’ (June 2008) *Information & Communication Technology Law* Vol 17(2), 95, 97.

with other players. The need to challenge for resources directly raises legal questions, especially in relation to the notion of scarcity, because there have been numerous instances where players have attempted to circumvent the scarcity that is built-in to games by listing and selling game items, game characters and even game accounts on online auction websites including eBay.<sup>855</sup> Scarcity poses particular challenges in terms of both in-game item control, but also copyright interests, especially if items are replicated or deleted at the will of the developers to ensure that the game retains interest.

*EverQuest II* included the 'tradeskill' feature which allows players to create items for in-game use.<sup>856</sup> It seems that it is possible for developers to legitimately exclude trading of in-game items in their EULAs because some Virtual World developers have entered into licensing agreements to allow for a dedicated auction venue<sup>857</sup> for their in-game objects to be disposed of. It is also seemingly a 'fair' position to take as allowing in-game items to be sold to other gamers will ultimately be beneficial to the game itself, but also mitigates the potential imbalances within EULA terms outlawing such activity. Duranske suggests that users develop expectations of their proprietary interests in in-game items,<sup>858</sup> and it is possible that allowing such sales goes some way to addressing this, and by doing so indicates that game developers concede that users have claims to in-game items and the associated game code, irrespective of the restrictive EULAs that both parties enter into.

The developers of games in which scarcity plays a large role often deliberately make weapons, food, currency and enhancements scarce in order to foster the competitive streak in their users.<sup>859</sup> However, some developers take scarcity, even to the point of incorporating specific mechanisms that are intended to destroy in-game items and certain objects with the intention of increasing competition for the remaining items. This therefore raises issues of control and copyright,

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<sup>855</sup> G Sandoval, 'eBay, Yahoo Crack Down on Fantasy Sales' (*CNET News*, 26 January 2001) available online: <<http://cnet.news.com/2100-1017-251654.html>> retrieved 20 November 2009; G Sandoval, 'Sony to Ban Sale of Online Characters from its Popular Gaming Sites' (*CNET News*, 10 April 2000) available online: <[http://cnet.news.com/Sony-to-ban-sale-of-online-characters-from-its-popular-gaming-sites/2100-1017\\_3-239052.html](http://cnet.news.com/Sony-to-ban-sale-of-online-characters-from-its-popular-gaming-sites/2100-1017_3-239052.html)> retrieved 20 November 2009.

<sup>856</sup> SOE Stratics, 'An Extensive Guide Into Tradeskills' *EverQuest II Wiki* available online: <[http://eq2.stratics.com/content/guides/padasher\\_crafting\\_1.php](http://eq2.stratics.com/content/guides/padasher_crafting_1.php)> accessed 25 June 2012.

<sup>857</sup> S F Kane, 'Virtual Judgment: Legal Implications of Online Gaming' (May / June 2009) *IEEE Computer and Reliability Societies*, Vol 7(3), 23 <<http://www.computer.org/portal/web/csdl/doi/10.1109/MSP.2009.81>> retrieved 16 March 2010.

<sup>858</sup> B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA Publishing 2008) 75.

<sup>859</sup> R Kennedy, 'Virtual Rights? Property in Online Game objects and Characters' (June 2008) *Information & Communication Technology Law* Vol 17(2), 95.



especially if a user has scripted a particularly rare and valuable in-game item which then becomes coveted by other gamers within the environment. Depriving a user of proprietary interests such as copyright in a potentially valuable item – some swords for example have been valued at over £400,<sup>860</sup> whereas other game property has been valued at over \$26 000<sup>861</sup> – seems contrary to property theory. As a result of low availability and high-demand, virtual theft is now a significant concern for gamers who are in possession of these potentially valuable in-game items.<sup>862</sup> There is no element of scarcity in traditional offline games, and questions of law tend to concern piracy rather than theft of items in cyberspace.<sup>863</sup>

As a result of deliberately increasing scarcity, there are likely to be implications on the game play, potentially increasing the copyright infringements that could occur. Such a practice would add to the competitive nature of online role playing games, but could also be indirectly fostering an online community where items are coveted, and seen as status symbols of gaming progress by an avatar in a particular skill area or environment. If such game items are indeed coveted because of their scarcity that may lead to an increased likelihood of copyright infringement. Players may seek to copy those items that have the highest value due to their scarcity; replicating the items themselves, or even reproducing the software code that enables such items to exist. If the game developers withhold permission to reproduce items – as they are likely to do if they seek to increase scarcity – such behaviour is potentially classifiable as infringement of copyright. Similarly, if users seek to be the best of the game characters, they may seek to reproduce items that have hitherto been scarce so that their value decreases whilst seeking to gather as many as possible of other items in an attempt to bolster the value, thereby increasing the virtual power and wealth attached to items which their avatar possesses. This kind of activity would damage the economic stability of the game, but would also prejudice the avatars and copyright interests of

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<sup>860</sup> BBC News, 'Chinese Gamer Sentenced to Life' (8 June 2005) available online:

<<http://news.bbc.co.uk/1/hi/4072704.stm>> retrieved 19 November 2009; A Krotoski, 'Chinese gamer gets suspended death sentence for stabbing a player who stole his virtual sword' *The Guardian* (London, 9 June 2005) available online: <<http://www.guardian.co.uk/technology/gamesblog/2005/jun/09/chinesegamers>> retrieved 19 November 2009.

<sup>861</sup> A Krotoski, '\$26 500 paid for property that doesn't exist' (*Guardian Unlimited Games Blog*) 15 December 2004, available online: <[http://blogs.guardian.co.uk/games/archives/virtual\\_worlds/2004/12/26500\\_paid\\_for\\_property\\_that\\_doesnt\\_exist.html](http://blogs.guardian.co.uk/games/archives/virtual_worlds/2004/12/26500_paid_for_property_that_doesnt_exist.html)> retrieved 19 November 2009.

<sup>862</sup> Albeit not relevant to the central argument of this work. The example will however be used to demonstrate the value of such items.

<sup>863</sup> See for example the Digital Economy Act 2010.

other users. Scarcity is not the only element of gaming that can have an impact upon potentially valuable copyright – avatars are also potentially vulnerable to copyright issues.

#### **4.10.2. Avatars.**

An avatar is a representation of a user in an online interactive environment which performs at the direction of, and under the control of, the user. Avatars are distinctive, and it is possible to customize avatars, however questions of proprietary interests in avatars arise, especially if a user has expended significant labour or spent money developing a particularly distinctive or coveted avatar. Such questions over proprietary interests – particularly copyright interests – in avatars are similar to the issues surrounding proprietary interests in gaming items more generally.

When a user first enters the online environment, he or she will be required to pick an avatar, and then customize it from the available options, or select and make choices as to aspects of its appearance. In MMORPGs this can encompass a choice as wide as selecting from different mythical creatures such as dragons, trolls and unicorns to choosing the outfit you wish your avatar to wear, or the colour of the avatar's hair.

Disputes concerning avatars have questioned whether hairstyles are capable of copyright protection.<sup>864</sup> Adrian argues that there is potential for such protection to exist; users make choices about the features their avatars are composed of, and the aspects which are on display.<sup>865</sup> To this end, this means many avatars may be protected under copyright as artistic works. Users may select their options rather than individually create each aspect of an avatar, but that is nevertheless an act of creativity. As Adrian highlights, the game servers do not remember the overall appearance of a house or village or character, they store the details of the individual components i.e. doors, windows, carpets, noses, eyebrows, hair colours – the list is sizable.<sup>866</sup> There is no storage of an entire 'house' on a server – and therefore, the user has created a new 'work' in selecting the elements to make the house or complete the look of his or her game character. This should therefore warrant some copyright protection of a standalone nature rather than falling

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<sup>864</sup> B Duranske, 'Second Life Hairstyle Raises Copyright Question' (*Virtually Blind*, 15 February 2007) available online: <<http://virtuallyblind.com/2007/02/15/second-life-hairstyle-copyright-question/>> retrieved 12 December 2010.

<sup>865</sup> A Adrian, 'Beyond grieving: virtual crime' (2010) *Computer & Security Law Review* 26, 641.

<sup>866</sup> A Adrian, 'Beyond grieving: virtual crime' (2010) *Computer & Security Law Review* 26, 641.

within the broad parameters of literary works due to their computer basis. If there is no standalone protection, the game developer will benefit from the copyright subsisting within the overall game, as well as in the creation of each individual avatar as per the vast majority of EULA clauses and the labour of the users will not be reflected. This is a situation which is perhaps not reflective of effort nor of proprietary claims. It is possible that such a situation does not arise, and that users exercise very little control in selecting the elements to a particular item within a world or game. If all of the items are available from a list for the users to select, then this could be very different. Contrastingly, if a user does not like the options available, and goes on to modify the choices or to design something new, then there must be some credit for this creativity. Similarly, the game provider is likely to conclude that such innovation and creativity would not be possible without the platform being created. Whilst this is a valid point, such environments exist due to their users, and if these users contribute to the environment in a creative manner, this should be rewarded through relevant proprietary interests in the content created, such as copyright.

Artists are recognised as the creators of their paintings and street art<sup>867</sup> rather than those that make and sell the paintbrushes, and supply the paint. Similarly, the producers of paper do not become the owners of anything and everything written on the paper – there is an expectation that once the paper is paid for, the person paying has the entitlement to do with it as he pleases. Similar expectations are likely to be applied in the consumer context to online games and game accounts on behalf of users.<sup>868</sup> If this example is extended to online games and to virtual worlds, users become creative with the materials they have at their disposal, but that does not necessarily mean that they should not also benefit from proprietary claims such as copyright in their creative output. Duranske summarises this when he states:

“...there is a fair argument that intellectual property rights in the characters users create, homes they build and ‘stories’ they tell through their interactions with other users should be theirs, just as the drawings users make with crayons and the stories users craft with word processing software should be owned by their creators, not the toolmakers.”<sup>869</sup>

The creation and design of avatars should be, at the very least, capable of joint authorship or of derivative work status and accordingly, copyright protection. A compelling argument can also be

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<sup>867</sup> CDPA 1988 s4.

<sup>868</sup> See Chapter 2: Property Matters: Virtually Justified? At 2.2. ‘Property.’

<sup>869</sup> B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA Publishing 2008) 140 - 141.

made to suggest that the design of an avatar is an original work and should be protected as such. The practicalities of such a scheme are more challenging to determine, but these aspects of online gaming and copyright law – as it stands – indicate that there is greater potential than the current framework of protection.

#### 4.10.3. *Griefing.*

Griefing is a specific form of activity that occurs within online games and virtual worlds, and has an adverse effect on the victims of this type of behaviour.<sup>870</sup> Mulligan and Patrovsky define griefing by reference to the player who is a griefer, and suggest that a griefer is someone, “who derives his/her enjoyment not from playing the game, but from performing actions that detract from the enjoyment of the game by other players.”<sup>871</sup> Given that MMORPGs and Virtual Worlds consist – and exist because of – software code, this essentially means that these spaces, items and characters are code-dependent. So in ‘stealing’ a sword, a user is not physically stealing the code, but a copy of the code. By taking the item, the item does not physically change hands, the particular piece of code that forms the item transfers from one game account to another. Grieferers therefore have implications not only for users – and developers – within games and online worlds, but also proprietary interests such as copyright.

On the basis that users have copyright and / or moral rights in in-game items, if a griefer steals a sword<sup>872</sup> or interrupts a raid on an enemy, or the killing of a monster, the griefer has deprived the user not only of the embodiment of the sword itself, but also of the potential loot, reputation points, and potential copyright interests. Johnson vociferously argues that there must be a

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<sup>870</sup> C Y Foo and E M I Koivisto, ‘Defining Grief Play in MMORPGs: Player and Developer Perceptions’ Proceedings of the 2004 ACM SIGCHI International Conference on Advances in Computer Entertainment Technology (ACM, New York, 2004) 246 available online: <<http://doi.acm.org/10.1145/1067343.1067375>> retrieved 1 August 2011.

<sup>871</sup> J Mulligan and B Patrovsky, ‘Developing online games: an insider’s guide’ (New Riders, Indiana, 2003); C Y Foo and E M I Koivisto, ‘Defining Grief Play in MMORPGs: Player and Developer Perceptions’ Proceedings of the 2004 ACM SIGCHI International Conference on Advances in Computer Entertainment Technology (ACM, New York, 2004) 246 available online: <<http://doi.acm.org/10.1145/1067343.1067375>> retrieved 1 August 2011; K Barker, ‘MMORPGing, Law and Lingo’ in M Freeman and F Smith (eds) *Current Legal Issues: Law and Language* (Vol 13, OUP 2013) 430.

<sup>872</sup> TechSecurityChina.com Editor, ‘Court Grants Online Chinese Gamer Virtual Property’ (23 December 2006) <<http://www.techsecuritychina.com/2003/12/23/628-court-grants-online-chinese-gamer-virtual-property/>> retrieved 11 May 2010.

distinction between the types of in-game property and online virtual spaces.<sup>873</sup> This hypothesis hinges on the suggestion that there should be a split system of proprietary interests in online games; the developer owning the copyright to the game, but the user benefitting from interests such as copyright in in-game items and characters.<sup>874</sup> This argument is not without merit; especially in light of the evidence from users about how they view their game items, possessions and creations.<sup>875</sup> It is also a reflection of theoretical arguments concerning proprietary claims but nonetheless contradicts the position adopted by EULAs, unless the terms are found to be unfair.<sup>876</sup> The arguments made by Johnson<sup>877</sup> are very powerful, and seem ‘just,’ reflecting the partnership of creative efforts on behalf of both the developers and of the users.

There are several possible ways to view the consequences of griefing activity. The game developer claims copyright – in everything related to the game through the EULA. On this basis, the individual as a user does not control or have proprietary claims to it, so it cannot be ‘stolen’ from him, and consequently his copyright interests cannot therefore be infringed by the griever. Secondly, on the basis that the developer benefits from the proprietary interests to the game as a whole but does not benefit from the copyright in the precise in-game items, the user would benefit from the copyright interests in his sword or character or other in-game items. In this latter scenario, the griever would be infringing the copyright of the user because in ‘stealing’ the sword, he would be making a copy of the software code which generates the graphical representation without having permission to do so – assuming this activity is not permitted within the game

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<sup>873</sup> N Johnson, ‘Swords, Shields and Statutes: Common Law Property Rights and Limited Licences – are Both Necessary to Protect Virtual Property’ (Cyberlaw Seminar, University of Iowa College of Law, 31 March 2006) available online: <<http://www.uiowa.edu/~cyberlaw/cls06/papers/dlfinfin.htm>> retrieved 22 June 2012.

<sup>874</sup> N Johnson, ‘Swords, Shields and Statutes: Common Law Property Rights and Limited Licences – are Both Necessary to Protect Virtual Property’ at IV (Cyberlaw Seminar, University of Iowa College of Law, 31 March 2006) available online: <<http://www.uiowa.edu/~cyberlaw/cls06/papers/dlfinfin.htm>> retrieved 22 June 2012.

<sup>875</sup> T S L Cheng, ‘A Brave New World for Intellectual Property Rights’ (2006) 17 *Journal of Law, Information and Science* 10; Z Tingting and D Moller, ‘Legislation Proposed to Protect Virtual Property’ (*China Through A Lens*, 26 January 2004) available online: <<http://www.china.org.cn/english/2004/Jan/85502.htm>> retrieved 22 June 2012.

<sup>876</sup> See: Chapter 5 - Contractual Displacement of Proprietary Interests: EULAs? At 5.5. *Standard terms – Fairness and Balance?*

<sup>877</sup> N Johnson, ‘Swords, Shields and Statutes: Common Law Property Rights and Limited Licences – are Both Necessary to Protect Virtual Property’ (Cyberlaw Seminar, University of Iowa College of Law, 31 March 2006) available online: <<http://www.uiowa.edu/~cyberlaw/cls06/papers/dlfinfin.htm>> retrieved 22 June 2012.

rules. If hairstyles,<sup>878</sup> horses<sup>879</sup> and beds<sup>880</sup> in *Second Life* are capable of attracting copyright, swords should also be considered to fall within this category and should also benefit from the same protection. The greater challenge – assuming the user is the copyright owner in this example – is in enforcing the rights and obtaining redress for the damage suffered.

It is also often the case that serious gamers modify their in-game or in-world items. In such situations – whilst dubiously treated by EULAs – it is perfectly possible for a user to have expended skill and effort in obtaining the sword, only to then modify it in a custom manner by altering the code or attributes of the sword. In this situation, the sword is no longer the sole creation of the game developer, and could be treated as a joint or derivative work. Accordingly therefore, the courts could no longer suggest that the sword was not capable of attracting its own protection under copyright. In this instance, it would no longer be a mere graphical representation generated by the software code. Under this construction, the allocation of copyright interests would also need to be re-considered. If an element of the code has been changed or amended – as in the instance with the sword – the user who amended the code must be acknowledged and treated as the author for copyright purposes. In this scenario, this could result in both the developer and the user being joint-authors and therefore joint copyright holders.

This has implications for the scarcity of items within a gaming world. If a user has amended or modified the code so as to alter the sword, it must then be unique, or at least more desirable because it is of a lower availability. In a way, the sword has the potential to be one of a kind – this makes it ‘scarce.’ Consequently, the game developer may then alter the game code or settings to either increase the availability of the sword with its modified characteristics, or to spread the word of its existence but not increase its availability. This type of activity by the game developer and game company is known as ‘nerfing.’<sup>881</sup> This is the process whereby the developer’s actions affect the value of the items and objects of a given user. Either way, this would have a significant

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<sup>878</sup> B Duranske, ‘*Second Life* Hairstyle Raises Copyright Question’ (*Virtually Blind*, 15 February 2007) available online: <<http://virtuallyblind.com/2007/02/15/second-life-hairstyle-copyright-question/>> retrieved 12 December 2010.

<sup>879</sup> *Amaretto Ranch Breedables v. Ozimals*, 3:10-cv-05696-CRB (N.D. Cal.) [2010].

<sup>880</sup> *Eros, LLC, v. John Doe*, US Dist. Ct. Middle District of Florida, Case No: 8:07-cv-1158-T-24TGW [2007].

<sup>881</sup> E A Crowne and M Kaploun, ‘From Blackacre & Whiteacre to Greyacre: Three Models for Ascribing Virtual Property Rights in Cyberspace’ [2010] *Baltimore Intellectual Property Law Journal* 19(1) 19; M Kaelin, ‘Playing a MMORPG is not all Fun and Games, you better have the right vocabulary’ (*Tech Republic*, 3 May 2006) available online: <<http://www.techrepublic.com/article/playing-a-mmorpg-is-not-all-fun-and-games-you-better-have-the-right-vocabulary/6068231>> retrieved 25 June 2012.

impact upon the value of the sword, and the copyright of the user who created and amended its desirability<sup>882</sup> not least because copyright is an economic right.

This could therefore result in the sword being replicated or duplicated, either through copying the code that produces the sword, or by producing a copy without literally copying the code. In such an instance, the user who originally modified the sword could potentially be the victim of copyright infringement, followed by the subsequent losses of potential trade and potential damage to reputation. This is broadly similar to the situation that arose in the case of *Eros v Volkov Cattaneo*.<sup>883</sup> In this situation, *Eros* was a company making and selling goods in *Second Life*. One such product was the SexGen bed, designed to allow avatars to enjoy intimate company. The beds typically sold for around \$55. However, *Cattaneo* saw the opportunity to share in this lucrative trade, and produced a copy of the SexGen beds, which retailed for a much lower \$15. This consequently undercut SexGen who suffered. *Eros* subsequently issued legal proceedings against *Cattaneo* for copyright infringement.<sup>884</sup> Whilst the precise details of the outcome of the case are unknown because it settled, part of this settlement included a prohibition on *Cattaneo* replicating any further items created by *Eros*.<sup>885</sup>

#### 4.10.4. Scripting.

The process refers to the activity of writing code in a particular scripting language<sup>886</sup> to develop items and objects to add to a particular online environment. One example would see a resident of *Second Life* scripting to produce a new hairstyle, or a new type of bed – as in the example lawsuit between *Eros* and *Volkov Cattaneo*<sup>887</sup> – or scripting for a new door to a house in *Second Life*. Such activity raises questions concerning copyright, especially where users have been creative. Theoretical justifications for proprietary interests for users suggest that users can make claims

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<sup>882</sup> R Kennedy, 'Virtual Rights? Property in Online Game objects and Characters' (June 2008) Information & Communication Technology Law Vol 17(2), 95.

<sup>883</sup> *Eros, LLC, v. John Doe*, US Dist. Ct. Middle District of Florida, Case No: 8:07-cv-1158-T-24TGW [2007].

<sup>884</sup> OUT-LAW News, 'Second Life gets its first copyright lawsuit' (17 July 2007) available online: <<http://www.out-law.com/page-8297>> retrieved 25 June 2012.

<sup>885</sup> *Eros, LLC, v. John Doe*, US Dist. Ct. Middle District of Florida, Case No: 8:07-cv-1158-T-24TGW [2007].

<sup>886</sup> Linden Scripting Language is the language used to work with the underlying code of *Second Life*; *Second Life*, 'LSL Portal' (18 March 2011) available online: <[http://wiki.secondlife.com/wiki/LSL\\_Portal](http://wiki.secondlife.com/wiki/LSL_Portal)> retrieved 1 August 2011.

<sup>887</sup> *Eros, LLC, v. John Doe*, US Dist. Ct. Middle District of Florida, Case No: 8:07-cv-1158-T-24TGW [2007]. Volkov Cattaneo was the name the avatar used in *Second Life*, as when the suit was lodged, the real identity of the gamer was unknown.

over things which they have developed<sup>888</sup> although the contractual agreements indicate this is not permissible, and therefore an imbalance between the interests of users and developers is apparent.

In such a situation, the user then has choices as to what happens to the item that has been created. If someone has spent hours or days creating and scripting, it is unlikely that the end result will be freely available for everyone to benefit from. Nevertheless, that is an option. So too – in *Second Life* at least – is the ability to set controls and restrictions on where, by whom and how an item is used. The Linden Scripting Language<sup>889</sup> allows the creator to set what are essentially access parameters and a simplified type of region-lock<sup>890</sup> in particular items. One example could be the home of a *Second Life* resident. The user is likely to have expended considerable time and effort creating and developing the virtual persona that possesses and controls the home and contents. Much like in the real world, *Second Life* allows the user to prevent others i.e. other avatarian residents, from entering their home. That is why certain *Second Life* islands are ‘off-limits’ to other avatars. In this way, *Second Life* is granting – and subversively enforcing – proprietary rights such as control and the exclusion of others in, user-scripted content. In doing this, the creating user will effectively be controlling his property through the exercise of his proprietary interests. The item he has created is still software code, and is still protected under copyright law, alongside the recognition this receives from *Second Life*. When a user sells a bed in *Second Life* what he is doing is actually selling the right to replicate, or a licence to use the code he has written in the format in which he has written it.

In MMORPGs and other online interactive spaces separate from *Second Life*, scripting can also occur. However, the critical difference in these spaces is the express clauses in the EULAs relating to the claims of proprietary interests in game items.<sup>891</sup> There have been examples of users of MMORPGs engaging in the process of scripting and adding to their game of choice, only to be deprived of any proprietary interests such as copyright in the material they have created. This has happened to users of *Lineage II*, where the contractual agreement states that even if the items they create have been created outside of the game mechanisms, once they are uploaded into the game,

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<sup>888</sup> See: Chapter 2 - Property Matters: Virtually Justified? At 2.6. *Lockean Theory of Labour*.

<sup>889</sup> *Second Life*, ‘LSL Portal’ (18 March 2011) available online: <[http://wiki.secondlife.com/wiki/LSL\\_Portal](http://wiki.secondlife.com/wiki/LSL_Portal)> retrieved 1 August 2011.

<sup>890</sup> A MacCulloch, ‘Game-Over – The Region Lock in Video Games’ [2005] EIPR 176.

<sup>891</sup> See: Chapter 5 - Contractual Displacement of Proprietary Interests: EULAw? At 5.4.1. *Ownership Issues*.



the user no longer owns or benefits from the intellectual property and property rights attached to the items.<sup>892</sup> This, at the very least, circumvents the moral rights provisions in the CDPA 1988,<sup>893</sup> and acts as a transfer of proprietary interests without a resulting benefit. It is possible to view such creations by users as derivative or joint works under a copyright construction, especially once the items are adopted into the game by the developers. Lockean theory<sup>894</sup> suggests that this is worthy of reward.

#### 4.10.5. *Bots and Botting.*

A further element of online gaming concerns the use – and misuse – of bots. In the context of gaming, the term refers to a character which is controlled by a computer.<sup>895</sup> The term can also be considered to include software produced by third-parties that complete game-play and perform repetitive tasks in order to boost reputation, points and experience.<sup>896</sup> In the context of MMORPGs such as *EverQuest II* and *Lineage*, to name but two examples, bots are potentially problematic. Whilst to a certain extent, bots are required to fight alongside and against gamers as they progress through the environment, the second interpretation of bots is more challenging to the gaming structure. Bots which perform repeated tasks whilst players are not actually at their computers, are a threat to the game and the gaming experience.<sup>897</sup> The use of bots to perform activities such as gathering gold<sup>898</sup> or repeatedly killing lower level players, is frowned upon in some circles, and regarded as cheating. The use of bots is potentially contradictory to the EULA

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<sup>892</sup> *Lineage II* EULA, Clause 6(c), (April 2008), available online: <<http://us.ncsoft.com/en/legal/user-agreement/Lineage-2-user-agreement.html>> retrieved 17 February 2011. See also K Barker, 'Copyright 2010: A Second Life or Death?' Fourth International Conference on Information Law (ICIL), University of Macedonia Thessaloniki, Greece, May 2011.

<sup>893</sup> CDPA 1988 Chapter IV.

<sup>894</sup> P Laslett (ed), *John Locke: Two Treatises of Government* (Cambridge University Press 1988)

<sup>895</sup> Techpedia, 'Bot' available online: <<http://http://www.techopedia.com/definition/10459/bot-gaming>> retrieved 25 June 2012.

<sup>896</sup> R Thawonmas, Y Kashifuji and K T Chen, 'Detections of MMORPG bots based on behaviour analysis' Proceedings of the 2008 International Conference on Advances in Computer Entertainment Technology, ACM, New York, 2008, 91.

<sup>897</sup> K T Chen, H K K Pao, and H C Chang, 'Game bot identification based on manifold learning.' In Proceedings of ACM NetGames, 2008, 91.

<sup>898</sup> Through a process known as 'farming.' See: R Bartle and M Davies, 'Gamers don't want any more grief' *The Guardian* (London, 15 June 2006) available online:

<<http://www.guardian.co.uk/technology/2006/jun/15/games.guardianweeklytechnologysection2>> retrieved 15 February 2013; R Davis, 'Welcome to the new gold mines' *The Guardian* (London, 5 March 2009) available online: <<http://www.guardian.co.uk/technology/2009/mar/05/virtual-world-china>> retrieved 16 February 2013; R Heeks, 'Current Analysis and Future Research Agenda on 'Gold Farming:' *Real World Production in*

*Developing Countries for the Virtual Economies of Online Games* Paper 32 (2008) available online: <[http://www.sed.manchester.ac.uk/idpm/research/publications/wp/di/documents/di\\_wp32.pdf](http://www.sed.manchester.ac.uk/idpm/research/publications/wp/di/documents/di_wp32.pdf)> retrieved 16 February 2013.

clauses and Terms of Use, but also potentially has an impact upon the in-game items developed by users. Additionally, bots could be infringing of the copyright of the developer in MMORPGs and Virtual Worlds, and therefore the practical implications of botting could impact upon proprietary interests in in-game items.

Recent litigation in the US highlighted the issues raised by bots in MMORPGs,<sup>899</sup> but also highlighted the significant impact that contractual agreements and covenants can have on proprietary interests such as copyright.<sup>900</sup> The case of *MDY v Blizzard*<sup>901</sup> concerned the bot known as ‘Glider.’ This bot had been developed by *MDY*, and could be used in *World of Warcraft* to complete mundane and repetitive tasks within this MMORPG, including the collection of currency and level-ups without a user being seated at his or her computer.<sup>902</sup>

The *MDY* case focused upon the interests of the developer rather than those of users. In this instance, *Blizzard* were contending that the use of Glider in *World of Warcraft* was a breach of the Terms of Use and EULA, and because of that, *MDY* were also allegedly infringing the copyright of *Blizzard* and were liable for secondary infringement on the basis that each user installing the bot was also breaching their licence.<sup>903</sup> On appeal, the court sided with *MDY*, the judgment stating that whilst there was a violation of contractual covenants, there was no violation of the exclusive copyrights held by *Blizzard*.<sup>904</sup> The reasoning behind this indicated that there was no violation of the copyright because there was no express mention of such rights in the Terms of Use and EULA that *Blizzard* had claimed were infringed. This suggests that had the contractual documents been more closely connected and explicitly referred to one another, and to the specific copyright issues, there may have been a different judgment. This case is significant because it focused on the rights of the developer rather than on the rights of the users. Nevertheless, it is not inconceivable that if the developer’s interests were at risk because of a bot, then users’ interests

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<sup>899</sup> *MDY Indus., LLC v. Blizzard Entertainment, Inc.*, 2010 WL 5141269, 97 U.S.P.Q.2d (BNA) 1001 (9th Cir. Dec. 14, 2010).

<sup>900</sup> K Barker, ‘MMORPGing - The Legalities of Game Play’ (2012) *European Journal for Law and Technology*, Vol. 3, No.1, 8, 8.1.

<sup>901</sup> *MDY Indus., LLC v. Blizzard Entertainment, Inc.*, 2010 WL 5141269, 97 U.S.P.Q.2d (BNA) 1001 (9th Cir. Dec. 14, 2010).

<sup>902</sup> G Lastowka and C Dougherty, ‘Copyright Issues in Virtual Economies’ [2007] *E-Commerce & Policy* 9(5).

<sup>903</sup> *MDY Indus., LLC v. Blizzard Entertainment, Inc.*, 2010 WL 5141269, 97 U.S.P.Q.2d (BNA) 1001 (9th Cir. Dec. 14, 2010).

<sup>904</sup> *MDY Indus., LLC v. Blizzard Entertainment, Inc.*, 2010 WL 5141269, 97 U.S.P.Q.2d (BNA) 1001 (9th Cir. Dec. 14, 2010).

could also be endangered. This rests on the argument that users are entitled to, and benefit from, proprietary interests in the form of copyright in in-game items.

#### 4.11. From no rights to rights and lefts?

The future of copyright, and its future design is something that many have speculated about.<sup>905</sup> In the context of online games and virtual worlds, it would seem that whilst there is a recognition of the potential value of these spaces – with the Department for Culture, Media and Sport itself stating that the gaming industry in England and Wales is the most valuable creative industry<sup>906</sup> with the gaming market worldwide being more valuable than that of the film industry<sup>907</sup> - attention remains elsewhere, and most recently it is been focused upon peer-to-peer file-sharing and illegal downloads<sup>908</sup> rather than on addressing issues of proprietary interests for the users – and contributors – of online games.

Bainbridge states categorically that, “The possibility that the application of labour alone can give rise to copyright must be regarded now with some scepticism.”<sup>909</sup> This is a valid point – labour (in general, unspecific and undefined terms) cannot per se give rise to copyrights that last for life plus 70 years. However, labour theorists have strong counter-arguments to such a suggestion.<sup>910</sup> The judgment of the *Ladbroke*<sup>911</sup> court in 1964 stated that a work must be the result of skill, labour or judgment. Accordingly, if an author has demonstrated the requisite skill, labour and judgment, proprietary interests in the form of copyright should be the recompense, as this is a foundation of copyright rationale.

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<sup>905</sup> B Fitzgerald, ‘Copyright 2010: The Future of Copyright’ [2008] EIPR 30(2) 4; D M Attridge, ‘Copyright Protection for Computer Programs’ [2000] EIPR 563; P Samuelson, ‘Towards A New Deal for Copyright in an Information Age’ (2002) 100 Michigan Law Review 1488; Y H Lee, ‘Play again? Revisiting the case for copyright protection of gameplay in videogames’ [2012] EIPR 34(12), 865; C Geiger, ‘The future of copyright in Europe: striking a fair balance between protection and access to information.’ [2010] IPQ 1, 1.

<sup>906</sup> I Livingstone and A Hope, ‘Next Gen: Transforming the UK into the world’s leading talent hub for the video games and creative effects industries’ NESTA (February 2011) available online: <[http://www.nesta.org.uk/home1/assets/features/next\\_gen](http://www.nesta.org.uk/home1/assets/features/next_gen)> retrieved 1 March 2011, 4.

<sup>907</sup> Department for Culture, Media and Sport, ‘Skills Review of Video Game and Visual Effects Industries’ (DCMS News) 1 February 2011, available online: <[http://www.culture.gov.uk/news/news\\_stories/7754.aspx](http://www.culture.gov.uk/news/news_stories/7754.aspx)> retrieved 13 March 2011.

<sup>908</sup> Digital Economy Act 2010; *BT Plc and TalkTalk Telecom Group Plc v Secretary of State for Culture, Olympics, Media and Sport and others* [2012] EWCA Civ 232.

<sup>909</sup> D Bainbridge, *Legal Protection of Computer Software* (5<sup>th</sup> edn, Tottel Publishing 2008) 63.

<sup>910</sup> See: Chapter 2 - Property Matters: Virtually Justified? At 2.6. *Lockean Theory of Labour*.

<sup>911</sup> *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 at 278 per Lord Reid.

In the MMORPGs context, debate goes on as to the role users have in the creation of the gaming environment. Potentially, users make choices, and those choices contribute not just to the development of their own experience, but also to their surroundings, and by ‘surroundings’ attention is paid to the structure of the game as well as to the immediate environment of the users. If such a suggestion is meritorious, then so, too, must be the idea of labour being rewarded in some way – and perhaps the most appropriate way would be through rights-based rewards. At the very least, this would reflect the practice of users – that is in most situations not curtailed by the game developers and platform providers – of real-money trading in-game items, characters and accounts. This view of labour may differ substantially from the views of labour adopted by others; the US Supreme Court being one example. In 1991, the Court regarded the notion that it was possible for a work which required the expenditure of effort alone to attract the protection of copyright as an idea that was far from desirable.<sup>912</sup> Garlick uses this reasoning to conclude that users will not benefit from proprietary interests in in-game and in-world items due to the lack of originality in selecting from the available options when customising avatars.<sup>913</sup> However, this is only one element where users are required to input choices. There are other elements to online games where users are not required to make selective choices, but can upload original content themselves.

In the EULAs, there is no recognition of the proprietary interests of users in the majority of online games and virtual worlds – the exception being *Second Life*. Consequently, users are often prohibited not only from claiming proprietary interests, but also from benefitting from the right to sale. If such activities are prohibited in the contractual agreement, users are likely to be in breach of contract if they attempt to sell items that they have acquired through the game activities. Yet, conversely to the contractual situation, users frequently and regularly do engage in RMT.<sup>914</sup> This suggests that users not only believe that they have an entitlement to sell what is ‘theirs’ or what belongs to their game account or avatar, but also that there is a right to benefit from outputs of the effort – or ‘labour’ – which they have expended in the game.<sup>915</sup>

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<sup>912</sup> *Feist Publications v Rural Telephone Service Inc* 499 US 340 (1991); D Bainbridge, *Legal Protection of Computer Software* (5<sup>th</sup> edn, Tottel Publishing 2008) 63.

<sup>913</sup> M Garlick, ‘Player, Pirate or Conducer? A Consideration of the Rights of Online Gamers’ (2004-2005) *Yale Jou of Law & Tech* 424, 442.

<sup>914</sup> Hereafter RMT.

<sup>915</sup> M Stephens, ‘Sale of In-Game Assets: An Illustration of the Continuing Failure of Intellectual Property Law to Protect Digital Content Creators’ [2001-2002] 80 *Tex L Rev* 1513; A Adrian, ‘Who Owns the Copyright In Multi-Author Interactive Works?’ [2003] *Ent L R* 35, 36; B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA 2008) 141.

If users are replicating elements of game code which create the graphical representations of swords, characters and other in-game and in-world items, there must be proprietary implications when they transfer such items. Under the EULAs, users often have no proprietary rights, yet the game code will be replicated every time an item appears. Given that this software code is protected by copyright, users must be risking copyright infringement if they replicate the code in order to replicate items either for use or for sale. Moreover, if this analogy is expanded, it can cover graphics, screen shots, videos and even musical copyrights too. Another element of online gaming that causes intense debate, relates to items that are created through the inspiration or ideas generated from interacting with a particular game. Fan fiction, machinima, and videos are just some examples of the derivative-type works that fall squarely within the purview of copyright.<sup>916</sup>

#### 4.12. Conclusion.

More of our world is now connected; we are no longer merely citizens or users; we are now 'netizens.'<sup>917</sup> Hauben defines a netizen as someone who is a citizen of the internet, using it from home and work, contributing to the social and intellectual value of it.<sup>918</sup> Rustad summarises the development of rules and law applying to cyberspace when he details that the most recent challenges to the legal framework in 2010 and 2011 have arisen through "social-media related copyright cases."<sup>919</sup> Adrian further explores the paradoxical relationship between users and owners in social and multimedia online spaces, stating that the audience is no longer distinct from, or an observer of, the story; the audience is now part of the story, and is responsible for producing and contributing to the media it consumes.<sup>920</sup> This suggests that how we interact through online platforms – irrespective of the genre – has changed, as have our expectations of what we may be entitled to as a result of our efforts.<sup>921</sup>

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<sup>916</sup> R Dannenberg and Others, *Computer Games and Virtual Worlds: A New Frontier in Intellectual Property Law* (ABA Publishing 2010) 70; E Uribe-Jongbloed and Others, 'Authorship and Copyright in Virtual Worlds – From the Death of the Author and the Disempowerment of User to the Revival of Rights?' J V W R (forthcoming, 2013).

<sup>917</sup> Oxford Dictionaries, 'Definition of Netizen in English' available online:

<<http://oxforddictionaries.com/definition/english/netizen>> retrieved 14 May 2013.

<sup>918</sup> J Hauben, 'Further thoughts about netizens' (1 June 2010) available online at:

<[http://www.columbia.edu/~hauben/CMC/netizen\\_thoughts.html](http://www.columbia.edu/~hauben/CMC/netizen_thoughts.html)> retrieved 25 June 2012.

<sup>919</sup> M Rustad and Others, 'Copyrights in Cyberspace: A Roundup of Recent Cases' (2011) 12 J High Tech L 106, 158.

<sup>920</sup> A Adrian, 'Who Owns the Copyright In Multi-Author Interactive Works?' [2003] Ent L R 35, 36.

<sup>921</sup> B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA 2008) 141.

Whilst other jurisdictions – namely China, South Korea and the US - are readily accepting that in-game items are becoming part of our legal world, England and Wales seems unwilling to change its traditional position and offer acceptance of computer-generated works, or of rights for those who contribute to online environments after the initial phase of development. The lack of protection afforded to elements of multifaceted computer software in England & Wales suggests that the interests of gamers are shunned by legislation at the very time gamers seek protection under the provisions relating to copyright and moral rights. This is compounded by the displacement of copyright through EULAs which demonstrate imbalances and disproportion between the interests of users and those of developers.

The ethos of residence in a Virtual World is that of creativity to develop one's surroundings. It is difficult to see how the game developers can object to 'farming' and to scripting with similar arguments, especially when game developers claim that they retain all proprietary interests that arise in a particular game.<sup>922</sup> The EULA makes no distinction between players who seek to play and others who seek to develop valuable interests alongside playing. If gamers did not seek to develop their gaming skills and game accounts, arguably much of the debate about proprietary interests would not have arisen because the focus would be on farming and digital sweatshops,<sup>923</sup> rather than on the moral and conceptual difficulties associated with granting proprietary rights to gamers. Developers apply the zero-tolerance approach to 'gamers' who simply want to release their investment from a game before terminating their account. Given the scale of virtual interaction, this could be corrected by any regulatory system which is mooted. A gamer or resident should not be penalised or suffer discriminatory treatment for seeking to offload, and claim copyright, and moral rights to game items that would otherwise go unused.

England and Wales enacted the first copyright statute in the world – the Statute of Anne 1709 – which was a significant development at the time. It now seems that other jurisdictions appear to be managing the online gaming phenomenon in a different manner to that of England and Wales.

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<sup>922</sup> See: Chapter 5 - Contractual Displacement of Proprietary Issues: EULAw? At 5.4.1. *Ownership Issues*.

<sup>923</sup> *BlackSnow Interactive v Mythic Entertainment Inc*, No: 02-00112 (C.D. Calif.) [2002]; P Brown and R Raysman, 'Property Rights in Cyberspace Games and Other Novel Legal Issues in Virtual Property' *Indian Journal of Law & Information Technology* (2006) Vol 2: 87, 103; M Berry, 'The Global Dimensions of Virtual Work' *Saint Louis University Law Journal* Vol. 54: 472, 471; J Dibbell, 'Serfing the Web: Blacksnow Interactive and the World's First Virtual Sweatshop' (*Wired Magazine*, January 2003) <<http://www.juliandibbell.com/texts/blacksnow.html>> retrieved 29 July 2010; T Thompson, 'They Play Games For 10 Hours And Earn £2.80 In A 'Virtual Sweatshop'' *The Guardian* (London, 13 March 2005). <<http://www.guardian.co.uk/technology/2005/mar/13/games.theobserver>> retrieved 11 May 2010.

These other jurisdictions are offering solutions to real-time challenges, recognising the conflicting claims between users and providers of online games. South Korea is just one example of a state taking steps to implement some system of governance, developing a special team dedicated to dealing with disputes arising from online gaming.<sup>924</sup> The CDPA in England and Wales has undoubtedly played a significant role in regulating intellectual property rights to date. Traditional copyright principles can – and should – continue to be applicable to traditional media and, if managed effectively, could potentially be applicable to digital media as well.

The practical examples considered in this chapter indicate that there are difficulties in applying fragmented rules to a diverse range of behaviour, but that the contractual displacement of proprietary rights does not address the competing interests in MMORPGs and Virtual Worlds. Users pay to play, pay to develop and pay to be unable to realise their investments in the games and worlds they virtually occupy, with one powerful argument suggesting users are not game items, but valuing the time it took to develop such items.<sup>925</sup> Whilst there are a number of questions about how such interests ought to be recognised, how protection ought to be granted, and who should be capable of deciding on disputed matters, there are also other queries that concern how the legal solution may be implemented. Some suggestions have included a virtual world judicial system complete with virtual magistrates<sup>926</sup> based on our real world system and a system of virtual real estate, based on the property system in the real world.<sup>927</sup> Economic models and moral protection are also of some relevance. It would seem then that the present legal position allows recognition and protection of computer software, whilst simultaneously denying online gamers and virtual world residents claims to proprietary interests. This is behaviour that mirrors the behaviour of the game developers who seek to have the best of both; using contract law and intellectual property law to their advantage in containing illicit game item sales, yet denying any proprietary claims of users. A comprehensive solution must be forthcoming in order for this position to be satisfactorily resolved, but this will necessitate consideration of the regulatory system currently in existence.

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<sup>924</sup> BBC News, 'Chinese Gamer Sentenced to Life' (8 June 2005) <<http://news.bbc.co.uk/1/hi/4072704.stm>> retrieved 19 November 2009; U Yoon, 'A Quest for the Legal Identity of MMORPGs - From a Computer Game, Back to a Play Association' (Fall 2005) *Journal of Game Industry & Culture*, Vol. 10.

<sup>925</sup> C Yans, 'Play to Pay' *Computer Games Magazine* #167 <[http://www.cgonline.com/computer-games-magazine/article/play\\_to\\_pay](http://www.cgonline.com/computer-games-magazine/article/play_to_pay)> retrieved 16 March 2010.

<sup>926</sup> F Alemi, 'An Avatar's Day In Court: A Proposal for Obtaining Relief and Resolving Disputes in Virtual World Games' [2007] *UCLA J L & Tech* 6.

<sup>927</sup> J Fairfield, 'Anti-Social Contracts: The Governance of Virtual Worlds' (2008) 53 *McGill LJ* 427, 451.

Game developers seek to invoke intellectual property laws in their favour when the users claim, for example, copyright over characters and creations. Game developers will also seek to rely on the contractual principles contained within the EULAs to support their position in denying the players and copyright claims. The players undermined by these and other similar arguments, claim that they are entitled to proprietary interests in in-game items because they are the result of a significant investment of time,<sup>928</sup> which understandably leads to feelings of ownership and control, and leads to persuasive arguments based on entitlements and rewards for such efforts. Where users have deployed significant skill and labour in developing game items and accounts, copyright should be applicable in their favour, alongside moral rights. The enforcement of such rights is, however, a different, and problematic aspect.<sup>929</sup>

This chapter has discussed copyright through practical examples of gaming behaviour from two perspectives. Firstly, consideration was given to the copyright in games as whole products, and secondly, copyright has been considered from the perspective of users. The first consideration of copyright indicates that copyright is the protective mechanism for games as whole products, and developers rightly have the dominant proprietary interest under this construction of copyright. The second consideration of copyright, including moral rights, joint works, and in-game copyright constructions, indicates that users also have strong claims to copyright in some of the in-game items, and a compelling case for recognition of moral rights also. This is displaced by contractual arrangements but, nevertheless, when these issues have been considered through the lens of copyright, in the context of property theory, the situation for users seems significantly weighted against them, and this gives the impression of unfairness.

There are still two main issues that have to be determined. Firstly, copyright, if it is to remain the predominant legal method of protecting in-game items, it needs to apply to game worlds. It must be used realistically and pragmatically. If it is not, then nothing will be gained. Secondly, there needs to be consultation and decision making about how online game environments will be controlled and who will conduct such control.<sup>930</sup> The interrelationship between the rights paradigm and the enforceability of these rights cannot be overlooked or underestimated. These two issues must be resolved and this will form the discussion in Chapter 6.

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<sup>928</sup> Y F Lim, 'Is It Really Just A Game? Copyright and Online Role-Playing Games' [2006] *JIPLP* 1(7) 487.

<sup>929</sup> See generally: Chapter 6 - Governance Structures and the Alternatives.

<sup>930</sup> See: Chapter 6 - Governance Structures and the Alternatives. At 6.6.1. *Virtual Courts*.



The following chapter: ‘Contractual Displacement of Proprietary Interests: EULAw?’ will discuss the contractual arrangements which currently control the displacement of automatically arising proprietary interests through contractual allocations of copyright in in-game content. The research within the following chapter builds upon the theoretical justifications outlined in Chapter 2: ‘Property Matters: Virtually Justified?’ but also the discussions in Chapter 4: ‘MMORPGing & Copyright’ which have suggested that there are significant imbalances in the allocation of proprietary interests in MMORPGs and Virtual Worlds. The following Chapter will therefore examine the idea of imbalances, in the specific context of a practical examination of End User Licence Agreements. Chapter 5: ‘Contractual Displacement of Proprietary Interests: EULAw?’ will analyse a selection of End User Licence Agreements from two online games and two Virtual Worlds, before considering whether these agreements reflect theoretical imbalances, and contain unfair contractual terms through an application of the Unfair Terms in Consumer Contracts Regulations 1999.

## Chapter 5

### Contractual Displacement of Proprietary Interests – EULAw?<sup>931</sup>

#### 5.1. Introduction.

There are various proposed methods of governance for virtual spaces in the online environment, including intellectual property,<sup>932</sup> tort, criminal law<sup>933</sup> and contract law.<sup>934</sup> However, as yet, no single method has proved to be solely capable of the demands placed upon it. Many different strands of law are combined to provide a regulatory framework that best protects the environment. The dominant mechanisms are contract and copyright,<sup>935</sup> each of which is interdependent on the other. Copyright and contract work together to provide online game developers with a contractual basis<sup>936</sup> for accruing intellectual and other proprietary interests rights arising out of online games and Virtual Worlds.

Dannenberg highlights the prominence of contractual regulation in online environments by indicating that;

“In the landscape of the Virtual World, however, life is ubiquitously but not exclusively governed by contract law. Speech, conduct and existence – in fact, everything that a Virtual World [or online game] resident does or says – is supposedly constrained by a contract.”<sup>937</sup>

Despite the certainty of this statement, there is some doubt inherent in it as to whether the contract really does regulate everything that happens in an online game or Virtual World. EULAs<sup>938</sup> are relied upon by the producers of software platforms. The EULAs that are used for

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<sup>931</sup> The law relating to End User Licence Agreements, but also the law of these agreements which are often the only controlling system in online environments; A Jankowich, ‘EULAw: The Complex Web of Corporate Rule-Making in Virtual Worlds’ (2006) 8 Tul J Tech & Intell Prop 2.

<sup>932</sup> E Reuveni, ‘On Virtual Worlds: Copyright and Contract Law At the Dawn of the Virtual Age’ [2007] 82 Indiana L J 261, 264.

<sup>933</sup> O S Kerr, ‘Criminal Law in Virtual Worlds.’ [2008] University of Chicago Legal Forum, GWU Law School Public Law Research Paper No. 391. Available at SSRN: <<http://ssrn.com/abstract=1097392>>.

<sup>934</sup> J Adams, ‘Digital Age Standard Form Contracts Under Australian Law; “Wrap” Agreements, Exclusive Jurisdiction, and Binding Arbitration Clauses’ [2004] 13 Pac Rim L & Pol’y J 503.

<sup>935</sup> SABIP, ‘The Relationship between Copyright and Contract Law’ (July 2010) available online at: <<http://www.sabip.org.uk>>.

<sup>936</sup> Through for example, User Agreements, Terms of Service, Terms of Use and Codes of Conduct.

<sup>937</sup> R Dannenberg and Others, *Computer Games and Virtual Worlds: A New Frontier in Intellectual Property Law* (ABA Publishing 2010) 6.

<sup>938</sup> Hereafter EULA.

Virtual Worlds and online games are expected to do more than simply regulate the use of the software – they contain all manner of contractual provisions that are expected to perform almost as a ‘catch-all’ agreement.<sup>939</sup>

The contractual agreement does not operate in the same way as the software code. The code restricts what a user can do whereas the contract states the kind of behaviour that the user is not supposed to partake in.<sup>940</sup> Essentially, the contract has to be enforced, whereas the software code does not; activity and actions are either possible or not within the parameters of the software code. There is a difference between what a user does and what a user is permitted to do by the code.<sup>941</sup> Suzor adopts the stance that a game developer is able to build-in controls into the code,<sup>942</sup> although this premise rests on the idea that developers would be willing to do so.

The EULA is a contractual document which offers a potential user the opportunity to agree to the terms contained within - and progress to - full access of a particular Virtual World or online game. There is no potential for negotiating the terms and conditions:

“If a user does not ‘accept’ the EULA, the software or registration process will abort installation and the Virtual World will remain largely if not entirely inaccessible to that individual. Like many consumer contracts, EULAs are non-negotiable – either as a practical matter or a contractual matter.”<sup>943</sup>

There appears to be an element of choice in agreeing to the EULA. In reality, however, if a user desires interaction and involvement in a particular online environment, there really is little choice as to whether or not he accepts the contents of the EULA. These contracts are issued on a ‘take it or leave it’ basis.<sup>944</sup> This is potentially unfair but, ultimately, they are connected to a private enterprise which has seen large investments and it is up to the owners and developers how they choose to regulate and grant access to their environments. Virtual Worlds and online games rely

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<sup>939</sup> R Dannenberg and Others, *Computer Games and Virtual Worlds: A New Frontier in Intellectual Property Law* (ABA Publishing 2010) 6.

<sup>940</sup> See for example, *Second Life*’s Community Standards; available online: <<http://secondlife.com/corporate/cs.php>> retrieved 29 August 2011.

<sup>941</sup> J Grimmelmann, ‘Regulation by Software’ [2005] *Yale L J* Vol 114:1719, 1732.

<sup>942</sup> N Suzor, ‘Order Supported by Law: The Enforcement of Rules in Online Communities’ (2012) *Mercer L Rev*, Vol 63, 531.

<sup>943</sup> R Dannenberg and Others, *Computer Games and Virtual Worlds: A New Frontier in Intellectual Property Law* (ABA Publishing 2010) 9; J J Kayser, ‘The New New-World: Virtual Property and the EULA’ (2006-2007) *Loy L A Ent L Rev* 60; J T Kunze, ‘Regulating Virtual Worlds Optimally: The Model EULA’ (2008-2009) *N W J Tech & Intell Prop* 102, 104.

<sup>944</sup> F Kessler, ‘Contracts of Adhesion-Some Thoughts About Freedom of Contract’ (1943) 43 *Column L Rev* 629; E A Dauer, ‘Contracts of Adhesion in Light of the Bargain Hypothesis: An Introduction’ (1972) 5 *Akron L Rev* 1.

on contractual agreements to not only provide pay-walls for their services, but also to control user behaviour in the online environments. In addition to this, there is an expectation that the EULA will also adequately deal with disputes, and assign proprietary interests, especially in the form intellectual property, alongside controlling other behavioural elements of activity online.<sup>945</sup> Such an expectation is apparent from the manner in which MMORPGs and Virtual Worlds rely upon these agreements to provide the governance paradigms. This expectation is distinct from the expectations held by users that they have proprietary interests in in-game properties. It is this conflict of expectations which suggests there may be imbalances between the interests of the parties involved in MMORPGs and Virtual Worlds. Through the governance paradigm, the EULAs take on a status that is almost akin to codified law or a constitution.<sup>946</sup>

This chapter draws upon the theoretical considerations of property, and suggested theoretical imbalances<sup>947</sup> to focus a discussion in light of the potential contractual disproportion between the interests of users and developers. The discussion within this chapter will address the issues of proprietary interests in game property through a contractual examination. The research here will question whether these agreements fall within the wider body of contract law, and if so, whether the unfair terms regimes may apply. ‘Contractual Governance of Proprietary Interests: EULAw?’ builds upon the discussions in previous chapters to consider potential imbalances within EULA clauses in light of the Unfair Terms in Consumer Contracts Regulations 1999. This discussion will focus on the practical challenges of applying fragmented rules to distinct and diverse online environments.

The consideration of EULA clauses falls within the broad context of contract law, but does not adopt a traditional approach. The research here deals with substantive unfairness rather than procedural unfairness, the latter being the unfairness dealt with by the law.<sup>948</sup> The approach in this chapter focuses on identifying potential imbalances between the interests of users and

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<sup>945</sup> R Dannenberg and Others, *Computer Games and Virtual Worlds: A New Frontier in Intellectual Property Law* (ABA Publishing 2010) 9; J J Kayser, ‘The New New-World: Virtual Property and the EULA’ (2006-2007) *Loy L A Ent L Rev* 60; J T Kunze, ‘Regulating Virtual Worlds Optimally: The Model EULA’ (2008-2009) *N W J Tech & Intell Prop* 102, 104.

<sup>946</sup> See A Jankowich, ‘EULAw: The Complex Web of Corporate Rule-Making in Virtual Worlds’ (2006) *8 Tul J Tech & Intell Prop* 2; N Suzor, ‘The Role of the Rule of Law in Virtual Communities’ (2010) *Berkeley Technology Law Journal* 25(4) 1817.

<sup>947</sup> See: Chapter 2 - Property Matters: Virtually Justified? At 2.7. *Theory for Parity?*

<sup>948</sup> *Thames Trains Ltd v Adams* [2006] EWHC 3291 (QB) at [31].

developers. Therefore, whilst elements of freedom to contract,<sup>949</sup> unequal bargaining power<sup>950</sup> and unconscionability<sup>951</sup> are elements which provide an undercurrent to questions of imbalances between game users and developers, this work is looking in a specific context at the Unfair Terms in Consumer Contracts Regulations 1999, and focuses on the practical relevance of this in relation to the situation under EULAs. This work is concerned with the practical examples of both EULA clauses, substantive unfairness and the application of fragmented rules to specific examples of gaming activity.

## 5.2. The EULA Relationships.

End User Licence Agreements have recognisable features of paper-contracts with one difference – such an agreement is a ‘click-wrap’<sup>952</sup> contract; there is no physical signing of a document – clicking signifies your agreement to the terms contained within it. This is especially significant as users are required to read the terms and conditions prior to agreeing to it with very few EULAs being available to print.<sup>953</sup> Contract law has become the favoured control method of choice by providers.<sup>954</sup>

Contracts and licence agreements play a significant role in the regulatory framework of computer software generally, but also online games and Virtual Worlds.<sup>955</sup> The game providers and software developers have a monopoly on their creation. If users do not agree to the parameters they set, they are not allowed to use it. This might seem to reflect commercial reality yet when considering the virtual environment in which users invest and develop characters such agreements tend to reserve any interests in the creations arising from the online activity exclusively for the software developers and the game providers. The game providers tend not to be concerned with

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<sup>949</sup> L Koffman and E Macdonald, *The Law of Contract* (7th edn, OUP 2010) 4.

<sup>950</sup> See for example: *Alec Lobb Garages Ltd v Total Oil (Great Britain) Ltd* [1985] 1 All ER 303; *Boustany v Pigott* (1993) 69 P & CR 298.

<sup>951</sup> See for example: *Union Eagle Ltd v Golden Achievement Ltd* [1997] 2 All ER 215.

<sup>952</sup> B Goodman, ‘Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract’ (1999-2000) 21 Cardozo L Rev 319, 322.

<sup>953</sup> M Kisielowska-Lipman, ‘Ups and down(load)s: Consumer Experiences of Buying Digital Goods and Services Online’ Consumer Focus, December 2010.

<sup>954</sup> See: Preamble to the *World of Warcraft* Terms of Use Agreement (Blizzard Entertainment, 9 December 2010) available online at <[http://eu.blizzard.com/en-gb/company/legal/wow\\_tou.html](http://eu.blizzard.com/en-gb/company/legal/wow_tou.html)> retrieved 29 August 2011.

<sup>955</sup> A Gomulkiewicz, W Robert and M L Williamson, ‘Brief Defense of Mass Market Software Licence Agreements’ (1996) 22 Rutgers Computer & Tech L J 335.

bargaining position or principles of fairness.<sup>956</sup> As such, many users are potentially contractually deprived of valuable proprietary interests in in-game items.

The EULAs of online games and Virtual Worlds all differ from one another and have different implications for the end users of the interactive platforms. Despite this, each game and world has a EULA<sup>957</sup> and each user is required to agree to the contents of the EULA of a particular world or game. Without agreeing to the contents of the EULA, a user will be unable to access the game or world completely.<sup>958</sup> Consequently, this makes these agreements adhesion contracts<sup>959</sup> – they are contractual agreements that are non-negotiable. Even if he or she seeks to enter a particular game or world and agrees to the majority of the contents of the EULA, if he or she seeks to alter one of the terms or clauses, this will effectively amount to non-agreement of the entire agreement. As a result, if a user objects to a single clause in the EULA, he or she is unable to negotiate with the developer or the platform provider to change the term.

EULAs are contracts between each user and the developer. Every user who seeks to create a virtual presence and game account needs to agree to the EULA with the developer, and the developer alone. The contracts are one-to-one contracts rather than one-to-many contracts. The EULAs are not contracts that are between User A, all other users and the developer; they are only between User A and the developer. Users B, C, D and so on all have their own contracts with the developer or platform provider. Despite this however, many EULAs or similar agreements will contain clauses which grant either the developer a licence to sub-licence or a clause granting other users a licence to use content that has been uploaded into the game or world.<sup>960</sup>

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<sup>956</sup> J J Kayser, 'The New New-World: Virtual Property and the EULA' (2006-2007) *Loy L A Ent L Rev* 60, 63.

<sup>957</sup> Or a similar contractual agreement known as a Terms of Use or Terms of Service Agreement.

<sup>958</sup> R Dannenberg and Others, *Computer Games and Virtual Worlds: A New Frontier in Intellectual Property Law* (ABA Publishing 2010) 9.

<sup>959</sup> B Goodman, 'Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract' (1999-2000) 21 *Cardozo L Rev* 319, 320.

<sup>960</sup> See for example: *Second Life Terms of Service*, Clause 7 (6 October 2010) available online: <<http://secondlife.com/corporate/tos.php>> retrieved 14 October 2010.

### 5.2.1. *Hernandez v IGE (2007).*

The relationship between users and other users as governed by the End User Licence Agreements has been the subject of a major legal dispute, with contractual elements at the centre of the disagreement. The dispute in question concerned the online MMORPG,<sup>961</sup> *World of Warcraft*. A user, *Hernandez* sought to rely upon the contractual agreements in a dispute with another user.<sup>962</sup> The other user was Internet Gaming Entertainment Ltd, a company which operates an online exchange and market place solely for online gaming items and currency, much like eBay but for a more specific range of goods. In this way, users were able to list for sale their unwanted and unused game items. Other users were then able to benefit from them by bidding in auction for these items.

The dispute that arose between *Hernandez* and *IGE* concerned ‘gold farming.’ Gold farming is the term given to a specific type of activity in Virtual Worlds and online games.<sup>963</sup> *IGE* effectively employed people, usually in third world countries, to work for up to 14 hours per day carrying out repetitive tasks in games such as *World of Warcraft* to generate virtual currency or gold. This gold would then be sold on the online exchange website for real money. *Hernandez*’s dispute concerned the impact of *IGE*’s gold farming operation on the gaming experience of other users. *Hernandez* claimed that *IGE* caused irreparable harm through “illicit marketing and sales.”<sup>964</sup> In addition to this, *Hernandez* also claimed that *IGE* was in breach of contract<sup>965</sup> because *IGE* employees, like *Hernandez* himself and all other users were required to agree to the terms and conditions put forward by Blizzard Entertainment<sup>966</sup> in their EULA and their Terms of Use Agreement and by encouraging and facilitating employees to engage in Real Money Trading (RMT), *IGE* was breaching the terms of the EULA. The *World of Warcraft* Terms of Use Agreement expressly states:

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<sup>961</sup> Massively Multitplayer Online Role Playing Game.

<sup>962</sup> *Hernandez v Internet Gaming Entertainment*, U.S. Dist. Ct. Southern District of Florida, Case No: 07-CIV-21403-COHN/SELTZER [2007]. Hereafter *Hernandez*.

<sup>963</sup> See for example; D Rosenberg, “Gold Farming” Good for Multiplayer Games?’ (*CNETNews*, 2 October 2008) <[http://news.cnet.com/8301-13846\\_3-10056262-62.html](http://news.cnet.com/8301-13846_3-10056262-62.html)> retrieved 23 June 2013.

<sup>964</sup> *Hernandez v Internet Gaming Entertainment*, U.S. Dist. Ct. Southern District of Florida, Case No:07-CIV-21403-COHN/SELTZER [2007] [31].

<sup>965</sup> *Hernandez v Internet Gaming Entertainment*, U.S. Dist. Ct. Southern District of Florida, Case No:07-CIV-21403-COHN/SELTZER [2007] [47].

<sup>966</sup> The creators of *World of Warcraft*.

“Ownership / Selling of the Account or Virtual Items.

Blizzard does not recognize the transfer of *World of Warcraft* Accounts or BNET Accounts (each an “Account”). You may not purchase, sell, gift or trade any Account, or offer to purchase, sell, gift or trade any Account, and any such attempt shall be null and void. Blizzard owns, has licenced, or otherwise has rights to all of the content that appears in the Game. You agree that you have no right or title in or to any such content, including without limitation the virtual goods or currency appearing or originating in the Game, or any other attributes associated with any Account. Blizzard does not recognize any purported transfers of virtual property executed outside of the Game, or the purported sale, gift or trade in the “real world” of anything that appears or originates in the Game. Accordingly, you may not sell in-game items or currency for “real” money, or exchange those items or currency for value outside of the Game.”<sup>967</sup>

*Hernandez’s* suit states that he is not a party to the agreement between *IGE* and Blizzard Entertainment, but he seeks to rely on his rights as a third party beneficiary. It seems that the contractual relationship exists only between the user and between the platform provider, rather than between a user and all other users as well as the developer or provider, hence the third party claim made by *Hernandez*. Under the Terms of Use, he was not considered as a party to the contract and therefore had to rely on his rights as a third party.

Duranske<sup>968</sup> suggests that the EULAs govern relationships between users because in most instances the EULAs will contain clauses that relate to acceptable behaviour. Such clauses, whilst seeking to regulate and control activity, do not necessarily mean that there is a contractual relationship between User A and all other users. Instead, given that contracts state who the parties are and all other users are not listed on every contract, there is more likely to be an implied duty of care between users than a contractual clause. The terms relating to behaviour generally relate to conduct rather than to specific activity, reinforcing the idea that a contract is not between User A and all other users but instead incorporates a general clause. It also implies that contract is not the sole regulatory mechanism, and that in tortious cases, a duty of care is necessary. The incorporation of such a general clause relating to user behaviour and activity will assist in the governance of online spaces because if a user breaches the acceptable standards of behaviour, rather than seeking to punish the user in the virtual space, the platform can revoke a user’s access

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<sup>967</sup> *World of Warcraft* EULA, Clause 8 (9 December 2010) available online at: <[http://eu.blizzard.com/en-gb/company/legal/wow\\_eula.html](http://eu.blizzard.com/en-gb/company/legal/wow_eula.html)> retrieved 29 August 2011. Hereafter WoW EULA.

<sup>968</sup> B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA Publishing 2008) 117.



rights on the basis of breach of contract. However, by doing so, Virtual Worlds and MMORPGs are acting against their economic interests and therefore there seems to be a conflict of interest when dealing with breaches and the enforcement of such provisions more generally.

If there is no contractual agreement, there is no contractual relationship, which emphasises the importance of these contracts where proprietary interests are concerned. This is especially the situation given that contractual rights must be enforced against parties to the agreement rather than against the world at large, which is the situation for enforcing proprietary interests.<sup>969</sup>

### 5.3. EULAs and ToS<sup>970</sup> – General Position.

Virtual World and MMORPG providers, as a general point, usually refuse to acknowledge that users may have any proprietary interests in in-game items because users do not develop such items or environments; such actions are the preserve of the developers themselves. The exception to this general statement is *Second Life*, which from 2003 onwards<sup>971</sup> has stated that the users are the owners of the items generated in the world itself.<sup>972</sup> This, as with most contractual clauses is of course limited.<sup>973</sup>

Despite denials of proprietary interests, and even of property in in-game items existing in Virtual Worlds, users claim otherwise and academics still engage in significant debate on this issue.<sup>974</sup> There has, to date, been no such comprehensive consideration at a judicial level, although US courts have indicated they are willing to examine clauses of EULAs.<sup>975</sup> No court decision has been

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<sup>969</sup> See: Chapter 2 - Property Matters: Virtually Justified? At 2.2. 'Property.'

<sup>970</sup> Terms of Service.

<sup>971</sup> B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA Publishing 2008) 140; Linden Lab Press Release, 'Second Life Residents to Own Digital Creations' (14 November 2003) available online: <[http://lindenlab.com/press/releases/03\\_11\\_14](http://lindenlab.com/press/releases/03_11_14)> retrieved 29 August 2011.

<sup>972</sup> *Second Life* Terms of Service Agreement Clause 7.1. (15 December 2010) Available online: <<http://secondlife.com/corporate/tos.php>> retrieved 29 August 2011. Hereafter *Second Life Terms of Service*.

<sup>973</sup> *Second Life Terms of Service*, Clause 7.1.

<sup>974</sup> See for example; D P Sheldon, 'Claiming Ownership But Getting Owned: Contractual Limitations on Asserting Property Interests in Virtual Goods' (2006-2007) 54 UCLA L Rev 751; K Hunt, 'This Land Is Not Your Land: *Second Life*, CopyBot, and the Looming Question of Virtual Property Rights' (2007-2008) 9 Tex L Rev Ent & Sports L 141; K E Deenihan, 'Leave Those Orcs Alone: Property Rights in Virtual Worlds' (26 March 2008) available at: SSRN<<http://ssrn.com/abstract=111340>>.

<sup>975</sup> *Bragg v Linden Research Inc.* (487 F.Supp 2d 593 E.D. Penn) [2007].

reached on the proprietary interests which may subsist in game items, although litigation has resulted in reinstated in-game items and game accounts.<sup>976</sup>

Developers are keen to retain all proprietary interests in both the game software and in-game items, whilst simultaneously denying users' claims. They deny the existence of such things yet explicitly state them to be extant in their EULA's and Terms of Service, as long as it suits their interests to do so. One example of this contradictory position can be found with *Entropia Universe's* EULA. Users are not entitled to claim proprietary interests, which are stated not to exist in virtual environments. Yet the EULA states differently:

"Virtual items are fictional in-world graphical objects with a predefined set of parameters in *Entropia Universe* and will often have names similar or identical to corresponding physical categories such as "people", "real estate", "possessions", "currency", "cloths" and the names of specific items in those categories such as "house", "rifle", "tools", "armor", "coat", "money" etc. ("Virtual Items"). Despite the similarity in terminology, all Virtual Items, including virtual currency, are part of the *Entropia Universe* System and/or features of the *Entropia Universe*, and MindArk and/or respective Mindark's Planet Partner(s) retains all rights, title, and interest in all parts including, but not limited to Avatars, Skills and Virtual Items. These retained rights include, without limitation, patent, copyright, trademark, trade secret and other proprietary rights throughout the world. Notwithstanding any other language or context to the contrary, as used in this EULA and/or in the *Entropia Universe* in the context of Virtual Items, You expressly acknowledge that all terms like "exchange of", "trade with", "purchase of", "sale of" or "use of" Virtual Items, and all similar terms in context of transactions with Virtual Items, refers to the licenced right to use a certain feature of the *Entropia Universe* or the *Entropia Universe* System in accordance with the terms and conditions of this EULA."<sup>977</sup>

This EULA clause mentions real estate, game items and possessions. Given that these aspects are mentioned in a binding contractual document, a user should be able to rely on it to infer that interests in in-game items do in fact subsist in virtual environments. Furthermore, to complete this inference, when interpreting the meaning of the clause in the *Entropia Universe* EULA,<sup>978</sup> the words ought to be given their ordinary and natural meaning,<sup>979</sup> such as the reasonable man would understand them. A similar idea is raised by Duranske in relation to what real world users of

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<sup>976</sup> *Bragg v Linden Research Inc.* (487 F.Supp 2d 593 E.D. Penn) [2007].

<sup>977</sup> *Entropia Universe* EULA, Clause 4.1 (MindArk, 5 May 2011) available online at: <<http://legal.entropiauniverse.com/legal/eula.xml>> retrieved 29 August 2011.

<sup>978</sup> *Entropia Universe* EULA, Clause 4.1 (MindArk, 5 May 2011) available online at: <<http://legal.entropiauniverse.com/legal/eula.xml>> retrieved 29 August 2011.

<sup>979</sup> *Fisher v Bell* [1961] 1 QB 394; *Duport Steel v Sirs* [1980] 1 All ER 529.

Virtual Worlds expect the implications of their activity in Virtual Worlds to be.<sup>980</sup> The questions that ought to be asked when determining the meaning of the clause are; firstly, did the user reasonably expect that real world implications meant he was the owner of the in-game land and in-game items in the virtual environment? And secondly, did he expect to benefit from all of the proprietary interests which were associated with the ownership of such in-game land and in-game items that he believed he owned?<sup>981</sup>

More generally, these EULAs often state which other areas of law apply to the given online space, often stating that intellectual property rights exist but are retained for the developers rather than for the users. Many agreements also contain standard exclusion clauses, and clauses that restrict or – in extreme cases – expressly state that users willingly surrender their rights to sue the developers. In addition to this, without exception, each EULA or Terms of Use Agreement contains express clauses that specifically limit the liability of the developer or platform provider. At the same time, these agreements often impose binding dispute resolution procedures and require users to give licences to other users and developers, and indemnities to the developers.

These agreements are non-negotiable, and because of that, often do not provide favourable – or arguably reasonable – terms to users. Despite the fact that very few users read all of the terms and conditions,<sup>982</sup> they are bound by these agreements and their clauses. Often such clauses displace automatically arising property rights. Moreover, the agreements exploit the differences in bargaining power to their utmost advantage, always at the expense of the user.

Both Fairfield<sup>983</sup> and Duranske<sup>984</sup> point out that the developers and game providers attempt to control productivity way beyond the traditionally accepted boundaries. For example, Duranske draws an analogy with crayons, suggesting that if online game providers claim that users do not own their in-game creations, it is similar to crayon producers claiming ownership over everything

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<sup>980</sup> B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA Publishing 2008) 76.

<sup>981</sup> B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA Publishing 2008) 76; *Office of Fair Trading v Foxtons* [2009] EWHC 1681 at 9.

<sup>982</sup> OUT-LAW News, 'Nobody Reads Terms and Conditions: Its Official' (19 April 2010) <<http://www.out-law.com/page-10929>> retrieved 20 April 2010; Y Bakos and Others, 'Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts' (October 6, 2009). CELS 2009 4th Annual Conference on Empirical Legal Studies Paper; NYU Law and Economics Research Paper No. 09-40. Available at SSRN: <<http://ssrn.com/abstract=1443256>>.

<sup>983</sup> J Fairfield, 'Anti-Social Contracts: The Contractual Governance of Virtual Worlds' (2008) 53 McGill LJ 427, 437.

<sup>984</sup> B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA Publishing 2008) 140, 141.

drawn by those who purchased the crayons.<sup>985</sup> The use of EULAs as form of central regulation has allowed platform providers to take advantage of the uncertainty and set their own boundaries according to what suits them at particular times in their creative development. Fairfield comments that, “Virtual World creators attempted to eliminate these emergent private – property interests through contractual means.”<sup>986</sup> In this way, developers have sought to limit the extent and impact of real world regulation in Virtual Worlds, moulding the regulation to suit their interests rather than to provide a system of governance.

In some games and worlds, there are separate Terms of Use Agreements that users are required to agree to. In *World of Warcraft* for example, there are separate EULAs and Terms of Use Agreements. This issue was the subject of litigation in the case of *MDY v Blizzard*.<sup>987</sup> In *MDY*, the dispute concerned the use of a piece of software code known as a ‘bot’ which could be used to perform repeated and menial tasks. *Blizzard Entertainment* tried to argue that the use of such a piece of code was a contravention of the Terms of Use, and could therefore also be a breach of copyright, as outlined in the EULA. This argument was not successful in this instance due to the lack of reference in each agreement to the provisions of the others. The arrangement of separate documents, in which each claims to bind the user to all other documents and policies was not the central issue in this case, but was closely related to the question of copyright infringement. It is, however, possible that a collateral contract between users could be found, on the basis of a *Clarke v Dunraven*<sup>988</sup> style agreement, and this is something that *Hernandez*<sup>989</sup> attempted to argue in his suit concerning gold farming in *World of Warcraft*.

#### 5.4. EULA Case Studies.

In order to consider the proprietary interests and claims of users, and the potential imbalances in online games and Virtual Worlds, two MMORPGs and two Virtual Worlds have been selected as case study examples. The MMORPGs which will be examined in detail below are: *EverQuest II*

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<sup>985</sup> See: Chapter 2 - Property Matters: Virtually Justified? At 2.2. ‘Property.’

<sup>986</sup> J Fairfield, ‘Anti-Social Contracts: The Contractual Governance of Virtual Worlds’ (2008) 53 McGill LJ 427, 437.

<sup>987</sup> *MDY Indus., LLC v. Blizzard Entertainment, Inc.*, 2010 WL 5141269, 97 U.S.P.Q.2d (BNA) 1001 (9th Cir. Dec. 14, 2010). Hereafter *MDY*.

<sup>988</sup> *Clarke v Earl of Dunraven* [1897] AC 59. Hereafter *Satanita*.

<sup>989</sup> *Hernandez v Internet Gaming Entertainment*, U.S. Dist. Ct. Southern District of Florida, Case No: 07-CIV-21403-COHN/SELTZER [2007].

and *World of Warcraft*, selected because they are two of the largest and most popular online games, but also because *World of Warcraft* has attracted various litigation in relation to proprietary elements. The Virtual Worlds which will be examined include: *Habbo Hotel* (UK) and *Second Life*. *Habbo* was selected because it operates through the idea of collecting items of virtual furniture, whereas *Second Life* was chosen because it is the largest, and was one of the founding Virtual Worlds, and it is the only online massively multiplayer environment that claims users will retain any and all of their proprietary interests.

The case study approach adopted in relation to the four selected environments will allow a selection of contractual clauses to be considered. This will provide a clear overview of the general trend towards contractual allocation of proprietary interests. This evaluation will also demonstrate the dominant balance of power and the potential curtailing of property interests through unilateral contractual assignment. The clauses to be considered fall within the following categories: ownership rights to virtual goods; user generated content rights / real-money trading; dispute resolution; applicable law. The latter category – clauses dealing with applicable law – is of significance when assessing whether terms are binding or not, especially for users who are contracting with organisations from different countries.

(i) *Second Life*.

*Second Life* is the widest known of the Virtual Worlds. It has also attracted a significant level of criticism and attention due to its<sup>990</sup> policy on proprietary interests, especially intellectual property. Some of the first litigation relating to online gaming concerned *Second Life*. Moreover, the trading of in-game items in *Second Life* seems to be more prosperous and rewarding than in other virtual environments, with reports appearing of virtual millionaires, such as Anshe Cheung.<sup>991</sup> Litigation has also been raised in relation to various aspects of copyright arising in *Second Life* items, including virtual beds<sup>992</sup> and even avatar hairstyles.<sup>993</sup> Nevertheless, the Terms of Service Agreement is still worthy of some significant evaluation.

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<sup>990</sup> Linden Lab Press Release, 'Second Life Residents to Own Digital Creations' (14 November 2003) available online: <[http://lindenlab.com/press/releases/03\\_11\\_14](http://lindenlab.com/press/releases/03_11_14)> retrieved 29 August 2011.

<sup>991</sup> Anshe Chung Studios, 'Anshe Chung Becomes First Virtual World Millionaire' (ACS Press Release, 26 November 2006), available online at: <[http://www.anshechung.com/include/press/press\\_release251106.html](http://www.anshechung.com/include/press/press_release251106.html)> retrieved 29 August 2011.

<sup>992</sup> *Eros, LLC, v. John Doe*, US Dist. Ct. Middle District of Florida, Case No: 8:07-cv-1158-T-24TG [2007].

<sup>993</sup> Y Karniel, 'Copyright in *Second Life*,' [2010] 20 Alb L J Sci & Tech 433.

*Second Life*'s Terms of Service Agreement is longer than most other Virtual World or online game EULAs. In addition to this, the Agreement specifically lists a further 17 policies and agreements relating to additional services and aspects of the *Second Life* experience that users may interact with.<sup>994</sup> These additional policies include agreements dealing with amongst other things, banking<sup>995</sup> and community standards.<sup>996</sup> The number of additional documents that users are agreeing to by assenting to the Terms of Service Agreement is greater than the number of clauses within the Terms of Service Agreement itself. This serves to illustrate the depth of interactive experience users can enjoy in the world of *Second Life*, but also fuels discussion surrounding the enforceability and effectiveness of such contractual terms.

(ii) *Habbo*.

*Habbo Hotel* (UK) is a lesser known Virtual World. Whilst it is admittedly directed at a slightly different audience than *Second Life* or the online games, it is a useful case study. This is especially the case because there have been a number of criminal trials and convictions for offences relating to *Habbo* game accounts and items in several European states.<sup>997</sup> These trials highlight the problematic nature of proprietary interests such as copyright in online games and Virtual Worlds.

(iii) *World of Warcraft*.

Several aspects of the *World of Warcraft* experience have been the subject of litigation.<sup>998</sup> To participate in *World of Warcraft*, each user needs his or her own game account. In addition to this, each user also needs to pay for the software to run the game and pay a monthly subscription to have continued access. If a user wishes to purchase additional in-game items, he or she will need to pay for this separately. *World of Warcraft* relies upon two contractual agreements; the EULA and the Terms of Use.

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<sup>994</sup> *Second Life* Terms of Service, Clause 14.

<sup>995</sup> *Second Life* Terms of Service, Clause 14; Banking Policy.

<sup>996</sup> *Second Life* Community Standards.

<sup>997</sup> M Boonk and A R Lodder, 'Virtual Worlds: Yet Another Challenge to Intellectual Property Law.' (Global IP Summit Magazine), 2007. Available at: <SSRN: <http://ssrn.com/abstract=1079970>>.

<sup>998</sup> *Hernandez v Internet Gaming Entertainment*, U.S. Dist. Ct. Southern District of Florida, Case No:07-CIV-21403-COHN/SELTZER [2007]; *MDY Indus., LLC v. Blizzard Entertainment, Inc.*, 2010 WL 5141269, 97 U.S.P.Q.2d (BNA) 1001 (9th Cir. Dec. 14, 2010).

(iv) *EverQuest II*.

*EverQuest II* is also a MMORPG. It is run by Sony Entertainment and has developed (in recognition, and acceptance of user trade of game items) the first in-game item exchange platform; StationExchange.<sup>999</sup> *EverQuest II* relies upon two contractual documents to regulate its users and their activities online. The first is the *EverQuest II* End User Licence Agreement. The second is the *EverQuest II* Rules of Conduct which contains 'Play Nice Policies – Activity within *EverQuest II*.'<sup>1000</sup>

#### 5.4.1. Ownership Issues.

##### 5.4.1.1. Virtual Worlds – *Second Life*.

The Terms of Service Agreement contains detailed provisions relating to intellectual property interests arising in items within the *Second Life* environment.<sup>1001</sup> It also makes explicit reference to a separate Intellectual Property Policy implemented by Linden Research.<sup>1002</sup> The IPP adds very little to the provisions contained within the Terms of Service Agreement however, and serves to outline the steps that will be taken by Linden Research if there is a sufficient legal notice issued to them in relation to intellectual property infringement.<sup>1003</sup> The provisions contained within the Terms of Service Agreement are far more detailed and deal with a range of issues, including licensing as well as ownership.

Linden Research grants users the intellectual property rights in content which they generate and upload into *Second Life*.<sup>1004</sup> This is particularly important because in *Second Life*, users are encouraged to create their own items, properties and surroundings. They are also encouraged to

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<sup>999</sup> Sony Entertainment's Station Exchange; available online at:

<<http://stationexchange.station.sony.com/livegamer.vm>> retrieved 20 August 2011.

<sup>1000</sup> *EverQuest II* Rules of Conduct, (SOE, 1 July 2011) available online at:

<[https://help.station.sony.com/app/answers/detail/a\\_id/16213](https://help.station.sony.com/app/answers/detail/a_id/16213)> retrieved 29 August 2011. Hereafter *EQ II*.

<sup>1001</sup> *Second Life* Terms of Service, Clause 7.

<sup>1002</sup> *Second Life* Intellectual Property Policy, available online at:

<[http://wiki.secondlife.com/wiki/Linden\\_Lab\\_Official:Intellectual\\_Property](http://wiki.secondlife.com/wiki/Linden_Lab_Official:Intellectual_Property)> retrieved 20 August 2011. Hereafter IPP.

<sup>1003</sup> *Second Life* IPP, Section 3, 'Copyrighted Material.'

<sup>1004</sup> The Terms of Service stating, 'You retain any and all Intellectual Property Rights in Content you submit to the Service.' *Second Life* Terms of Service, Clause 7 (6 October 2010) available online:

<<http://secondlife.com/corporate/tos.php>> retrieved 14 October 2010.

write their own pieces of program code and upload material into the *Second Life* environment.<sup>1005</sup> Consequently, the *Second Life* approach to user generated content seems to reflect Locke's Labour Theory in that users are entitled to rewards for their labours, and in *Second Life*, this consists of limited intellectual property rights.<sup>1006</sup>

The residents of *Second Life* are entitled to all of the rights they would already hold under the relevant and applicable law (which is dependent on the jurisdiction<sup>1007</sup> of the user) only in so far as they do not infringe or affect any underlying rights in the *Second Life* service.<sup>1008</sup> Furthermore, by submitting and uploading user generated content, users grant indemnities and warranties to Linden Labs that limit and remove their liabilities.<sup>1009</sup> In addition to the limits and liabilities, users also grant several licences to various parties to use the content as part of the *Second Life* experience.<sup>1010</sup>

By uploading user generated content, users are granting Linden Labs a non-exclusive, worldwide, sub - licensable and transferable licence to do whatever they like to the Content.<sup>1011</sup> This generous grant of a licence is limited in the first instance to uses of the content which promote the *Second Life* service.<sup>1012</sup> However, subsequent clauses also grant licences to access and use this content to all other users in publicly accessible areas.<sup>1013</sup> It is, therefore, possible for users to generate

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<sup>1005</sup> Linden Lab, 'Scripting Object Behaviour' (*Second Life Knowledge Base*, 24 February 2011), available online at: <<http://community.secondlife.com/t5/English-Knowledge-Base/Scripting-object-behavior/ta-p/700139>> retrieved 29 August 2011.

<sup>1006</sup> *Second Life Terms of Service Agreement*, Clause 7.1.

<sup>1007</sup> The detailed discussion of jurisdictional issues is outside of the scope of this discussion. But see for example: L Collins and Others, *Dicey, Morris, and Collins on the Conflict of Laws*. (15<sup>th</sup> edn, Sweet & Maxwell 2012); U Kohl, *Jurisdiction and the Internet – Regulatory Competence over Online Activity* (Cambridge University Press 2007); A Cabasso, 'Piercing Pennoyer with the Sword of a Thousand Truths: Jurisdictional Issues in the Virtual World' (2011-2012) 22 *Fordham Intell Prop Media & Ent LJ* 383; J T Kunze, 'Regulating Virtual Worlds Optimally: The Model EULA' (2008-2009) *N W J Tech & Intell Prop* 102; B J Gilbert, 'Getting to Conscionable: Negotiating Virtual Worlds' End User Licence Agreements without Getting Externally Regulated' (2009) available at: <[http://works.bepress.com/brendan\\_gilbert/1](http://works.bepress.com/brendan_gilbert/1)> retrieved 16 February 2013; D R Johnson and D G Post, 'Law and Borders – The Rise of Law in Cyberspace' (1996) 48 *Stan L Rev* 1367; T Schulz, 'Carving Up the Internet: Legal Orders and the Public / Private International Law Interface' (2008) *EJIL Vol.* 19(4) 799; J Goldsmith and T Wu, *Who Controls the Internet?* (OUP 2008); J Goldsmith, 'Against Cyberanarchy' (1998) 65 *U Chi L Rev* 119; J Reidenberg, *Technology and Internet Jurisdiction*; (2005) 153 *U Pa L Rev* 1951; C Reed, *Making Laws for Cyberspace*, (OUP, 2012); C Marsden, *Net Neutrality: Towards a Co-Regulatory Solution* (Bloomsbury Academic 2010); J Goldsmith and T Wu, *Who Controls the Internet?* (OUP 2008); Y F Lim, *Cyberspace Law: Commentaries and Materials* (2<sup>nd</sup> edn, OUP 2007).

<sup>1008</sup> *Second Life Terms of Service Agreement*, Clause 7.1.

<sup>1009</sup> *Second Life Terms of Service Agreement*, Clause 7.1.

<sup>1010</sup> *Second Life Terms of Service Agreement*, Clauses 7.2 to 7.5 inclusive.

<sup>1011</sup> *Second Life Terms of Service Agreement*, Clause 7.2.

<sup>1012</sup> *Second Life Terms of Service Agreement*, Clause 7.2.

<sup>1013</sup> *Second Life Terms of Service Agreement*, Clause 7.3.



materials and content, upload it into *Second Life*, grant a generous licence to Linden Labs and keep the content limited by setting restrictions on access to the areas containing the content. In such instances, users are able to restrict who can access the content,<sup>1014</sup> and can theoretically limit the potential infringing activities that may involve their content. However, Linden Labs is still able to use the content as it sees fit because the licence granted to it by the uploading user is far wider and allows for far more purposes than the licence granted to other users.<sup>1015</sup> The licence granted to other users is a licence only for use of material in publicly accessible areas.<sup>1016</sup> Therefore, if an area is not publicly accessible and a user gains unauthorized access to it, he or she will be in breach of intellectual property rights and the Terms of Service Agreement by not having a licence to use the content in the restricted area. Unauthorised accessing of restricted areas – such as land auction sites – can be used as a justification for terminating a user's access to his or her account and property, as happened in the case of *Bragg v Linden Research Inc.*<sup>1017</sup>

The Terms of Service Agreement also sets out the rights accrued by users who acquire a licence to use content.<sup>1018</sup> The Agreement explicitly states that such a licence does not grant users any ownership over copies of any content that is present in *Second Life*. It also states that buying and selling in this context means the grant of a licence to use rather than a purchase and transfer of property rights.<sup>1019</sup> Uploading residents of *Second Life* also permit other users a licence to use snapshots or machinima<sup>1020</sup> content. Again this provision is limited to material and content that is made available in publicly accessible areas.<sup>1021</sup> The Agreement also sets out that it is the responsibility of the uploading party to ensure that they set the relevant restrictions on accessibility if they do not want their content and material to be available to the population of *Second Life*.<sup>1022</sup> Again, this provides residents with the potential to limit the uses of their content. This is something which is not present in other Virtual Worlds or online games, and adds a degree of uniqueness to the *Second Life* experience.

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<sup>1014</sup> *Second Life* Terms of Service Agreement, Clause 7.3.

<sup>1015</sup> *Second Life* Terms of Service Agreement, Clause 7.2.

<sup>1016</sup> *Second Life* Terms of Service Agreement, Clause 7.3.

<sup>1017</sup> *Bragg v Linden Research Inc.* (487 F.Supp 2d 593 E.D. Penn) [2007].

<sup>1018</sup> *Second Life* Terms of Service Agreement, Clause 7.3.

<sup>1019</sup> *Second Life* Terms of Service Agreement, Clause 7.3.

<sup>1020</sup> See Glossary.

<sup>1021</sup> *Second Life* Terms of Service Agreement, Clause 7.4.

<sup>1022</sup> *Second Life* Terms of Service Agreement, Clause 7.3; 7.4.

Further provisions relate to deleting material that a user has uploaded. If a user seeks to delete material in his or her account, he or she is entitled to do so.<sup>1023</sup> Any licences associated with that material are terminated with immediate effect. This does not apply to copies of the material that may have been transferred to other users.<sup>1024</sup> The uploading user therefore still has a licence with the users who have acquired authorized copies of the content. The licences that have been granted to Linden Labs also survive the deletion.<sup>1025</sup> Uploading users can therefore control their content and material to a limited extent. This can be further restricted if a user does not make content available in public areas.

Despite the grant of intellectual property rights to users in relation to their user generated content, the provisions relating to the remaining intellectual property rights follow the same standard form as in other online games and Virtual Worlds with one exception. Linden Labs claims the ownership of all intellectual property rights in and to the *Second Life* service apart from in relation to user generated content.<sup>1026</sup> This is a significant difference. The intellectual property rights that Linden Labs claims relates to material it has created and therefore the division in ownership and intellectual property rights seems to reflect the Labour Theory. Along with the ownership claims, Linden Labs grants users a limited licence to access and use the *Second Life*.<sup>1027</sup> In this respect there are two different types of licence that users are engaged with in relation to content and material.<sup>1028</sup> Firstly, the User Content licence relates to anything that is created and uploaded into the *Second Life* environment. Secondly, users are bound to comply with the Linden In-World Content Licence.<sup>1029</sup> The two licences reflect the different provisions for different ownership of content that comprises *Second Life*. They also adequately distinguish the associated rights of the parties involved in *Second Life*.

The *Second Life* Terms of Service contains provisions relating to the Linden Dollar<sup>1030</sup> – or virtual currency for use in *Second Life* - and Virtual Land.<sup>1031</sup> The Terms of Service Agreement does not

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<sup>1023</sup> *Second Life* Terms of Service Agreement, Clause 7.5.

<sup>1024</sup> *Second Life* Terms of Service Agreement, Clause 7.5.

<sup>1025</sup> *Second Life* Terms of Service Agreement, Clause 7.5.

<sup>1026</sup> *Second Life* Terms of Service Agreement, Clause 7.6.

<sup>1027</sup> *Second Life* Terms of Service Agreement, Clause 7.7.

<sup>1028</sup> Users can therefore be considered as creators in *Second Life*; E Uribe-Jongbloed and Others, 'Authorship and Copyright in Virtual Worlds – From the Death of the Author and the Disempowerment of User to the Revival of Rights?' J V W R (forthcoming, 2013).

<sup>1029</sup> *Second Life* Terms of Service Agreement, Clause 7.7.

<sup>1030</sup> *Second Life* Terms of Service Agreement, Clause 5.1.

<sup>1031</sup> *Second Life* Terms of Service Agreement, Clause 6.

prohibit the trade of these items.<sup>1032</sup> In fact, the Terms of Service set out the ways in which currency can be traded, and where this can be done.<sup>1033</sup> This again, is a contrast to other games and Virtual Worlds that tend to adopt the position whereby any trade is expressly prohibited and could result in account termination.<sup>1034</sup>

The Terms of Service stipulates that the Linden Dollars and the Virtual Land are tokens<sup>1035</sup> and graphical representations respectively<sup>1036</sup> and are not redeemable for real currency from Linden Labs. The Terms of Service Agreement expressly states that the terms ‘buy’ and ‘sell’ refer to licensing arrangements and therefore no property or intellectual property rights are attached to the in-game dollars or in-game land.<sup>1037</sup> Moreover, the agreement expressly states that users cannot transfer or assign their account, rights or obligations.<sup>1038</sup>

Consequently, the differences between *Second Life* land and in-game items, and their respective licensing agreements suggest that if a user purchases in-game land, he or she does not own it, but merely has a right to use a graphical representation. This is, however, a market driven phenomenon. All users are granted a general licence to use or access material. If users want to ensure that their content remains scarce, he or she is entitled to set restrictions on public access. If a user wants to profit from this content, it is possible to restrict the content until another user has provided some form of consideration for it. Essentially, users are paying other users for an extended licence to use material which is not included within the grant of a general licence. This is especially the case if a user provides consideration to the creating user and then receives a copy of the image of the item. The provision of consideration does not entitle the paying user to any ownership interests over the content.<sup>1039</sup> However, if a user creates a virtual house and then places it on his or her piece of land, he or she will own the intellectual property rights relating to the house that is placed on the *Second Life* in-game land. The differences in the type of property – and

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<sup>1032</sup> *Second Life* Terms of Service Agreement, Clause 5.1.

<sup>1033</sup> *Second Life* Terms of Service Agreement, Clause 5.2.

<sup>1034</sup> See for example: *EverQuest II* User Agreement and Software Licence, Clause 8 available online: <[http://help.station.sony.com/cgi-bin/soe.cfg/php/enduser/std\\_adp.php?p\\_faaid=12248](http://help.station.sony.com/cgi-bin/soe.cfg/php/enduser/std_adp.php?p_faaid=12248)> retrieved 15 October 2010. Hereafter *EQ II* EULA.

<sup>1035</sup> *Second Life* Terms of Service Agreement, Clause 5.1.

<sup>1036</sup> *Second Life* Terms of Service Agreement, Clause 6.

<sup>1037</sup> *Second Life* Terms of Service Agreement, Clause 6; Clause 5.2.

<sup>1038</sup> *Second Life* Terms of Service, Clause 3.1.

<sup>1039</sup> *Second Life* Terms of Service, Clause 7.3.

between Clauses 6 and 7<sup>1040</sup> - have significant implications for not only licensing rights but also for the intellectual property rights too.

#### 5.4.1.2. *Virtual Worlds – Habbo.*

*Habbo* includes in its EULA, a specific clause relating to the ownership of material in *Habbo Hotel*'s website. *Habbo* claims that everything on the website belongs exclusively to *Sulake* Limited without limitation.<sup>1041</sup> It also distinguishes between the materials owned by *Sulake* and the materials present on the website that are owned by other parties. The EULA obliges a user to comply with all notices and restrictions as they appear on the website.<sup>1042</sup> Equally, *Sulake* are explicit in stating that they will act against anyone who is allegedly infringing their intellectual property rights.<sup>1043</sup> Interestingly, the clause states that 'commercial infringement' will not be tolerated;<sup>1044</sup> it does not specifically state that all forms of infringement will be acted upon. This would suggest that non-commercial infringing is not as concerning for *Sulake*, but is a reminder of the differences in position between the user and the provider, and the resulting double standards in terms of the ultimate impacts.

The grant of a licence to use the *Habbo* website and access *Habbo Hotel* is contingent upon eligibility to use the website. However, again (similar to Clause 8 of the *EverQuest II* EULA) there are no definitions of 'eligibility' listed in the EULA itself. Moreover, no single clause sets out the eligibility of potential users. It is perhaps appropriate to revisit clauses 1.1 to 1.4 which set out the basic minimum requirements for not only accessing the website but for registering an account. i.e. users are required to be over the age of 13<sup>1045</sup> and be registered as an authorised user.<sup>1046</sup>

This provision<sup>1047</sup> also states that the licence granted to users by *Sulake* is revocable at any time of *Sulake*'s choosing. They are not required to give notice of termination or revocation to the users

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<sup>1040</sup> *Second Life* Terms of Service Agreement.

<sup>1041</sup> *Habbo Hotel* EULA, Clause 1.10.

<sup>1042</sup> *Habbo Hotel* EULA, Clause 1.10.

<sup>1043</sup> *Habbo Hotel* EULA, Clause 1.11.

<sup>1044</sup> *Habbo Hotel* EULA, Clause 1.11.

<sup>1045</sup> *Habbo Hotel* EULA, Clause 1.3.

<sup>1046</sup> *Habbo Hotel* EULA, Clause 1.4.

<sup>1047</sup> *Habbo Hotel* EULA, Clause 1.12.

at any point.<sup>1048</sup> Neither are *Sulake* under any obligation to provide reasons for the revocation of account access should it happen. The clause does state that there will be no termination unless there has been some use for which the licence has not been granted.<sup>1049</sup>

It would seem that if *Sulake* believe a user has carried out some form of action for which a licence has not been granted, then *Sulake* can revoke the licence at will and will not be questioned or challenged for doing so because there is no such entitlement for the user under the provisions of the EULA. This situation is compounded by the fact that the user agrees to the contents of the EULA without reading its contents in the majority of situations.<sup>1050</sup>

*Habbo* does not allow any use of intellectual property rights in any properties other than those expressly permitted.<sup>1051</sup> Included within the restrictions on the use of website material is derivative creativity.<sup>1052</sup> This, therefore, expressly prohibits any form of fan fiction or spin-off projects arising out of the *Habbo Hotel* idea. At the same time as prohibiting a wide range of derivative uses of website material, *Habbo* expressly reserves all of the intellectual property rights relating to creations by *Habbo* UK and *Habbo* Affiliates.<sup>1053</sup> Whilst this is designed to arrange protection for all of *Habbo*'s interests, it also provides *Habbo* with a sweeping provision under which it can claim that it owns derivative works. This again prevents users from seeking to exploit their labours and is not a dissimilar provision to those found in other EULAs.<sup>1054</sup>

Users agree that they will not upload any file to the *Habbo* website that is capable of, or likely to infringe, any intellectual property rights of any party.<sup>1055</sup> This applies to any intellectual property rights, rather than just those belonging to *Sulake*; there is no distinction between the intellectual property rights of *Habbo* and the intellectual property rights of users or third parties.

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<sup>1048</sup> Seemingly there are parallels here to the 'notice and take-down' procedure, albeit such a discussion is outside the scope of this work. See for example: I Steadman, 'Copyright holders target their takedown notices with takedown notices' (*Wired News*, 5 April 2013) available online: <<http://www.wired.co.uk/news/archive/2013-04/5/takedown-notices-takedown-notices>> retrieved 23 June 2013.

<sup>1049</sup> *Habbo Hotel* EULA, Clause 1.12.

<sup>1050</sup> OUT-LAW News, 'Nobody Reads Terms and Conditions: Its Official' (19 April 2010) <<http://www.out-law.com/page-10929>> retrieved 20 April 2010; Y Bakos and Others, 'Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts' (October 6, 2009). CELS 2009 4th Annual Conference on Empirical Legal Studies Paper; NYU Law and Economics Research Paper No. 09-40. Available at SSRN: <<http://ssrn.com/abstract=1443256>>.

<sup>1051</sup> *Habbo Hotel* EULA, Clause 1.13.

<sup>1052</sup> *Habbo Hotel* EULA, Clause 1.13.

<sup>1053</sup> *Habbo Hotel* EULA, Clause 1.13.

<sup>1054</sup> *WoW* EULA, Clause 4A; *EQ II* EULA, Clause 8.

<sup>1055</sup> *Habbo Hotel* EULA, Clause 2.1.4.

Consequently, it would appear therefore that User A (for example) could seek to upload a piece of in-game furniture that he has designed and created. Depending on the definition given to ‘Visitor Materials,’ intellectual property rights will accrue to either the user or *Habbo*.<sup>1056</sup> User A believes this piece of in-game furniture to be unique, and is seeking to protect it in the *Habbo Hotel*. However, what User A does not know is that, six weeks previously, User B uploaded an identical piece of in-game furniture which User B knew to be unique and original at the time of the upload. User A has, therefore, to his knowledge done nothing wrong, has not infringed any of the EULA provisions and has designed something that is a one-off. Despite this, User A has created an item identical to, or substantially similar to a pre-existing item. Moreover, even though the item of User B attracts no intellectual property rights for User B’s benefit (due to the ownership provisions of the *Habbo* EULA reserving all rights for *Sulake*), it does attract intellectual property rights. The EULA grants *Habbo* a licence to use material and also states that all materials are exclusively owned by them.<sup>1057</sup>

Essentially, User A, having had no intention to do anything wrong, has potentially infringed *Habbo*’s intellectual property rights. Additionally, under Clause 2.2,<sup>1058</sup> *Habbo* could suspend or terminate User A’s account without notice. Clause 13<sup>1059</sup> states that suspension or deletion can also lead to deletion of the game account. More problematically for the user, the EULA contains no details or clauses referring to dispute resolution or grievance procedures aside from litigation. User A could potentially be ‘evicted’ from *Habbo Hotel*, losing his Visitor without notice or warning and without any form of response other than prohibitively expensive litigation.<sup>1060</sup> This seems to be an extremely weak position for the user to be placed in.

#### 5.4.1.3. MMORPGs – *World of Warcraft*.

The provisions relating to in-game items are closely connected to the provisions in the licence limitations found in Clause 2 of the EULA. The ownership clause states that all rights and title in all objects arising in the game and game material belong exclusively to Blizzard.<sup>1061</sup> This includes

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<sup>1056</sup> *Habbo Hotel* EULA, Clause 1.10.

<sup>1057</sup> *Habbo Hotel* EULA, Clause 1.10.

<sup>1058</sup> *Habbo Hotel* EULA, Clause 2.2.

<sup>1059</sup> *Habbo Hotel* EULA, Clause 13.

<sup>1060</sup> *Habbo Hotel* EULA, Clause 19.1.

<sup>1061</sup> *WoW* EULA, Clause 4 (A).

the characters, names of characters, stories and catch phrases.<sup>1062</sup> Blizzard also claims the copyright of these items.<sup>1063</sup> Even where there are third party materials involved in the game, Blizzard claims the exclusive licence to these as well.<sup>1064</sup>

Despite the fact that Blizzard expressly claims all of the rights arising from game materials and expressly prohibit users from seeking to generate a profit or improve their game levelling, users still engage in Real Money Trading. There is no official arena for RMT to take place in *WoW* therefore users seek to arrange deals and RMT outside of the *World of Warcraft*. This is still against the licence limitations however.<sup>1065</sup> What is more anomalous is that Blizzard rarely takes any action against users who seek to engage in RMT despite what the EULA indicates. Blizzard may not necessarily be making money out of the RMT, but it continues to make a return from the subscription fees of users who do engage in RMT outside of *WoW*. By not taking action against every single one of those who contravene the licence limitations, Blizzard are, by implication, endorsing the activity and even encouraging it.<sup>1066</sup> Nevertheless, if users have no right to sell the items, and they are neither in control of them nor own them, it is doubtful whether a true sale really occurs. The lack of proprietary interests in in-game items would indicate that users lease them from Blizzard.

The ownership provisions in the Terms of Use Agreement are more comprehensive than the concurrent provisions in the EULA. The Terms of Use Agreement explicitly states, “You acknowledge and agree that you have no ownership or other property interest in any account.”<sup>1067</sup> The Terms of Use Agreement also includes a third clause that deals with property rights above and beyond the contents of the EULA.<sup>1068</sup> Clause 8 of the Terms of Use stipulates that Blizzard refuses to recognise any transfer of game accounts and game items because users have no rights to title in any of them. It also expressly states that:

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<sup>1062</sup> *WoW* EULA, Clause 4 (A).

<sup>1063</sup> *WoW* EULA, Preamble.

<sup>1064</sup> *WoW* EULA, Clause 4 (A).

<sup>1065</sup> *WoW* EULA, Clause 2 (C).

<sup>1066</sup> K Barker, 'Are Users Usurpers?' Departmental Research Seminar Series, Department of Law & Criminology, Aberystwyth University, June 2011.

<sup>1067</sup> *WoW* ToU, Clause 5.

<sup>1068</sup> *WoW* ToU, Clause 8.

“Blizzard does not recognize any purported transfers of virtual property executed outside of the Game or the purported sale, gift or trade in the “real world” of anything that appears or originates in the Game.”<sup>1069</sup>

This states that the users have no proprietary rights and have no right to sell game items but should users try to do so, Blizzard will not recognise such transfers. This is peculiar when the EULA makes express provision for the transfer of software, rights and obligations.<sup>1070</sup> This essentially means that a user can pass the software onto someone else but cannot also transfer his game account and items. Preventing users from transferring game accounts is akin to preventing users benefitting from their financial outlay or from the deployment of their labour. A EULA having regard for users expectations<sup>1071</sup> would allow a user to sell his or her game account or items, even if the sale price was limited to the amount in ‘real money’ that the user has spent in developing the account.

The contractual documents governing *World of Warcraft* make it abundantly clear that the users have no ownership interests over in-game items or any of the other material relating to the game itself. The provisions contained within the EULA and the Terms of Use also make it clear that trading game items is a prohibited activity, yet Blizzard is often lackadaisical in addressing these activities, appearing to silently endorse them.

#### 5.4.1.4. MMORPGs – *EverQuest II*.

Claims to in-game items in *EverQuest II* are also unlikely given that the EULA states: “you have not and will not acquire or obtain any intellectual property or other rights, including any right of exploitation.”<sup>1072</sup> Users are permitted to purchase and use in-game items in the *EverQuest II* game play. These goods are prohibited from trade unless expressly permitted by SOE. Clause 6 states that all of the fees relating to *EverQuest II* are to be prepaid but are not refundable. Moreover, Clause 6 goes on to state, “All payments for Virtual Goods are non-refundable; Virtual Goods

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<sup>1069</sup> *WoW ToU*, Clause 8.

<sup>1070</sup> *WoW EULA*, Clause 4 (B).

<sup>1071</sup> B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA Publishing 2008) 76; *Office of Fair Trading v Foxtons* [2009] EWHC 1681 at 91.

<sup>1072</sup> *EQ II EULA*, Clause 8.



shall not be tradeable or transferable unless otherwise expressly agreed to in writing by SOE.”<sup>1073</sup> Accordingly, therefore, in-game items are purchasable but not exploitable

There is, however, an exception to this general position adopted by SOE.<sup>1074</sup> The *EverQuest II* EULA states that in-game items cannot be transferred or traded in any way, “unless otherwise expressly agreed to in writing by SOE.”<sup>1075</sup> This reference refers to Sony Entertainment’s Station Exchange platform which users can use to trade game items and game accounts. The provisions in the EULA relating to the trading and transfer of in-game items prohibit exploitation and trade on platforms outside of the control of SOE. The prohibition essentially limits users to trading items within Sony’s platforms rather than on external platforms such as online auction sites such as eBay and Internet Gaming Exchange.<sup>1076</sup> Originally however, SOE did not prevent users seeking to trade items on eBay. Station Exchange was founded for users of SOE games after SOE joined the eBay VeRO program.<sup>1077</sup>

The ownership clause<sup>1078</sup> in the *EverQuest II* EULA states that the user is not entitled to any rights in the in-game items, or intellectual property of those items. Given that the clause within the EULA does not allow users any proprietary interests, it is unsurprising that users are also prohibited from benefiting from a right of exploitation. However, whilst the EULA does not define what SOE mean by ‘exploitation’ the fact that Clause 5<sup>1079</sup> refers to the possibility of trading and transferring in-game items if SOE agree to it, suggests that users can, in fact, benefit from exploitation at the discretion of SOE.<sup>1080</sup> There would be little point in permitting trade and transfer of game items if exploitation was prohibited.

Clause 8<sup>1081</sup> goes on to state that everything is owned by SOE except as far as SOE allows the use of goods for exploitation in Station Exchange. Therefore, it would appear that SOE does permit

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<sup>1073</sup> *EQ II* EULA, Clause 5.

<sup>1074</sup> *EQ II* EULA, Clause 5.

<sup>1075</sup> *EQ II* EULA, Clause 5.

<sup>1076</sup> Internet Gaming Exchange: see <[www.IGE.com](http://www.IGE.com)> retrieved 29 August 2011.

<sup>1077</sup> A system whereby owners of content can file a notice of infringement with eBay and request the allegedly infringing material is removed. eBay, ‘About VeRo’ available online: <<http://pages.ebay.co.uk/vero/about.html>> retrieved 29 August 2011.

<sup>1078</sup> *EQ II* EULA, Clause 8.

<sup>1079</sup> *EQ II* EULA Clause 5.

<sup>1080</sup> *EQ II* EULA, Clause 5.

<sup>1081</sup> *EQ II* EULA, Clause 8.

a limited – and arena specific<sup>1082</sup> – exploitation right. This, whilst not entirely reflective of Locke's Labour Theory reflects some form of reward for the time and effort invested by users. The permitted exploitation does not infer that users accrue proprietary interests. It does, however, suggest that in-game personae can exploit the outcome of their labours, and hints at the fact that users may be more like hirers of items and characters in that they pay in order to access and use them but are deprived of ownership claims.

The *EverQuest II* EULA also permits users to upload their own content into the game to enhance the gaming experience.<sup>1083</sup> If a user chooses to do this, he or she must obviously not infringe any rights of SOE or any third party rights by doing so. Moreover, the EULA states that the content which is uploaded by the user must not be used in a way that would be detrimental to other users or to the overall gaming experience.<sup>1084</sup> What users are entitled to upload, therefore, is limited to game content. If users do engage in activity contrary to the EULA permission, then at the very least they are likely to be in breach of contract.

Few gamers are likely to upload their own material which would then be useable by SOE. A user doing this could be risking termination from the game because it could be using its material in a manner which SOE determines to be unacceptable. It is also entirely possible that a user may upload a character, for example, into *EverQuest II*. The user would then seek to use this character until at some point the user was accused of engaging in prohibited conduct. The user would then be suspended or terminated from the game entirely. However, because the user uploaded content into *EverQuest II*, SOE could now use the character uploaded by the terminated user for any purpose it chooses. This is because by uploading the material the user granted SOE a licence to use it that was irrevocable.<sup>1085</sup> Consequently the user could no longer exclusively use the character. Neither could the user control the character because by virtue of termination, the user was unable to access the game or the character. SOE would control the character and would have a wide ranging and fully comprehensive licence to use the material uploaded. SOE could replicate it or sub-licence it if it chose to do so. SOE has a licence to do exactly the same as the 'owner.' This is a particularly detrimental situation for the user to be in because the users do not benefit from ownership interests over SOE's creations and they are only granted a limited and prohibitive

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<sup>1082</sup> Goods and items can only be exploited in SOE's Station Exchange.

<sup>1083</sup> *EQ II* EULA, Clause 11.

<sup>1084</sup> *EQ II* EULA, Clause 11.

<sup>1085</sup> *EQ II* EULA, Clause 11.

right to exploit game content. This is in contrast to the position SOE adopts when a user uploads material; SOE is granted a full licence to use the material and can exploit it in any way.<sup>1086</sup> This is a complete reversal of the position in relation to SOE generated content for users.

#### 5.4.2. *Dispute Resolution.*

##### 5.4.2.1. *Virtual Worlds – Second Life.*

The *Second Life* Terms of Service Agreement contains provisions relating to the resolution of disputes arising out of interacting with *Second Life*.<sup>1087</sup> The dispute resolution procedures contained within the Terms of Service impose binding Alternative Dispute Resolution<sup>1088</sup> procedures upon a user providing the amount sought does not exceed \$10 000.<sup>1089</sup> If the dispute does amount to more than this, a user is required to commence litigation.<sup>1090</sup> Moreover, if a user has not complied with the provisions in the Terms of Service relating to Alternative Dispute Resolution,<sup>1091</sup> the claim will be considered improperly filed and the party which has not complied shall be liable for costs up to \$1000.<sup>1092</sup>

These provisions impress upon the user that Linden Labs believes most disputes will not be of a significant value. These provisions seem to suggest that Linden Labs tries to avoid users lodging disputes at all, but where that does happen, they require strict compliance. This implies that disputes will fail because the binding contractual agreement to follow procedures will be contravened. These clauses do not encourage users to seek redress for wrongs that they may have suffered. Disputes relating to intellectual property rights – such as copyright in in-game items – are to be dealt with in a court,<sup>1093</sup> and this does not have to be within the State of California, which is the venue with applicable law.<sup>1094</sup> This suggests that Linden Labs is prepared to be more flexible than some other game developers when it comes to dealing with disputes but is not prepared to consider dealing with intellectual property disputes through ADR. This too reflects

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<sup>1086</sup> *EQ II* EULA, Clause 11.

<sup>1087</sup> *Second Life* Terms of Service Agreement, Clause 12.

<sup>1088</sup> Hereafter ADR.

<sup>1089</sup> *Second Life* Terms of Service Agreement, Clause 12.1.

<sup>1090</sup> *Second Life* Terms of Service Agreement, Clause 12.1.

<sup>1091</sup> Hereafter ADR.

<sup>1092</sup> *Second Life* Terms of Service Agreement, Clause 12.3.

<sup>1093</sup> *Second Life* Terms of Service Agreement, Clause 12.2.

<sup>1094</sup> *Second Life* Terms of Service Agreement, Clause 12.2.

the standard form approach to intellectual property rights disputes that is present throughout the gaming industry.

#### 5.4.2.2. *Virtual Worlds – Habbo.*

The *Habbo* Terms of Service – similar to those of *Second Life* – also contain provisions dealing with resolving disputes that may arise from the use of the environment. The clauses contained within the *Habbo* agreement fall under the category of “Arbitration” rather than dispute resolution.<sup>1095</sup> The agreement firstly defines what is meant by disputes<sup>1096</sup> before outlining the two stages in the procedure. The first stage requires a written notice to be issued,<sup>1097</sup> detailing the complaint before the second stage, full arbitration procedure is commenced.<sup>1098</sup>

Interestingly, the agreement is the only example from the four EULAs that have been examined which states that disputes requiring arbitration will be heard in the area where the user involved is resident.<sup>1099</sup> This is subject to the provision outlined in Clause 10.3<sup>1100</sup> indicating that the applicable law is that of Finland.<sup>1101</sup> Issues relating to intellectual property rights are dealt with under a distinct resolution system.<sup>1102</sup> The latest version of the agreement indicates that users will be able to retain rights in user-generated content.<sup>1103</sup> This reflects the long-standing approach adopted by *Second Life* and is more reflective of the general trend by Virtual Worlds of allowing users to retain interests in at least part of the content they create.

#### 5.4.2.3. *MMORPGs – World of Warcraft.*

*World of Warcraft* contains identical clauses in its EULA and Terms of Use documents relating to dispute resolution and the law governing the contractual relationships between Blizzard and the user. The dispute resolution provisions are split into three main categories; informal negotiations

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<sup>1095</sup> *Habbo* Terms of Service, Clause 10.

<sup>1096</sup> *Habbo* Terms of Service, Clause 10.1.

<sup>1097</sup> *Habbo* Terms of Service, Clause 10.1.1.

<sup>1098</sup> *Habbo* Terms of Service, Clause 10.1.2.

<sup>1099</sup> *Habbo* Terms of Service, Clause 10.1.4.

<sup>1100</sup> *Habbo* Terms of Service.

<sup>1101</sup> *Habbo* Terms of Service, Clause 11.2.

<sup>1102</sup> *Habbo* Terms of Service, Clause 10.2.

<sup>1103</sup> *Habbo* Terms of Service, Clause 3.

between Blizzard and the user; Binding Arbitration, and then finally litigation.<sup>1104</sup> The informal negotiations are the first step in resolving a dispute and are a prerequisite before any other form of resolution can be sought.<sup>1105</sup> The arbitration, which can only occur after an informal negotiation has been attempted, is binding on a party once the other party elects to arbitrate.<sup>1106</sup> Binding ADR has been the subject of litigation in relation to Virtual Worlds.<sup>1107</sup> Nevertheless, Blizzard includes it as an option for the parties. Blizzard seemingly recognises that users may not necessarily be capable of being bound by ADR.<sup>1108</sup>

The ADR provisions cannot be used to resolve all of the potential disputes that may arise. Clauses 15 (D) of the EULA and 17 (D) of the Terms of Use state that disputes relating to any intellectual property rights such as copyright, or disputes relating to theft of in-game items cannot be dealt with through informal negotiations or arbitration, and must therefore be dealt with through litigation. This is potentially unfair due to the costs and potential travel expenses that may be incurred by users who are not ordinarily resident in the state of California. It is also highly probable that most disputes will arise in relation to intellectual property rights in in-game items, or theft of in-game items. The Terms of Use do not contain any provisions relating to ADR between users. This therefore indicates that *Blizzard* will refuse to become involved in a pure user-user dispute, or, that users are required to resolve their differences outside of Blizzard's provisions. What is more likely however, is that most user-user disputes will arise in relation to proprietary interests in in-game items, which are to be the subject of litigation. This Terms of Use Agreement also fails to make a differentiation for users who are resident outside of the state of California to resolve the dispute in a different jurisdictional area. This is in stark contrast to the position adopted by the leading Virtual World.<sup>1109</sup>

#### 5.4.2.4. MMORPGs – *EverQuest II*.

Given the lack of alternative dispute resolution methods and the lack of governance procedures laid out in the EULA, if there is some form of dispute that arises in relation to the game, the likely

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<sup>1104</sup> *WoW* EULA, Clause 15 (A), (B) and (D); *WoW* ToU, Clause 17 (A), (B) and (D).

<sup>1105</sup> *WoW* EULA, Clause 15 (B); *WoW* ToU, Clause 17 (B).

<sup>1106</sup> *WoW* EULA, Clause 15 (A); *WoW* ToU, Clause 17 (A).

<sup>1107</sup> *Bragg v Linden Research Inc.* (487 F. Supp 2d 593 E.D. Penn) [2007].

<sup>1108</sup> *WoW* EULA, Clause 15 (G); *WoW* ToU, Clause 17 (G).

<sup>1109</sup> *Second Life* Terms of Service, Clause 12.2.

action would be litigation. However, the litigation would – under the EULA – be in the US because that is what both parties (when agreeing to the EULA) agreed to – assuming that this was a binding term. This could mean for example, that a user in the UK has agreed to a contract which is not governed by English law. It would therefore appear that SOE is attempting to avoid court based disputes by putting hurdles in the way of users, to whom the cost of litigating will far outweigh the value of the game accounts. The costs of legal action in foreign jurisdictions is prohibitive for the majority of users, and this is one of the reasons why the European Union has introduced consumer protection measures to ensure that users are not pursued in states where they are not residents. The provisions also enable consumers to bring actions in the home jurisdiction, in certain circumstances.<sup>1110</sup>

### 5.5. Standard terms - Fairness and Balance?

Each of the spaces considered here is controlled through an online contractual agreement; these are specific in stating that users have very limited proprietary interests in items in the online environment. These provisions are closely connected to the notion that property theorists,<sup>1111</sup> including Locke, have advanced, indicating that if you have laboured over something then you have the right to claim a proprietary interest in it. This theoretical basis of ‘fairness’ and the expectations of users<sup>1112</sup> - in that they will benefit from proprietary interests in in-game items - is something which is displaced through EULA terms. User efforts in online gaming platforms result in a valuable game account, or other gaming items and characters, all of which have been developed through considerable user input. Consequently, there is a conflicting situation between property justifications and theory, consumer protection mechanisms, user expectations and the contractual positions.

This creates a problematic scenario for users who may potentially believe that they have property rights in gaming items, only to later discover that they have contracted away any such rights. There are wider implications for any user of online content who is required to assent to

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<sup>1110</sup> The provisions dealing with Alternative Dispute Resolution may be affected by the recent European amendments. See for example: Directive 2013/11/EU of The European Parliament and of The Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC.

<sup>1111</sup> See: Chapter 2 - Property Matters: Virtually Justified? At 2.4. *Utilitarian Theory*; 2.5. *Hegel's Personality Theory* and 2.6. *Lockean Labour Theory* respectively.

<sup>1112</sup> B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA Publishing 2008) 76.

EULAs,<sup>1113</sup> as Belgrove and the National Consumer Council<sup>1114</sup> highlighted in 2008, reporting on the deficiencies of such contractual agreements.<sup>1115</sup> The NCC indicated in this report that a mere 28 percent of users read the terms and conditions in EULAs before agreeing to them. The same report highlighted wide-ranging, “gaps” which were in need of redress.<sup>1116</sup> Consumer Focus<sup>1117</sup> has conducted similar research, suggesting that these issues are still prevalent, particularly in relation to digital content where only 43 percent of consumers are able to understand the terms and conditions<sup>1118</sup> outlined in the EULAs.

Whilst many of the online games and Virtual Worlds have user bases that are distributed worldwide, in the European Union, the EULAs are governed by the unfair terms regimes;<sup>1119</sup> implemented in England and Wales by the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999. The Unfair Terms Directive<sup>1120</sup> was introduced at a European level to ensure a minimum layer of protection for consumers.<sup>1121</sup> Arora emphasizes the significance of this regime because it highlights:

“the struggle not only between consumer protection and freedom of contract, but also the balance between consumer protection and consumer choice, and attempts to redress the national differences in treatment between Member States, by imposing minimum harmonising standards, in respect of consumer contracts and unfair terms.”<sup>1122</sup>

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<sup>1113</sup> C Belgrove, ‘Whose licence is it anyway? A study of end-user licence agreements for computer software - National Consumer Council unfair contract terms survey and findings’ (National Consumer Council 2008); R Massey, ‘Whose licence is it anyway? A study of end-user licence agreements for computer software - National Consumer Council unfair contract terms survey and findings’ (2008) CTLR 14(5), 117.

<sup>1114</sup> Hereafter NCC.

<sup>1115</sup> C Belgrove, ‘Whose licence is it anyway? A study of end-user licence agreements for computer software - National Consumer Council unfair contract terms survey and findings’ (National Consumer Council 2008); R Massey, ‘Whose licence is it anyway? A study of end-user licence agreements for computer software - National Consumer Council unfair contract terms survey and findings’ (2008) CTLR 14(5), 117.

<sup>1116</sup> SCL, ‘NCC Refers Software Companies to OFT’ 21 February 2008, available online: <<http://www.scl.org/site.aspx?i=ne9235>> retrieved 22 June 2013.

<sup>1117</sup> M Kisielowska-Lipman, ‘Ups and down(load)s: Consumer Experiences of Buying Digital Goods and Services Online’ Consumer Focus, December 2010.

<sup>1118</sup> M Kisielowska-Lipman, ‘Ups and down(load)s: Consumer Experiences of Buying Digital Goods and Services Online’ Consumer Focus, December 2010, 11.

<sup>1119</sup> Specifically the Unfair Contract Terms Act 1977, and the Unfair Terms in Consumer Contracts Regulations 1999.

<sup>1120</sup> Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts (1993 OJL95/29).

<sup>1121</sup> L Koffman and E Macdonald, *The Law of Contract* (7<sup>th</sup> edn, OUP 2010) 247.

<sup>1122</sup> A Arora, ‘Unfair contract terms and unauthorised bank charges: a banking lawyer's perspective’ (2012) J B L (1) 44, 57.

The Directive<sup>1123</sup> required member states to give effect to the protective layer, giving rise to the Unfair Terms in Consumer Contracts Regulations 1999<sup>1124</sup> in the England and Wales. Consequently, the UTCCR introduce a minimum layer of consumer protections into the law, and this compliments the similar unconscionability doctrine which is applied in the US.<sup>1125</sup> It is of particular importance that there is a preventive level mechanism operating for consumers and users because consumers do not generally commence legal proceedings, and often do not know their rights.<sup>1126</sup>

### 5.5.1. *The 'issue'?*

Standard form contracts do not offer, nor require negotiation on, specific terms but nevertheless, as Kessler indicates, a party to one should know what he is agreeing to.<sup>1127</sup> Such contracts offer practical commercial advantages for the party whose terms they are. Hatzis for example, argues that whilst there may initially be cost savings for the party developing the standard-form contract, the users will soon appreciate that they are being exploited, at which point the saving is reversed.<sup>1128</sup> However, this is likely to be the situation only where the standard form contracts contain unfair terms, and not all standard form contracts will contain unfair terms. Nevertheless, from a theoretical lens of fairness, there are disadvantages from the perspective of users and consumers because agreements of this nature require little more from a weaker party than obedience and consent. This is the very essence of standard-form adhesion contracts.<sup>1129</sup> The advantage of such contracts allows game developers to issue all of its potential users with the same non-negotiable terms,<sup>1130</sup> thereby reducing the need for potentially expensive and time-consuming individual negotiations.<sup>1131</sup> This would, perhaps, see the cost ultimately transferred to

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<sup>1123</sup> Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts (1993 OJ195/29).

<sup>1124</sup> SI 1999/2083 Unfair Terms in Consumer Contracts Regulations 1999. Hereafter UTCCR.

<sup>1125</sup> See for example, L A Kornhauser, 'Unconscionability in Standard Forms' (1976) 64 Cal L Rev 1151.

Unconscionability per se is not something which is a considered element of contract law in England and Wales.

<sup>1126</sup> L Koffman and E Macdonald, *The Law of Contract* (7<sup>th</sup> edn, OUP 2010) 246.

<sup>1127</sup> F Kessler, 'Contracts of Adhesion-Some Thoughts About Freedom of Contract' (1943) 43 Column L Rev 629.

<sup>1128</sup> A N Hatzis, 'An Offer You Cannot Negotiate: Some Thoughts on the Economics of Standard Form Consumer Contracts' in H Collins (eds), *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law* (Kluwer Law International 2008) 46.

<sup>1129</sup> E A Dauer, 'Contracts of Adhesion in Light of the Bargain Hypothesis: An Introduction' (1972) 5 Akron L Rev 1.

<sup>1130</sup> M Schillig, 'Inequality of Bargaining Power Versus Market for Lemons: Legal Paradigm Change and the Court of Justice's Jurisprudence on Directive 93/13 on Unfair Contract Terms' (2008) E L Rev 33(3) 336, 339.

<sup>1131</sup> M Trebilcock and D Dewees, 'Judicial control of standard form contracts' in P Burrows and C Veljanowski (eds), *The Economic Approach to Law* (Butterworths 1982) 99.



the end-users, with all the potential burdens this would entail,<sup>1132</sup> including difficulties with material wealth as highlighted by Smith.<sup>1133</sup> The contracts and agreements that are the concern of game providers and game users contain clauses that deal with purported proprietary transfers of in-game items, and proprietary claims to them.

One example of such a situation arises in the context of the MMORPG *Lineage II*, where users are able to create their own virtual items and objects, and upload them into the game itself. The creation and uploading of material which has been independently developed is not necessarily problematic unless it forms what is classed as a derivative work.<sup>1134</sup> The difficulties arise when the user then seeks to perhaps sell the item created independently of the game, engaging in Real Money Trading, and selling what the user perceives to be his or her item.<sup>1135</sup> However, what becomes an issue is the provision contained within the EULA which all users are required to agree to in order to play in *Lineage*.<sup>1136</sup> This EULA states that the users are not entitled to any proprietary interests in any part of the game, including material which they may upload themselves having created it outside of the game, including derivative works.<sup>1137</sup> In this way, by agreeing to a EULA, a user is essentially agreeing to transfer potentially valuable proprietary interests to the game developer without any consideration. Users are contractually bound to paying subscription fees to upload self-created material that will no longer be user-owned, and if the user attempts to use it elsewhere or replicate it again, the user could be liable for copyright infringement.

Users have been granted intellectual property rights in in-game items in other jurisdictions.<sup>1138</sup> Accordingly, it would seem that users are entitled to rights in virtual goods and objects arising out of their interactions with virtual spaces and online games. If this is the case, such an argument presupposes that users have an interest in the items that they create, customise or modify, and this is a particularly persuasive stance when applying theoretical justifications for property rights.

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<sup>1132</sup> M Trebilcock and D Dewees, 'Judicial control of standard form contracts' in P Burrows and C Veljanowski (eds), *The Economic Approach to Law* (Butterworths 1982) 99; M Schillig, 'Inequality of Bargaining Power Versus Market for Lemons: Legal Paradigm Change and the Court of Justice's Jurisprudence on Directive 93/13 on Unfair Contract Terms' (2008) E L Rev 33(3) 336, 339.

<sup>1133</sup> S A Smith, 'In Defence of Substantive Fairness' (1996) LQR 112 (Jan) 138, 151.

<sup>1134</sup> See: Chapter 4 – MMORPGing & Copyright. At 4.8.1. *Derivative Works*.

<sup>1135</sup> Hereafter RMT.

<sup>1136</sup> NCSoft, 'Lineage II Terms of Use' (21 November 2012) available online: <<http://ncsoft.com/en/legal/terms-of-use.php>> retrieved 22 November 2012.

<sup>1137</sup> NCSoft, 'Lineage II Terms of Use' (21 November 2012) available online: <<http://ncsoft.com/en/legal/terms-of-use.php>> retrieved 22 November 2012.

<sup>1138</sup> For example, the US, The Netherlands, South Korea and China.

When users are required to agree to EULAs, they will surrender their claims to automatically arising proprietary interests in in-game items.

The lack of knowledge of rights, combined with contractual terms which are incomprehensible suggests that many users who are obliged to comply with EULAs do so without comprehending the potential conflicts between their proprietary expectations, and unfair contract terms. Given the contradictions between automatically arising proprietary interests, questions of balance arise in respect of contractual terms. These terms will now be considered under the legislative unfair terms regime.

### 5.5.2. *Unfair Terms Regime.*

The UTCCR<sup>1139</sup> regulate terms potentially unfair terms in consumer contracts i.e. contracts between a ‘consumer’ and a ‘seller or supplier’<sup>1140</sup> which have not been individually negotiated.<sup>1141</sup> The UTCCR therefore aim to regulate unfair terms in adhesion contracts, and as such their purview is much wider than that of the Unfair Contract Terms Act 1977.<sup>1142</sup> UCTA does not expressly apply to anything where there is a transfer of intellectual property rights.<sup>1143</sup> EULAs, such as those examined in this work, usually expressly state that users will not be entitled to any such proprietary rights.<sup>1144</sup> Therefore it is suggested that these rights are transferred from users to developers through the EULA, and as such, UCTA is of limited applicability.

The UTCCR are extra-territorial, which potentially benefits users<sup>1145</sup> and could provide an additional layer of protection from legal action being taken against them, and are therefore significant because, as McKendrick highlights, they seek to protect consumers from “unfair surprise” rather than adequacy of pricing<sup>1146</sup> and expressly do not apply to business – to – business contracts.<sup>1147</sup> The UTCCR apply to contractual agreements that are entered into across Europe,

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<sup>1139</sup> Unfair Terms in Consumer Contracts Regulations 1999.

<sup>1140</sup> UTCCR Regulation 3.

<sup>1141</sup> UTCCR Regulation 5(1). See further; M Furmiston, *Cheshire, Fifoot and Furmiston’s Law of Contract* (16<sup>th</sup> edn, OUP 2012) 256.

<sup>1142</sup> Hereafter UCTA.

<sup>1143</sup> UCTA 1977, Schedule 1(c).

<sup>1144</sup> See for example, *EQ II* EULA, Clause 8.

<sup>1145</sup> As long as a user qualifies under the UTCCR as a consumer; UTCCR Regulation 3 i.e. ‘a natural person.’

<sup>1146</sup> E McKendrick, *Contract Law – Text, Cases and Materials* (5<sup>th</sup> edn, OUP 2012) 460.

<sup>1147</sup> UTCCR Regulation 3(1).

and as an EU provision, automatically provides a minimum level of protection throughout the EU. This is because of the provisions contained within the Rome I Regulation,<sup>1148</sup> and the Brussels Regulation,<sup>1149</sup> that there must be some activity which is pursued or directed within a signatory state.<sup>1150</sup> If for example, the developers of a MMORPG or Virtual Worlds are based outside of the European Union Member States, it is necessary for such developers to be pursuing or directing their activities within the European Union for UTCRR to apply to the contracts users will enter into with the developers. For users who are habitually resident in England & Wales therefore, and who enter into a contractual agreement with a developer who is pursuing or directing activities within the Member State where the user is resident, the UTCCR will be applicable to EULAs.

Under the Rome I Regulation, parties to a contract are free to choose – within the restrictions placed upon consumer contracts – the applicable law which will be used to govern the contract they have entered.<sup>1151</sup> Where there has been no express choice of applicable law, it will be implied,<sup>1152</sup> and will be the law of the country that the user is closely connected to.<sup>1153</sup> However, whilst this may appear to offer protection for users, the parties to EULAs often agree to applicable law clauses, most often contracting that specific courts will have jurisdiction over any disputes. If a user of *World of Warcraft* is based in England, and the EULA of *World of Warcraft* EULA includes provisions that the governing law will be that of the US state of Delaware.<sup>1154</sup> Proceedings therefore, if brought against the user would be subject to the law of Delaware. The Brussels Regulation and Rome I Regulation can combine to create a regime whereby consumers are protected under the laws of the European state within which they are domiciled if proceedings are brought within the EU. In the context of MMORPG users however, the Brussels Regulation and the contractual provisions users agree to combine to mean that proceedings could be brought against them in the state or courts which have exclusive jurisdiction, and this may well result in proceedings being lodged in the US.<sup>1155</sup>

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<sup>1148</sup> Regulation (EC) no 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I); hereafter Rome I Regulation; Article 6.

<sup>1149</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Hereafter Brussels Regulation; Article 2.

<sup>1150</sup> Rome I Regulation, Article 25.

<sup>1151</sup> Rome I Regulation, Article 3(1).

<sup>1152</sup> Rome I Regulation, Article 4(1)(b).

<sup>1153</sup> Rome I Regulation, Article (6).

<sup>1154</sup> *WoW* EULA, Clause 15F.

<sup>1155</sup> Brussels Regulation, Article 4; D Mclean and V Ruiz Abou-Nigm, *The Conflict of Laws* (8<sup>th</sup> edn, Sweet & Maxwell 2012) 140.

These contractual agreements are created by the game developers and are offered to users on a “take it or leave it” basis.<sup>1156</sup> There is no negotiation between the users and the developers over any part of the contractual agreement and as such, this means that the UTCCR may apply to these contracts as they are not “individually negotiated.”<sup>1157</sup> Where the UTCCR apply to contractual terms, they can be used to ‘strike out’ potentially unfair terms<sup>1158</sup> although if the contract is capable of existing with the unfair terms removed, it shall continue to be binding. Importantly, it is not necessary for users to question the fairness of contractual terms – courts can question this in their own right<sup>1159</sup> which may potentially be of benefit to users in England and Wales, who may be seeking to challenge issues arising from EULA disputes.<sup>1160</sup> At a UK level, the Office of Fair Trading plays a leading role in preventive work relating to unfair terms in contracts, and again, this can potentially be of benefit for users.

#### 5.5.2.1. ‘Unfairness.’

The UTCCR outlines that the Regulations will *only*<sup>1161</sup> apply where there has been very limited negotiation over the contract.<sup>1162</sup> For example, if users are provided with a choice of three terms, this may not necessarily count as negotiation under the Regulations, especially if all three terms are standard terms (although this may not necessarily make them unfair). It is widely accepted that EULAs are non-negotiable adhesion contracts,<sup>1163</sup> and as such, the UTCCR will be applicable. The test under the UTCCR is one of fairness<sup>1164</sup> rather than the test of reasonableness which has been adopted under UCTA.<sup>1165</sup> The fairness test has distinct elements to it, each of which are to be satisfied to find a term is unfair. Firstly, there must be a “significant imbalance”<sup>1166</sup> in the rights

<sup>1156</sup> *Comb v. Paypal* 218 F. Supp. 2d 1165 (N.D. Cal. 2002); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996); *Groff v. America Online, Inc.*, 1998 WL 307001 (1998). See also; L E Trakman, ‘The Boundaries of Contract Law in Cyberspace’ (2009) IBLJ (2) 159.

<sup>1157</sup> UTCCR Regulation 5(2).

<sup>1158</sup> UTCCR Regulation 8(1). Schedule 2 of the UTCCR indicates a range of terms which are likely to be regarded as unfair. For discussion, see below at 5.6. *UTCCR Schedule 2 and EULA Clauses*.

<sup>1159</sup> Office of Fair Trading, ‘Unfair Terms in Consumer Contracts’ available online: <<http://www.offt.gov.uk/about-the-offt/legal-powers/legal/unfair-terms/#.UcXCkDSW-So>> retrieved 22 November 2012.

<sup>1160</sup> *Océano Grupo Editorial SA v Roció Murciano Quintero* (C-240/98) and *Salvat Editores SA v José M. Sánchez Alcón Prades* (C-241/98).

<sup>1161</sup> Emphasis added.

<sup>1162</sup> UTCCR Regulation 5(1).

<sup>1163</sup> See for example, *Schroeder Music Publishing Co Ltd v Macaulay* (1975) 1 All ER 237, per Diplock LJ.

<sup>1164</sup> UTCCR Regulation 5(1).

<sup>1165</sup> UCTA s6, s7 and s11.

<sup>1166</sup> UTCCR Regulation 5(1).

and obligations between the parties, which has to provide a detriment to the consumer rather than to the seller or supplier.<sup>1167</sup> Secondly, the fairness test requires that the significant imbalance be contrary to the requirement of good faith.<sup>1168</sup>

Despite the elements of the fairness test appearing uncontroversial, there has been a significant level of comment about the precise meaning of this test,<sup>1169</sup> and whether it contains an additional third element.<sup>1170</sup> Even so, further levels of disagreement have emerged in the approaches adopted through the case law. It is significant to note that the Court of Justice (CJEU) has been categorical in its statement that it will not adjudicate on the fairness or otherwise of specific contractual terms,<sup>1171</sup> and that this falls to national courts to determine within the parameters of the protective mechanism.<sup>1172</sup> Under the EULAs examined above, the imbalance is apparent in the contractual displacement of any potential proprietary interests in in-game items. It is necessary to show that the imbalance is a significant one, as identified by Kitchin J,<sup>1173</sup> although a precise understanding of this is difficult to ascertain, and is for the courts to determine.

#### 5.5.2.2. 'Significant Imbalance' contrary to good faith?

The element of good faith has proved to be a problematic one not least because English contract law generally does not recognise such a requirement.<sup>1174</sup> Good faith is therefore taken to have the European meaning,<sup>1175</sup> although it is conceivable that the good faith element can be linked directly to significant imbalance. Under the terms of the EULAs considered, the imbalance seems to be such that there is little evidence of good faith being apparent. The courts in their considerations

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<sup>1167</sup> UTCCR Regulation 5(1); *Director General of Fair Trading v First National Bank* [2002] 1 AC 481 per Steyn LJ at 36.

<sup>1168</sup> UTCCR Regulation 5(1).

<sup>1169</sup> See for example; O Bray and L-J Pickford, 'The UTCCR: Coming to Terms with a Grey Area' (2009) CTLR 15(2), 26; M Chen-Wishart, 'Transparency and Fairness in Bank Charges' (2010) LQR 126 (Apr) 157; P S Davies, 'Bank charges in the Supreme Court' (2010) CLJ 69(1), 21; C Thomas, 'What Role Should Substantive Fairness Have in the English Law of Contract? An overview of the law.' (2010) CSLR 6(1) 177; E Macdonald, 'Unifying Unfair Terms Legislation' (2004) 67 MLR 69; W C H Irvine, 'The unfair terms in consumer contracts regulations in the courts?' (2004) SLT 21, 127. The law is concerned with procedural unfairness rather than substantive unfairness.

<sup>1170</sup> L Koffman and E Macdonald, *The Law of Contract* (7<sup>th</sup> edn, OUP 2010) 258.

<sup>1171</sup> Which reflects the position that the law does not address issues of substantive unfairness, focussing instead on procedural unfairness whereas this work focuses upon substantive unfairness.

<sup>1172</sup> *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Hofstetter* (Case C-237/02) [2004] CMLR 13.

<sup>1173</sup> *Office of Fair Trading v Ashbourne Management Services Ltd* [2011] All ER (D) 276 (May) per Kitchin J at 174.

<sup>1174</sup> E McKendrick, *Contract Law – Text, Cases and Materials* (5<sup>th</sup> edn, OUP 2012) 466.

<sup>1175</sup> *Director General of Fair Trading v First National Bank* [2002] 1 AC 481.

of what is meant by significant imbalance and good faith have adopted different approaches since the UTCCR were introduced. In assessing fairness, Regulation 6(1) indicates that it shall be necessary to consider “all of the circumstances of the contract.”<sup>1176</sup> This has been expanded upon by Lord Steyn, who has indicated that given the UTCCR did not deal with fairness generally, it is therefore necessary to take into account other things.<sup>1177</sup>

Significant imbalance is not explained within the UTCCR themselves, and this has caused some difficulties in applying the test, highlighted in the *First National Bank* decision.<sup>1178</sup> This has been taken to mean that regard should be paid to the other terms of the contract,<sup>1179</sup> as well as the contractual obligations resting on each party.<sup>1180</sup> Bingham LJ’s approach of examining the contract as a whole has been evident in later cases, notably the *Foxtons*<sup>1181</sup> case where the court examined the whole contract to determine whether a significant imbalance was present. Such an approach is embracing of wider considerations than just the contractual term under examination, and may be particularly useful in assessing potential imbalances in EULA clauses, especially from the perspective of users. Koffman and Macdonald have indicated that this approach may also mean that in assessing the imbalance, the term in question should be examined to determine whether there is a corresponding right or obligation for the other party.<sup>1182</sup> A different approach has also gained some favour, and this approach - evident in the *Peabody*<sup>1183</sup> case - combines the ‘contract terms’ and ‘whole contract’ approaches to assess the whether a significant imbalance is apparent, and whether it is contrary to the requirement of good faith.

Whilst English courts are unfamiliar with this approach,<sup>1184</sup> it has often been referred to as “playing fair.”<sup>1185</sup> This is generally accepted as not taking advantage of the other party through a list of factors identified in *First National Bank*.<sup>1186</sup> Recital 16<sup>1187</sup> is also relevant here as it outlines things to be considered when assessing good faith, and includes bargaining positions and

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<sup>1176</sup> UTCCR Regulation 6(1).

<sup>1177</sup> *Director General of Fair Trading v First National Bank* [2002] 1 AC 481, per Steyn LJ at 33.

<sup>1178</sup> *Director General of Fair Trading v First National Bank* [2002] 1 AC 481, per Steyn LJ at 33.

<sup>1179</sup> i.e. ‘The Whole Contract’ approach.

<sup>1180</sup> *Director General of Fair Trading v First National Bank* [2002] 1 AC 481, per Bingham LJ at 17.

<sup>1181</sup> *Office of Fair Trading v Foxtons* [2009] EWHC 1681.

<sup>1182</sup> L Koffman and E Macdonald, *The Law of Contract* (7<sup>th</sup> edn, OUP 2010) 260.

<sup>1183</sup> *Peabody Trust Governors v Reeve* [2008] EWHC 1432 (Ch).

<sup>1184</sup> L Koffman and E Macdonald, *The Law of Contract* (7<sup>th</sup> edn, OUP 2010) 264.

<sup>1185</sup> *Interfoto Picture Library Ltd v Stilleto Visual Programmes Ltd* [1989] QB 433 per Bingham LJ at 439.

<sup>1186</sup> *Director General of Fair Trading v First National Bank* [2002] 1 AC 481.

<sup>1187</sup> Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer **Contracts** (1993 OJL95/29), Recital 16.

inducements of the parties in agreeing to the contract. For example, the approach adopted by *Second Life*, of the ability to ‘own property’ may be perceived as an inducement to users to select *Second Life* over other environments such as *World of Warcraft*.

In assessing fairness, it is necessary to consider significant imbalance as well as good faith. Whilst these are both elements of the fairness test and have usually been considered separately, it is possible to construe them as directly related and therefore view the test somewhat differently. This was the situation in the *Peabody* case,<sup>1188</sup> but potential parallels can be identified in *First National Bank* through the judgment of Millett LJ who indicated a more cohesive and wide approach was necessary in identifying factors relevant to the fairness test.<sup>1189</sup> In advocating for such an approach, it is possible that this was a similar suggestion to that adopted in the later case of *Peabody*.<sup>1190</sup> It is possible that a sufficient imbalance will indicate that there has been a lack of good faith, therefore rendering the contractual term unfair and not binding. If the approach of Millett LJ is adopted for MMORPG and Virtual World EULA clauses, it is perhaps possible that such a wide approach could allow theoretical claims, or Value Theory<sup>1191</sup> to be considered in determining whether there has been an imbalance.

## 5.6. UTCCR Schedule 2 and EULA Clauses.

Schedule 2 of the UTCCR outlines indicative terms, which may be deemed to be unfair if such terms appear in a contractual agreement. Whilst this list of 17 terms is contained within the Regulations, there are some doubts as to the status of the list, with opinions differing on whether it is presumptive or merely indicative. McKendrick<sup>1192</sup> and Bright<sup>1193</sup> for example indicate that status of this list is far from clear, raising suggestions that the list is merely indicative. The lack of clarity in relation to the status of the list in Schedule 2 means that the list could be used to either raise a presumption of an unfair term in a consumer contract, or the list could be used as a guide to show the sorts of terms which may be regarded as unfair. This issue has, as yet, no definitive answer and the Regulations themselves do not provide a solution. Nevertheless, the terms in

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<sup>1188</sup> *Peabody Trust Governors v Reeve* [2008] EWHC 1432 (Ch).

<sup>1189</sup> *Director General of Fair Trading v First National Bank* [2002] 1 AC 481, per Millett LJ at 54.

<sup>1190</sup> *Peabody Trust Governors v Reeve* [2008] EWHC 1432 (Ch).

<sup>1191</sup> See: Chapter 2 – Property Matters: Virtually Justified? Especially at 2.7. *Theory for Parity?*

<sup>1192</sup> E McKendrick, *Contract Law – Text, Cases and Materials* (5<sup>th</sup> edn, OUP 2012) 467.

<sup>1193</sup> S Bright, ‘Unfairness and the Consumer Contract Regulations’ in A Burrows and E Peel (eds) *Contract Terms* (OUP 2007) 176.

Schedule 2 can be indicative of the types of terms that may appear as unfair terms in EULAs. Consequently, in considering the balance between user rights and developers' rights in online games, and the EULAs, it is beneficial to consider the grey list within Schedule 2.

Regulation 5(5) identifies the fairness test that applies to contractual terms. As part of the fairness test, Schedule 2 and the so-called 'grey list' is highlighted as relevant. In identifying Schedule 2, Regulation 5(5) highlights the types of terms that may potentially be regarded as unfair. Regulation 5(5) is only applicable where the contract terms have not been individually negotiated,<sup>1194</sup> meaning that they are terms where the consumer has had no influence over the term or, it forms part of a pre-formulated agreement. This suggests that EULA clauses could fall within the remit of the UTCCR given that the EULAs are pre-formulated agreements<sup>1195</sup> over which the users of the games have no influence, and which offer standard terms to all users alike.

#### *5.6.1. EULA Clauses and The 'Indicative List'*

All contractual terms must be tested against the fairness test.<sup>1196</sup> However, whilst this work is predominantly concerned with clauses relating to ownership provisions and dispute resolution provisions respectively in each of the four environments identified above, it is submitted that the EULAs themselves may contain additional unfair terms under the UTCCR. Given that EULAs do not allow for any individual negotiation, every clause within a EULA can be tested for fairness,<sup>1197</sup> but also considered under the indicative list in Schedule 2. Whilst not every EULA term will be tested here for reasons of relevance, those relating to particular issues of fairness will be examined, including those potentially impacting upon ownership and dispute resolution provisions. This examination will determine whether the EULA clauses are potentially unfair. The analysis here will build upon previous discussions of the contractual contents elsewhere in this chapter, but also follows the consideration of the fairness test in Regulation 5(5).

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<sup>1194</sup> UTCCR Regulation 5(2); 5(3) and 5(4).

<sup>1195</sup> UTCCR Regulation 5(3).

<sup>1196</sup> UTCCR Regulation 5(1).

<sup>1197</sup> Although for the core exemption, the terms relating to main subject matter or price to be paid are assessed.



### 5.6.2. EULAs and Schedule 2

The EULA clauses to be assessed here have been found in the EULAs used by the four online game environments identified in this work. Each of these clauses can be examined under the UTCCR, especially with reference to Schedule 2 because of the standard term nature of EULAs, and the lack of influence a user has over the terms themselves.

#### 5.6.2.1. *Terms limiting or excluding legal rights of the consumer.*

The indicative list in Schedule 2 includes provision for what is a ‘wrap up’ term, should a similar term be found in a contract.<sup>1198</sup> The indicative term in paragraph 1(b) of Schedule 2 covers terms, which seek to place inappropriate exclusions or limits on the consumers (users) in respect of the suppliers where there has been some form of non-performance of a contractual obligation by the supplier. This type of term has been found in some of the EULAs examined in this work. These clauses tend to provide a general limitation on liability for the game providers, preventing or limiting the legal remedy that a user may be entitled to. Generally, such clauses seek to limit the amount of damages or value of liability that a game provider could be subject to. For example, the *Habbo* Terms & Conditions excludes liability for the *Habbo* provider, Sulake.<sup>1199</sup> Similar provisions having a similar effect are found in Clause 14 of the *EverQuest II* EULA, requiring the user to “promise” not to bring any claims or suits against the developer, SOE. Again, similar provisions are identifiable in the *Second Life* Terms of Service,<sup>1200</sup> and Clause 12 in the *World of Warcraft* EULA and Terms of Service.

Given that paragraph 1(b) makes it clear that such contractual terms will be indicative of unfair terms, such limitations on the rights of the user as the consumer in a game context, are seemingly unfair terms. These EULA clauses have not been negotiated by the users, and therefore may be unfair terms, and not binding. In relation to this aspect, the practical effect would be to hold the terms as not binding, as they will be unlikely to pass the fairness test because these EULA terms are likely to be seen to cause a significant imbalance which is contrary to the good faith requirement. Interestingly, similar terms relating to binding arbitration are also found in the

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<sup>1198</sup> UTCCR Schedule 2, paragraph 1(b).

<sup>1199</sup> *Habbo Hotel* EULA, Clause 6.

<sup>1200</sup> *Second Life* Terms of Service, Clause 10.1.

EULAs, which is likely to prove problematic albeit other forms of alternative dispute resolution may be viewed as good practice.

#### 5.6.2.2. *Terms excluding or hindering legal remedies.*

The indicative term in paragraph 1(q)<sup>1201</sup> of the grey list deals with terms that exclude or limit the rights of consumers (users) to take legal action or exercise any other legal remedy. Whilst it is possible to view the general limitation of liability clauses – as discussed above – under this indicative term, paragraph 1(q) is more concerned with restrictions placed upon legal remedies, especially where there exists a term which imposes an obligation to arbitrate. This type of term is present in the *Second Life* Terms of Service,<sup>1202</sup> and has been the subject of litigation in the *Bragg* decision, which indicated that the contractual term compelling arbitration could not be binding upon the parties.<sup>1203</sup> A similar provision seeking to limit the rights of consumers – and therefore users – is present more notably in the *World of Warcraft* EULA<sup>1204</sup> and the Terms of Use Agreements.<sup>1205</sup> The *World of Warcraft* provisions set out a detailed contractual system of addressing disputes. The provisions first require a written complaint, before compelled arbitration is entered into. Interestingly, whilst this clause imposes limits upon the legal remedies available to the users, the situation is different if the dispute relates to intellectual property, where the *World of Warcraft* agreements indicate that litigation is to be the forum of resolution.<sup>1206</sup> Nevertheless, by stipulating that litigation is the route to be pursued, there is still a contractual limitation placed on the legal remedies the user can pursue. Whilst both the *Second Life* and *World of Warcraft* agreements contain clauses which are indicative of unfair terms under paragraph 1(q), the agreements of *Habbo* and *EverQuest II* do not contain such provisions and in this respect, do not seek to restrict the legal remedies available to their users, suggesting greater fairness or a better balance of interests.

However, the indicative term in 1(q) is not free from debate, as Treitel has suggested that not all alternative dispute resolution provisions will fall within it.<sup>1207</sup> Nevertheless, the terms in the *World*

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<sup>1201</sup> UTCCR Schedule 2, paragraph 1(q).

<sup>1202</sup> *Second Life* Terms of Service, Clause 12.1.

<sup>1203</sup> *Bragg v Linden Research Inc* (487 F.Supp 2d 593 E.D. Penn) [2007].

<sup>1204</sup> *WoW* EULA, Clause 15(B).

<sup>1205</sup> *WoW* EULA, Clause 17(B).

<sup>1206</sup> *WoW* EULA, Clause 15(D).

<sup>1207</sup> W E Peel, *Treitel: The Law of Contract* (13<sup>th</sup> edn, Sweet & Maxwell 2011) para 7-112.

of *Warcraft* and *Second Life* agreements are terms which are indicative of unfairness, but these are not the only examples. Other terms, including alteration of agreement terms are also subject to examination under Schedule 2.

#### 5.6.2.3. *Terms allowing unilateral alteration of the contract.*

Paragraph 1(j)<sup>1208</sup> of the indicative list in Schedule 2 includes in its potentially unfair terms, terms which enable the supplier to alter the terms of the agreement unilaterally without giving notice to the user. This type of term does not mean that each alteration clause will be presumed to be unfair. For example, there may be terms which allow alteration and require a seller to give notice and reasons to the consumer or user of the change. Nevertheless, widely phrased terms granting unilateral alterations to the supplier may be regarded as unfair. Again, such terms are present in the agreements of *Second Life*, *Habbo*, *World of Warcraft* and *EverQuest II*. Simply because all four environments have unilateral alteration clauses does not mean that they are all unfair. The *Second Life* clause for example, provides a mechanism for notifying the users of any changes,<sup>1209</sup> which would seem to mitigate a finding of unfairness under paragraph 1(j). However, Clause 13.4<sup>1210</sup> provides five methods of notice which may be used by *Second Life*. This would seem to satisfy the notice provision but it is a moot point as to whether notification by written communication to the account physical address is appropriate given the nature and provision of the *Second Life* service.

*Second Life* is not the only provider to contain such a clause in its agreement. *Habbo's* unilateral alteration clause states that they may not always tell users about any changes that have been made.<sup>1211</sup> This would seemingly be reflective of paragraph 1(j) which would be potentially unfair as *Habbo* seeks to avoid giving notice of unilateral alterations. The caveat to this is found in Clause 15.3, where *Habbo* advances a different position,<sup>1212</sup> and states that it will provide notice but only where it is potentially a detrimental alteration. Again, this latter provision would seem to satisfy paragraph 1(j) by providing notice. The prior provision however, is likely to be regarded as an unfair term because there is no recognition of a notice requirement.

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<sup>1208</sup> UTCCR Schedule 2, paragraph 1(j).

<sup>1209</sup> *Second Life* Terms of Service, Clause 1.

<sup>1210</sup> *Second Life* Terms of Service, Clause 13.4.

<sup>1211</sup> *Habbo Hotel* EULA, Clause 15.

<sup>1212</sup> *Habbo Hotel* EULA, Clause 15.3.

Similarly, *World of Warcraft* contains within its EULA, unilateral alteration provisions.<sup>1213</sup> This provision also details how users are to be given notice of the relevant changes, and includes express recognition of, and reference to, the right for users to terminate the agreement as a result of the changes. Consequently, as a result of this, the term is likely to be regarded as fair under paragraph 1(j) due to the notice provisions. *EverQuest II*'s agreement also contains provisions for unilateral discretion to amend the agreement at any time.<sup>1214</sup> This provision also indicates that there will be some form of notice given to the users but does not specify what this will consist of. This term is the least specific of all of the unilateral alteration clauses considered here because the *EverQuest II* EULA indicates that the alterations will be effective once the notification is made to the users. Again, the agreement does not specify how this will occur. Nonetheless, there is some form of notice provision included here also, and this too seems to mitigate the indicator of unfairness. Where there is an indicator of unfairness in respect of unilateral alteration terms it is possible that under the provisions in paragraph 2(b) of Schedule 2, unfairness may not be the result where there is a notice provision and the consumer (user) is able to terminate the agreement. It is therefore unlikely that a term under paragraph 1(j) will be a term indicating unfairness, unless there is unilateral alteration without notice, and without a right of termination for the user.

#### 5.6.2.4. *Terms allowing unilateral alteration of any characteristics of the service.*

Further unilateral alteration terms may also be indicative of unfairness under paragraph 1(k).<sup>1215</sup> Such terms are also unilateral alterations as in the previous paragraph – 1(j) – but are concerned with unilateral alterations of the characteristics of the service, rather than alterations to the agreement. Nevertheless, such clauses also appear in the gaming agreements under this heading. *Second Life*'s Terms of Service include such a clause allowing unilateral changes without notice being given to its users,<sup>1216</sup> and this is indicative of an unfair term. There is no notice aspect in *Second Life*'s term, and a list of reasons for the unilateral alterations is also absent. As such, this term is likely to be one which is regarded as unfair from the perspective of the user.

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<sup>1213</sup> *WoW* EULA, Clause 14.

<sup>1214</sup> *EQ II* Preamble.

<sup>1215</sup> UTCCR Schedule 2, paragraph 1(k).

<sup>1216</sup> *Second Life* Terms of Service, 4.2.

Similar provisions are present in the *Habbo* agreement, and again, *Habbo* is selective about the notice it will give to its users.<sup>1217</sup> In a manner identical to that of the unilateral alteration to the agreement clause, *Habbo* also indicates that notice will not always be given to users where there has been a unilateral alteration to characteristics of the service.<sup>1218</sup> Again, no reasons are listed, suggesting that this term will also be an unfair one under paragraph 1(k).

In the *World of Warcraft* Terms of Use Agreement, terms replicating unilateral characteristic alteration clauses are present, including a term allowing modifications of any game accounts for any reason at any time without notice or reasons being given.<sup>1219</sup> This is repeated in a wider manner for other characteristics of the game, and again is likely to fall within the type of clause to be regarded as indicative of unfairness.<sup>1220</sup> Similarly, the *EverQuest II* agreement contains a wide-ranging power to alter characteristics at will, and refers in the Preamble, to the “unfettered” right to make alterations and modifications to the service.<sup>1221</sup> There is also nothing to suggest that *EverQuest II* will provide reasons for such alterations to the service, and it is therefore likely that this clause too will be one which is indicative of unfairness.

It is however, possible that a “valid reason” could be to improve or develop the game or virtual world. Whilst there is little guidance on the meaning of “valid reason” under paragraph 1(k), it is possible that such a phrase could include developments of the service itself. If such reasons were accepted as valid under paragraph 1(k), it is possible that the clauses in all of the agreements considered above would not be regarded as potentially unfair. However, to date, no such determination has been made, and accordingly, paragraph 1(k) indicates that these terms may all be terms which are indicative of unfairness.

#### 5.6.2.5. *Terms purporting termination without notice.*

Alongside EULA provisions purporting to allow suppliers to modify unilaterally the agreement and the characteristics, these agreements also encompass termination clauses. Paragraph 1(g)<sup>1222</sup>

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<sup>1217</sup> *Habbo Hotel* EULA, Clause 14.

<sup>1218</sup> *Habbo Hotel* EULA, Clause 14.3.

<sup>1219</sup> *WoW* Terms of Use, Clause 6.

<sup>1220</sup> *Wow* Terms of Use, Clause 9.

<sup>1221</sup> *EQII* Preamble.

<sup>1222</sup> UTCCR Schedule 2, paragraph 1(g).

indicates that where such terms seek to provide termination without notice, there must be a serious ground for doing so. This indicative term, suggests clauses will be unfair terms without having a “serious ground.” There are three distinct elements to this indicative term: “reasonable notice; indeterminate duration [and] serious grounds”<sup>1223</sup> although none of these have been defined or considered in a judicial context. As such, it is suggested that contracts other than those which are fixed term will fall within the scope of this indicative term.

*Second Life* includes such a termination provision,<sup>1224</sup> but does state that termination without notice usually be where there is a reason, for example, the user is a registered sex offender.<sup>1225</sup> Whilst this may constitute “serious grounds,” there is a concurrent provision in this agreement which provides a general termination right.<sup>1226</sup> This term is connected to the account suspension provisions, and it would therefore appear that if *Second Life* determines there to be a reason for suspending a user’s account, that would provide grounds for termination without notice. The issue with the termination provisions in the *Second Life* Terms of Service arises in respect of serious grounds. In the absence of definition and judicial guidance, it is suggested that grounds such as those cited in Clause 11.4 (registered sex offender) or some similar indicator may suffice. Consequently, these provisions are likely to be fair as long as there is a reason provided.

Similar terms are found in the *Habbo* Terms and Conditions, which provide for account termination.<sup>1227</sup> Again here, no notice of termination will be provided. Whilst the agreement states no notice will be given, no notice will be given in three situations: account dormancy for six months; breach of *Habbo* conditions; or *Habbo* as a service is ending.<sup>1228</sup> Given that the agreement states when notice will be given, this would indicate that in any other instance, no notice will be given to affected users and that would seemingly fall foul of the indicative term in paragraph 1(g) of Schedule 2 of the Regulations. The issue here is also one of “serious grounds” and it is conceivable that all of the instances in the Terms and Conditions could be regarded as “serious” although it is also possible to conceive of a distinction between the grounds offered by *Second Life* and those offered by *Habbo*. Equally, given the lack of guidance on the meaning of

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<sup>1223</sup> UTCCR Schedule 2, paragraph 1(g).

<sup>1224</sup> *Second Life* Terms of Service, Clause 11.

<sup>1225</sup> *Second Life* Terms of Service, Clause 11.4.

<sup>1226</sup> *Second Life* Terms of Service, Clause 11.5.

<sup>1227</sup> *Habbo Hotel* EULA, Clause 12.2.

<sup>1228</sup> *Habbo Hotel* EULA, Clause 12.2.

“serious grounds” it is possible to construe all reasons as sufficient to potentially mitigate the lack of notice.

Termination provisions also appear in the *World of Warcraft* EULA<sup>1229</sup> and Terms of Use agreement.<sup>1230</sup> The EULA provision simply states that the service may be terminated or otherwise ended at the “sole discretion” of Blizzard – the developer of *World of Warcraft* – under the Terms of Use agreement.<sup>1231</sup> The corresponding provision in the *World of Warcraft* Terms of Use agreement also states that the service will be terminated at Blizzard’s discretion without reason or notice, only for further information to be given in relation to the code of conduct, where Blizzard indicates that it may terminate the accounts of users for anything it considers to be, “outside of the spirit of the game.”<sup>1232</sup> This would seemingly be the broadest and least specific of all of the termination clauses to this point. It would also seemingly fall foul of the “serious grounds” aspect of paragraph 1(g) of Schedule 2, suggesting that this term is unfair. If the reasons listed were more specific, it may be that this clause would not be reflective of the indicative term in paragraph 1(g).

*EverQuest II* also contains termination provisions, and offers six reasons or grounds<sup>1233</sup> for doing so – more numerous than the *Habbo* and *Second Life* provisions, and more specific than the *World of Warcraft* equivalents. The grounds for termination without notice include reasons largely connected to behaviours SOE – as provider of *EverQuest II* – would deem inappropriate<sup>1234</sup> and activity breaching the agreement itself.<sup>1235</sup> These grounds again differ from the grounds offered by *Second Life* and potentially lack the level of seriousness in that example. Nevertheless, where there has been some breach of the *EverQuest II* agreement, the breach may be serious enough to prevent the term becoming an unfair one, as indicated in paragraph 1(g) of Schedule 2. The unfairness, or otherwise, of the termination terms is an issue which will require a greater consideration of the entire contract<sup>1236</sup> than other EULA clauses may necessarily warrant here, especially in the absence of definitions of aspects of paragraph 1(g) of Schedule 2.

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<sup>1229</sup> *WoW* EULA, Clause 10.

<sup>1230</sup> *WoW* Terms of Use, Clause 10.

<sup>1231</sup> This is unusual given that the Terms of Use Agreement is a separate document – see below at 4.8.2.6. Incorporating Terms of Other Documents. See also: *MDY Indus., LLC v Blizzard Entertainment, Inc.*, 2010 WL 5141269, 97 U.S.P.Q.2d (BNA) 1001 (9th Cir. Dec. 14, 2010).

<sup>1232</sup> *WoW* Terms of Use, Clause 7.

<sup>1233</sup> *EQ II* EULA, Clause 6.

<sup>1234</sup> *EQ II* EULA, Clause 6(iv).

<sup>1235</sup> *EQ II* EULA, Clause 6(vi).

<sup>1236</sup> *Peabody Trust Governors v Reeve* [2008] EWHC 1432 (Ch).

#### 5.6.2.6. *Terms incorporating terms of other documents.*

Paragraph 1(i) of Schedule 2 indicates that terms which have the effect of “irrevocably binding the [user] to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract” may be regarded as terms which are unfair. Such terms can also be found within the agreements under examination here, because such agreements, especially in the context of online games, do not always contain all of the terms to which the game providers would like to see their users bound. McKendrick highlights that this particular paragraph in Schedule 2 is rather unclear in its scope.<sup>1237</sup> Therefore, it is suggested here, that such terms may be regarded as unfair, especially where the user has not had chance to view the additional documents to which the potentially unfair term refers.

In the *Second Life* Terms of Service for example, there are a further 17 policies which the agreement claims a user is bound by.<sup>1238</sup> These additional agreements contain a wealth of information, and cover a whole range of things from billing to safety guidelines. The *Second Life* terms stipulate that these agreements also form part of the binding agreement with the user. Under paragraph 1(i) it would seem that such a term may be regarded as unfair. However, when viewing the *Second Life* Terms of Service, all of the additional policies and documents are hyperlinked, and therefore are available to the user should the user choose to read them. As such, this would alter the potential unfairness of these terms, and suggest that users will be bound by such clauses, especially where they sign an agreement, because by doing so, a user is bound by the terms and it is immaterial whether the terms have in fact been read.<sup>1239</sup> This is supported by Mellish LJ, who advocated that where a written agreement exists, and that agreement is signed, it is proven by the adding of the signatures.<sup>1240</sup> Consequently, given that the documents are available to potential *Second Life* users, and are linked to the initial document, it is suggested that this term is not one which is indicative of unfairness under paragraph 1(i).

The *Habbo* Terms and Conditions stipulate that the user, by agreeing to the terms and conditions, will also be bound by both the privacy policy and the Habboway Code of Conduct;<sup>1241</sup> both of which are linked from the terms and conditions document itself. As this is an identical situation

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<sup>1237</sup> E McKendrick, *Contract Law – Text, Cases and Materials* (5<sup>th</sup> edn, OUP 2012) 478.

<sup>1238</sup> *Second Life* Terms of Service, Clause 14.

<sup>1239</sup> *L'Estrange v F Graucob Ltd* [1934] 2 KB 394; hereafter *L'Estrange*.

<sup>1240</sup> *Parker v South Eastern Railway* [1877] 2 CPD 416.

<sup>1241</sup> *Habbo Hotel* EULA, Preamble.



to that discussed in relation to *Second Life*, it is unlikely that the term will be unfair based on paragraph 1(i). However, the situation is different in respect of the agreements for *World of Warcraft*.

The *World of Warcraft* EULA and Terms of Use agreements are distinct from *Second Life* and *Habbo* because both of the *World of Warcraft* documents indicate that users are bound by both documents by virtue of being in agreement with one. For example, the *World of Warcraft* EULA states, “...subject to a separate Terms of Use Agreement, incorporated into this Agreement by this reference.”<sup>1242</sup> Whilst this is of little distinction to the terms in *Second Life* and *Habbo*, the *World of Warcraft* agreements are not hyperlinked to one another. In addition, there is no other reference to the Terms of Use in the EULA, and vice versa. Consequently, where a user is therefore faced with one document, it is purporting to bind him to another which he has not seen, and which he cannot access easily from the original document. This may therefore give rise to an indication of unfairness under paragraph 1(i) of Schedule 2. This could be similar to, and reflective of, the finding in *MDY v Blizzard*,<sup>1243</sup> that breaching the terms of one agreement did not mean that the terms of the second agreement were also breached. The court highlighted in this case, that there had not been enough done by Blizzard in the agreements to ensure that the two documents were linked. It is therefore suggested that the *World of Warcraft* term seeking to incorporate terms of a second document not available in the first document would be an unfair term. Significantly, *EverQuest II* does not contain a term purporting to do that which the previously considered terms aim to do.

It would therefore appear that despite the situation in *EverQuest II*'s EULA, there is a standard practice in the online gaming sector of attempting to incorporate additional terms and documents into EULAs, but that some of these attempts will be indicative of unfair terms under paragraph 1(i). More broadly, the clauses examined here, with respect to Schedule 2 and the grey list, suggest that there are number of terms contained within EULAs of online games and virtual worlds which are indicative of unfair terms under the UTCCR. This is reflective of the disparity in bargaining position between the user and the game developer, and reflects the lack of balance in this respect.

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<sup>1242</sup> *WoW* EULA Preamble.

<sup>1243</sup> *MDY Indus LLC v Blizzard Entertainment Inc* 2010 WL 5141269, 97 U.S.P.Q.2d (BNA) 1001 (9th Cir. Dec. 14, 2010).

## 5.7. Are EULA clauses imbalanced?

In assessing fairness, in England and Wales, “the requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties’ rights and obligations under the contract significantly in his favour.”<sup>1244</sup> This interpretation when applied to EULA clauses indicates that where developers are benefitting from all rights before they have even arisen as rights, this puts them into a significantly more advantageous position. This is especially the situation when in-game items are very valuable and it is the developers who benefit from them rather than the users who have toiled to acquire and develop them.

It therefore seems that clauses relating to proprietary interests in EULAs are likely to be considered unfair under the UTCCR regime, and they must be assessed in terms of fairness at the point the contract was entered into.<sup>1245</sup> Cheshire highlights that there is a degree of ambiguity surrounding good faith and the imbalance elements but that it ultimately means the scope of unfairness is very wide.<sup>1246</sup> Particularly one-sided clauses are likely to be imbalanced – and therefore potentially unfair (within the meaning of the UTCCR) - especially where these have not been drawn to the attention of the contracting parties.<sup>1247</sup> In EULAs, clauses are not drawn to the attention of users, and frequently such contracts are largely unread.<sup>1248</sup> This is a further indication of the lack of balance in EULAs on the basis of their general ‘unreadability.’ Ownership clauses are specific examples of such disproportion and are potentially onerous. No attention is brought to them, which, when combined with the ‘unreadability’ of the EULAs generally puts the users at a significant disadvantage to that of the developer with whom a user will be contracting.

A further point to note is in relation to written terms, which are required to be expressed plainly and intelligibly. As EULAs tend to be written documents, every clause within the contract ought to be capable of meeting this requirement.<sup>1249</sup> There has been debate over whether contracts are

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<sup>1244</sup> *Director General of Fair Trading v First National Bank* [2002] 1 AC 481, per Bingham LJ at 17.

<sup>1245</sup> UTCCR Regulation 6(1).

<sup>1246</sup> M Furmiston, *Cheshire, Fifoot and Furmiston’s Law of Contract* (16<sup>th</sup> edn, OUP 2012) 257.

<sup>1247</sup> *Muckenbeck & Marshall v Harold* [2005] All ER (D) 227 (April).

<sup>1248</sup> Y Bakos and Others, ‘Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts’ (October 6, 2009). CELS 2009, 4th Annual Conference on Empirical Legal Studies Paper; NYU Law and Economics Research Paper No. 09-40. Available at SSRN: <<http://ssrn.com/abstract=1443256>>.

<sup>1249</sup> UTCCR Regulation 6(2) and 7(1); L Koffman and E Macdonald, *The Law of Contract* (7<sup>th</sup> edn, OUP 2010) 276.

expressed intelligibly, but recent research into the reading of contracts would suggest that they are not expressed in such a way, which further supports the potential claims of users.<sup>1250</sup>

It is nevertheless very clear that the balance of the terms cannot be assessed in relation to the definitions of the subject matter or the prices involved. The proportion - and fairness - will be assessed with regards to the nature of the subject matter, and the concluding of the contract itself, although the breadth of Regulation 6(2) has been restricted by the Courts in England and Wales.<sup>1251</sup> The Court in this instance stated that terms may be excluded from some assessment but could still potentially be challenged under other grounds. However, the Supreme Court has also indicated that there is a significant difficulty in assessing fairness under Regulation 6 because in many situations all of the terms of the contracts are related to price and remuneration.<sup>1252</sup> It must be noted however, that the Court indicated if a term related to a core service or was itself core to the agreement, it would not fall within the UTCCR.<sup>1253</sup> Nevertheless, the *First National Bank* decision remains important, and analogous to EULAs, because traders should not be able to benefit from placing consumers into a default position in the contracts.<sup>1254</sup> As EULAs are predominantly concerned with the access to an online environment without which users cannot access game accounts and in-game items, EULAs are a requirement in order to access such environments. In this way, there is very often little choice for users as to whether or not they accept the contract offered to them on the standard terms of the developer.

It is possible to see that a number of provisions could be struck out<sup>1255</sup> of EULAs for online games and Virtual Worlds, but most especially those dealing with proprietary interests in in-game items. There is a 'trade-off' to be made for using a platform which has been developed by others, because, as users are using this platform, it is therefore to be expected that there is something to be given in return for this. Nevertheless, in the majority of environments, users pay a regular subscription fee, and as such are paying for access. If developers require an additional 'payment' in the form of all proprietary interests, it seems disproportionate to the users who are essentially

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<sup>1250</sup> Y Bakos and Others, 'Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts' (October 6, 2009). CELS 2009, 4th Annual Conference on Empirical Legal Studies Paper; NYU Law and Economics Research Paper No. 09-40. Available at SSRN: <<http://ssrn.com/abstract=1443256>>. Available at SSRN: <<http://ssrn.com/abstract=1443256>>.

<sup>1251</sup> *Director General of Fair Trading v First National Bank* [2002] 1 AC 481.

<sup>1252</sup> *Office of Fair Trading v Abbey National plc* [2010] 1 AC 696, per Steyn LJ at 34.

<sup>1253</sup> *Office of Fair Trading v Abbey National plc* [2010] 1 AC 696.

<sup>1254</sup> *Office of Fair Trading v Abbey National plc* [2010] 1 AC 696, per Walker LJ at 43.

<sup>1255</sup> UTCCR Regulation 8(1) – terms which are found to be unfair will cease to be binding although if the remainder of the contract is capable of existing it will remain binding without the unfair terms (See Schedule 1).

paying two times over. It will be interesting to note whether any changes to the Unfair Terms Regime will be enacted in light of the recently published bill on Consumer Rights.<sup>1256</sup> The Government has clearly indicated a willingness to improve the situation relating to terms, stating:

“Some protection in law is necessary because consumers often cannot or do not wish to investigate the detail of every contract term before they sign-up to an agreement. Consumers are focused on the product or service they are purchasing rather than the contract.”<sup>1257</sup>

This is an intriguing statement of intent, especially for digital products and services, such as online games and Virtual Worlds, which have traditionally been reliant upon the EULA. The Draft Bill also indicates that its provisions will apply to contracts under which digital content will be provided in exchange for a consumer paying a price.<sup>1258</sup> This indicates that there is strong potential for online game and Virtual World EULAs to fall under the remit of the revised regime on consumer rights, albeit if this seems a distant reality at present.

When considering the positions of an individual social gamer who seeks the opportunity to engage with an online platform of his or her choice, and the multi-national, entertainment corporations, a comparison is perhaps unavoidable. Nevertheless, when considering the strength of the “little guy” against the potential behemoths of entertainment such as Sony Entertainment, - the creators of *EverQuest II* - or *Blizzard Entertainment*, - the creators of *World of Warcraft* - the comparative positions are striking. It is these positions relative to one another, in the context of adhesion contracts that compound a difficult situation for users.

The position of each party should be considered, alongside other alternative means which could be satisfying the needs of the consumer. When comparing the relative positions, an individual user who is probably a gaming enthusiast at best, and a social gamer with a curiosity about online gaming at worst, and a multinational entertainment company with the resources to develop, create and maintain a game that attracts millions of people worldwide and continues to grow, it is unsurprising that there is a stark contrast between the positions. As such, *Blizzard Entertainment*

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<sup>1256</sup> Draft Consumer Rights Bill, especially Part 2 which deals with Unfair Terms. Draft Consumer Rights Bill (BIS/13/925) 12 June 2013, available online: <<https://www.gov.uk/government/publications/draft-consumer-rights-bill>> retrieved 15 June 2013. Hereafter Draft Consumer Rights Bill 2013.

<sup>1257</sup> Department for Business, Innovation and Skills, ‘Draft Consumer Rights Bill: Government Response to Consultations on Consumer Rights (BIS/13/916)’ (June 2013) available online: <<https://www.gov.uk/government/publications/draft-consumer-rights-bill>> retrieved 1 July 2013.

<sup>1258</sup> Draft Consumer Rights Bill 2013, s35(1).

for example, will not have a need to make consideration of the needs of individual users. There is unlikely to be any great concern for the interests of the gamers themselves by *Blizzard* other than that gamers are attracted to the game, and return to play on a regular basis. The different positions of the parties reflect different needs and interests.

There are other online games and Virtual Worlds available for a user to attempt to access or even use for a trial period. However, most other MMORPGs or Virtual Worlds will adopt a set of terms almost identical in nature to those adopted and used by *Blizzard Entertainment* to regulate *World of Warcraft*. Moreover, if a user wishes to join *World of Warcraft* so that he can play online with his friends, how would this need be met by an alternative platform if the user's friends all played *World of Warcraft*, and this game only? Quite simply, the user, should he desperately wish to engage with *World of Warcraft*, would struggle to find a game that is similar to *World of Warcraft* in terms of design and gameplay. Whilst it is true that other games exist, each has a unique appeal and set of characteristics. The requirements could be met by an alternative gaming platform provided that the user concerned had only one requirement; that he play an online game. As soon as a customer's requirements become more detailed and comprehensive, the number of potential alternatives becomes a great deal narrower – if not non-existent.

With regard to Clause 8 of the EULA from *World of Warcraft*, which deals with ownership of in-game items, whilst this clause is comprehensive, such a clause is replicated elsewhere in other online game and Virtual World EULAs. The general nature and content remains the same throughout a number of different online games, with the only significant difference being the precise wording. As such, a user seeking to engage with an online game will have to agree to a term of this ilk regardless of the precise platform, and as such, it would appear that there is little doubt over the standard term nature of EULAs for Virtual Worlds and online games. The lack of bargaining position of users is therefore a key determining factor in their acquiescence, regardless of reading the terms and conditions.

Of similar importance is the potential for inducements to agree to EULAs to play a significant role in assessing the balance within terms. Such factors were outlined in the original Directive,<sup>1259</sup> and have been considered in later cases. The idea of an inducement to contract could potentially

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<sup>1259</sup> Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts (1993 OJL95/29), Recital 16.

include something as significant as retaining ownership over in-game items in a Virtual World. This is the unique selling point of *Second Life*<sup>1260</sup> and as such, could be viewed as an inducement to contract with *Linden Labs* rather than the provider of an alternative, competing platform. This would therefore give users of *Second Life* expectations of proprietary interests and entitlements.<sup>1261</sup>

### 5.7.1. Bragg Unfairness.

In the US, there have been indications of similar treatment being given to terms which are deemed to be unfair, or ‘unconscionable.’ The leading example in relation to online games and Virtual Worlds arose in 2007 in the case of *Bragg*.<sup>1262</sup> Bragg was a user of *Second Life* who had his access and account terminated for acting in violation of the terms of service. Bragg then claimed that he had proprietary rights in his *Second Life* items which amounted to several thousand dollars. *Linden Research* in their contractual EULA included an arbitration clause which, in the event of a dispute, compelled users to submit to a process of arbitration. Although this case was settled before a court judgment could be made, Judge Robreno was very clear to determine that the arbitration clause was not binding upon Bragg and that there could be no compelled arbitration because the clause was not a fair one.

Whilst this decision is a state decision from California, in the US, and is therefore not covered by the UTCCR, it is a clear indication that unfair terms in EULAs may not be binding upon the users who have agreed to them. The EULA terms identified – in particular those dealing with ownership and dispute resolution provisions – have been treated under US law, in a similar way to which they could be treated under the UTCCR. This is evident from the *Bragg* decision, and suggests that the US approach may be reflected in the different European approach and tests. This also indicates that the reading in full of such agreements is not necessary, as potentially disproportionate clauses may cease to be binding regardless of whether or not the user has agreed to them.

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<sup>1260</sup> *Second Life*, ‘Terms of Service’ Clause 7 (6 October 2010) available online: <<http://secondlife.com/corporate/tos.php#tos7>> retrieved 14 October 2010.

<sup>1261</sup> B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA Publishing 2008) 76; *Office of Fair Trading v Foxtons* [2009] EWHC 1681 at 91.

<sup>1262</sup> *Bragg v Linden Research Inc.* (487 F.Supp 2d 593 E.D. Penn) [2007]; hereafter *Bragg*.

## 5.8. Conclusion.

EULAs demonstrate the balance of power and bargaining positions between a user and the multinational game developer. Whilst this is accepted as an existing problem in contractual relationships generally, the exertion of power in the contractual bargain for users of distinct and unique online spaces is far more problematic. It is the uniqueness of these online games and Virtual Worlds - and their distinctiveness from rivals that comprise their desirability – offering access to users, but requiring them to agree that they have no proprietary interests in in-game items - even if they are created outside of the environment. It does not, for instance, reflect property theories.<sup>1263</sup>

This has been a relatively minor issue, but the rise in considerations of digital content, and the associated increased awareness of the value of online gaming items mean that this is no longer the situation. Disputes are arising that concern the impact of behaviour and activity on game account items, and these disputes are no longer confined to the online worlds – they are now a part of the offline legal system. Perhaps more prevalently, users are no longer solely users – they are also potentially joint-owners. In the majority of online games and Virtual Worlds, users are now paying subscription fees and, as such, there is an assertion that they are paying for something in which they have interests, and this reflects the essence of a contractual agreement. Yet this notion is one which game developers seem to be contractually displacing because users are required to pay fees to gain nothing other than access to these online spaces – they have no other rights and are entirely at the mercy of the game developers.

The recent announcement by the Office for Fair Trading<sup>1264</sup> that games on mobile devices and the fees associated with them are to be examined, suggests there may be some changes ahead. This would also seem to suggest that the OFT believes that the games contracts should fall within the remit of consumer regulation, and consumer protection rather than solely unfair terms regulation, and with the new draft Consumer Rights Bill,<sup>1265</sup> this is perhaps now achievable.

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<sup>1263</sup> See: Chapter 2 - Property Matters: Virtually Justified?

<sup>1264</sup> Hereafter OFT.

<sup>1265</sup> Draft Consumer Rights Bill (BIS/13/925) 12 June 2013, available online:  
<<https://www.gov.uk/government/publications/draft-consumer-rights-bill>> retrieved 15 June 2013.

This chapter has examined from a contractual perspective, the potential imbalances and potential disproportion in EULA clauses. The research demonstrates that the ways in which these contracts allocate rights lacks balance, and the lack of choice in accepting standard terms – regardless of the precise gaming environment – is also disproportionate. The discussion in this chapter: ‘Contractual Displacement of Proprietary Interests: EULAw?’ has considered how EULA clauses relating to potential proprietary interests claims, and other EULA clauses in MMORPGs and Virtual Worlds may be treated under the UTCCR. The research indicates that such agreements may fall within the UTCCR, and that several clauses are indicative of unfairness due to the significant imbalance which is contrary to the requirement of good faith.

This research adds to knowledge relating to substantive unfairness in MMORPG EULAs, and builds upon this through an examination of practical examples in a gaming context. This research demonstrates the interrelationship between copyright and contract, and identifies the use of EULAs as controlling mechanisms in MMORPGs and Virtual Worlds. This discussion therefore builds upon the contribution in previous chapters of both proprietary interests,<sup>1266</sup> and theoretical justifications for such interests.<sup>1267</sup> The research within this chapter also identifies further issues relating to proprietary interests, suggesting that that displacement of automatic proprietary interests by EULA clauses provides an imbalance.

The following chapter: ‘Governance Structures and the Alternatives’ will consider the current governance and regulatory approach to online games and Virtual Worlds, with a specific focus falling upon the activities that can impact upon the rights of users in relation to in-game content and items. ‘Governance Structures and the Alternatives’ will address these issues, and will consider some of the broader regulatory issues, including the contractual paradigm, before considering some potential alternative approaches. It will draw upon the discussions of both copyright and contract that have preceded it, and will conclude that mechanisms which reflect the position and rights of users are desirable, especially given the potential imbalances in the interests of users and developers contained within the EULAs.

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<sup>1266</sup> See generally: Chapter 3 - Digital Copyright: 1988 or Web 2.0?

<sup>1267</sup> See generally: Chapter 2 - Property Matters: Virtually Justified?



## Chapter 6

### Governance Structures and the Alternatives?

#### 6.1. Introduction.

Our digital networked society spends a significant period of time engaging with, and interacting through, online environments, with Ofcom reporting in 2010 that almost 50% of time is spent online across numerous platforms, using various devices.<sup>1268</sup> We are both consumers and netizens.<sup>1269</sup> These environments encompass a range of spaces such as social media,<sup>1270</sup> social networking<sup>1271</sup> and gaming. Our interactions have changed; the environments have developed but fundamentally the objective of each environment remains unaltered. As such, the ways in which *World of Warcraft*, *EverQuest II*, *Habbo* and *Second Life* operate have not been altered since these environments became available to gaming markets. Neither have their controlling mechanisms or systems of governance been adapted or amended.

The topic of cyberspace and the constituent elements of it have attracted a significant level of criticism and comment.<sup>1272</sup> From the inception of the World Wide Web, discussions have arisen that have attempted to address how we should govern and control the Internet and parts of it. J P Barlow famously stated that Governments have no claim to cyberspace because it is beyond their jurisdiction and their authority will not be recognised.<sup>1273</sup> This statement did not draw to a close the speculative discussions and concerns of interested parties such as rights holders and content controllers. The discussion of controlling the Internet is closely linked to the ideas of jurisdiction and the limits of Governmental interference. Whilst these are an interesting element to the debates over control, and governance, they are also relevant to the contractual approach

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<sup>1268</sup> Ofcom, 'TV, phones and Internet take up almost half our waking hours' Ofcom Marketing Report 2010 available online: <<http://consumers.ofcom.org.uk/2010/08/tv-phones-and-Internet-take-up-almost-half-our-waking-hours/>> retrieved 17 February 2013.

<sup>1269</sup> Oxford Dictionaries, 'Definition of Netizen in English' available online: <<http://oxforddictionaries.com/definition/english/netizen>> retrieved 14 May 2013; J Hauben, 'Further thoughts about netizens' (1 June 2010) available online at: <[http://http://www.columbia.edu/~hauben/CMC/netizen\\_thoughts.html](http://http://www.columbia.edu/~hauben/CMC/netizen_thoughts.html)> retrieved 25 June 2012.

<sup>1270</sup> Oxford Dictionaries, 'Definition of Social Media in English' available online: <<http://oxforddictionaries.com/definition/english/social-media>> retrieved 14 May 2013.

<sup>1271</sup> For example; Facebook, Twitter, Instagram to cite but three examples.

<sup>1272</sup> For example: A Murray, *The Regulation of Cyberspace: Control in the Online Environment* (Routledge-Cavendish, 2006); D G Post, 'Governing Cyberspace: Law' (2007-2008) 24 Santa Clara Computer & High Tech L J 883; D G Post, *In Search of Jefferson's Moose – Notes on the State of Cyberspace* (OUP 2009).

<sup>1273</sup> J P Barlow, 'Declaration of the Independence of Cyberspace' EFF (8 February 1996) available online: <<https://projects.eff.org/~barlow/Declaration-Final.html>> retrieved 17 February 2013.

that online game and virtual world platform providers have to date favoured.<sup>1274</sup> On first examination, this method seems to be the practical choice; it allows for custom control of online environments yet deals – at least in theory – comprehensively with a host of potential issues, and governs the expected behaviours of users.

Since the recent revelations<sup>1275</sup> over the use of online interactive environments and the dangers that they encompass, alongside concerns over online privacy and the use of data,<sup>1276</sup> greater attention has been placed upon online platforms.<sup>1277</sup> This focus has fallen – in a gaming context – particularly on the relationship between copyright and contract law,<sup>1278</sup> which are the dominant and inter-reliant methods of formal control recognised by our offline legal system. An increasing number of cases is emerging within legal jurisdictions that focus on disputes in online games or virtual worlds.<sup>1279</sup> In 2012 for example, new suits were lodged in the US;<sup>1280</sup> whilst others saw amendments made to the original cases, concerning copyright and proprietary interests in virtual items.<sup>1281</sup> This, added to the developing body of literature relating to elements of online gaming disputes,<sup>1282</sup> implies that there could be some room for reconsidering the regulatory framework and systems of governance that have hitherto been the accepted standards.

The contractual method of controlling behaviour and managing the expectations of users<sup>1283</sup> is problematic, especially when the issue of user interests is considered. The current regulatory framework pays little credence to the claims of users that they are entitled to interests in in-game

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<sup>1274</sup> Contractual provisions will be subject to the Unfair Terms in Consumer Contracts Regulations 1999.

<sup>1275</sup> R Seifert, 'Striptease and cyber sex: My stay at Habbo Hotel' (*Channel 4 News*, 12 June, 2012) available online: <<http://www.channel4.com/news/striptease-and-cyber-sex-my-stay-at-habbo-hotel>> retrieved 16 February 2013.

<sup>1276</sup> BBC News, 'Leveson: Internet needs new privacy laws' (7 December 2012) available online: <<http://www.bbc.co.uk/news/uk-20636697>> retrieved 17 February 2013.

<sup>1277</sup> O Wright, 'David Cameron to announce crackdown on violent Internet porn' *The Independent* (London, 22 July 2013) available online: <<http://www.independent.co.uk/news/uk/politics/david-cameron-to-announce-crackdown-on-violent-Internet-porn-8725011.html>> retrieved 23 July 2013.

<sup>1278</sup> SABIP, 'The Relationship between Copyright and Contract Law' (July 2010) <<http://www.sabip.org.uk>>.

<sup>1279</sup> See for example: *Bragg v Linden Research Inc.* (487 F.Supp 2d 593 E.D. Penn) [2007]; *Eros, LLC, v. John Doe*, US Dist. Ct. Middle District of Florida, Case No: 8:07-cv-1158-T-24TGW [2007]; *Hernandez v Internet Gaming Entertainment*, U.S. Dist. Ct. Southern District of Florida, Case No:07-CIV-21403-COHN/SELTZER [2007]; *BlackSnow Interactive v. Mythic Entertainment Inc.*, No. 02-00112 (C.D. Calif.) [2002].

<sup>1280</sup> *Electronic Arts Inc v. Zynga Inc*, U.S. District Court, Northern District of California, No. 12-04099 [2012].

<sup>1281</sup> *Amaretto Ranch Breedables v. Ozimals*, 3:10-cv-05696-CRB (N.D. Cal.) [2010]; *Evans et al v Linden Research Inc. et al* No. C 11-01078 DM, United States District Court, N.D. California (November 20 2012).

<sup>1282</sup> For example: Y H Lee, 'Play again? Revisiting the case for copyright protection of gameplay in videogames' [2012] EIPR 34(12); K Barker, 'MMORPGing - The Legalities of Game Play.' (2012) *European Journal for Law and Technology*, Vol. 3, No.1; R Kennedy, 'Virtual Rights? Property in Online Game objects and Characters' (June 2008) *Information & Communication Technology Law* Vol 17(2).

<sup>1283</sup> B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA Publishing 2008) 75.

content. The EULAs, which remain the leading method of outlining what can and cannot happen online, especially in environments such as *Habbo* and *World of Warcraft*, potentially contain numerous unfair contract terms.<sup>1284</sup> This, combined with the lack of interests for users in in-game content, indicates that the regulatory approach ought to be examined. Such a situation is compounded by the difficulty in enforcing rights<sup>1285</sup> – if users have such entitlements – in online games and Virtual Worlds.

This chapter will consider wider issues than those discussed in the preceding chapters, and will focus upon the regulatory framework applicable to MMORPGs and Virtual Worlds. This discussion necessarily will involve some consideration of the pervasive issue that is the control of cyberspace. The regulation under consideration in the gaming context focuses on different approaches to controlling these spaces, but also considers potential alternatives that would reflect an improved set of End User Licence Agreements, and a more user-friendly and balanced set of rights in gaming content. In addition to this, this chapter also considers other issues that impact upon the gamer's experiences in their chosen environment, and considers how these fit within a regulatory setting at present.

This chapter builds upon the outlines in Chapter 1 of the parties and characters involved in online gaming, and focuses on the types of activities performed by these characters to highlight the challenges of governance of these environments. Chapter 6 therefore develops the discussion in previous chapters of theoretical justifications for proprietary claims in in-game items,<sup>1286</sup> and also builds upon the assessment of EULA clauses in Chapter 5. The discussion of contractual claims, together with the prior discussion of potential copyright claims draws upon practical examples of gaming activity to consider alternative approaches. These alternatives may address the imbalances between user and developer interests - in the contract-copyright governance paradigm used in MMORPGs and Virtual Worlds. The discussion in this chapter will add to our understanding of the practical issues in these environments, and will draw upon both contract and copyright in considering potential alternatives to the current governance mechanism.

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<sup>1284</sup> See: Chapter 5 - Contractual Displacement of Proprietary Interests: EULAw? At 5.5. *Standard terms – Fairness and Balance?*

<sup>1285</sup> The experience of gamers in China demonstrates this, with the police refusing to investigate such issues: BBC News, 'Chinese Gamer Sentenced to Life' (8 June 2005) <<http://news.bbc.co.uk/1/hi/4072704.stm>> retrieved 19 November 2009. However, this has not been the experience in some European states, with criminal proceedings resulting in custodial sentences for gaming thefts: BBC, 'Virtual theft leads to arrest' (14 November 2007) available online: <<http://news.bbc.co.uk/1/hi/technology/7094764.stm>> retrieved 18 February 2013.

<sup>1286</sup> See: Chapter 2 – Property Matters: Virtually Justified?

This chapter does not consider jurisdictional issues, in terms of conflict of laws or applicable law. Jurisdictional issues are a potential undercurrent to any consideration of a discussion on regulating elements of cyberspace, but jurisdiction in the traditional sense is not considered in this work. The discussion will outline the links between copyright, contract, code and control in these environments, and suggest that a layered approach may resolve some of the governance challenges.

## **6.2. Governance, regulation, control: One and the same?**

Governance and regulation of the Internet, and cyberspace are terms that tend to be used interchangeably. Whilst this is convenient, it is far from precise, and therefore provides some difficulties in determining the scope of the discussion. The Working Group on Internet Governance,<sup>1287</sup> organised by the United Nations in 2005 adopted a definition of Internet governance, which comprises a number of elements:

“Internet governance is the development and application by Governments, the private sector and civil society, in their respective roles, of shared principles, norms, rules, decision-making procedures, and programmes that shape the evolution and use of the Internet.”<sup>1288</sup>

This definition is rather wide-ranging, and encompasses much more than a simple idea of controlling cyberspace, or instilling some element of norms. However, there is one quite unsatisfactory element of this definition; the development and application by Governments. Whilst Governments are not intended to be the sole controllers, they nevertheless do have a significant level of influence. It is therefore apparent that the WGIG is directly opposed to the Declaration of the Independence of Cyberspace that was issued by John Perry Barlow in 1996.<sup>1289</sup> Seemingly, under this definition, Governments perceive that they have a right to impose their will and control over cyberspace, and therefore it would appear that this definition views cyberspace as a territory which can be subjected to Governmental control, an argument which has some support as it can be viewed as a sensible method of controlling cyberspace.<sup>1290</sup> This gains

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<sup>1287</sup> Hereafter WGIG.

<sup>1288</sup> Report of the Working Group on Internet Governance (WGIG), (Chateau de Bossey, June 2005) para 10 available online: <<http://www.wgig.org/docs/WGIGREPORT.pdf>> retrieved 12 June 2013.

<sup>1289</sup> J P Barlow, ‘Declaration of the Independence of Cyberspace’ EFF (8 February 1996) available online: <<https://projects.eff.org/~barlow/Declaration-Final.html>> retrieved 17 February 2013.

<sup>1290</sup> D R Johnson and D G Post, ‘Law and Borders – The Rise of Law in Cyberspace’ (1996) 48 Stan L Rev 1367.

some support from Duranske who argues that real world laws must apply to games<sup>1291</sup> and these laws stem from those with a law making authority, and in the cyberspace arena, the WGIG is of the opinion that this authority rests with Governments.<sup>1292</sup> It is possible they view game developers as quasi-Governments because they stipulate the rules and regulations of a particular environment and could act like Governments.<sup>1293</sup>

The WGIG approach, whilst undoubtedly unsavoury to cyber-libertarians,<sup>1294</sup> also raises difficulties, most especially in relation to territorial claims. Cyberspace cannot be ‘touched;’ therefore, if it is to be treated on a territorial basis, this suggests that jurisdictional claims will play a role in the norms and programmes shaping the Internet. The Internet & Jurisdiction Project<sup>1295</sup> states that cyberspace is nothing more than a patch-work of spaces that contain elements that are both public and private, and which stretch across national and international boundaries.<sup>1296</sup> This, in turn, leads to a significant challenge; the so-called boundaries of cyberspace do not align neatly with the boundaries of the physical world. This makes regulation or governance along the same basis as offline regulation a challenge. Governance of cyberspace tends to focus on behaviours that offline legal regulation deems undesirable, for example criminal activity, rather than arena-specific behaviour such as grieving, or Real-Money Trading in games.

The US has recently turned its attention to the governance of cyberspace.<sup>1297</sup> Whilst this is a positive step, in that these issues are now gaining attention, it is important that the diversity of cyberspace is appreciated. The dominant thinking tends to concern criminal acts, and potential cyber-terrorism<sup>1298</sup> rather than considering the governance issues of interactivity in multi-user

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<sup>1291</sup> B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA Publishing 2008) 74.

<sup>1292</sup> Report of the Working Group on Internet Governance (WGIG), (Chateau de Bossey, June 2005) para 10 available online: <<http://www.wgig.org/docs/WGIGREPORT.pdf>> retrieved 12 June 2013.

<sup>1293</sup> G Lastowka, *Virtual Justice: The New Laws of Online Worlds* (Yale University Press 2010) 19.

<sup>1294</sup> A Thirer, ‘What is cyber-libertarianism? (The Debate over Lessig’s Code at 10 Continues)’ (*The Technology Liberation Front*, 14 May 2009) available online: <<http://techliberation.com/2009/05/14/what-is-cyber-libertarianism-the-debate-over-lessigs-code-at-10-continues/>> retrieved 17 February 2013.

<sup>1295</sup> Internet & Jurisdiction Project, see online: <<http://www.Internetjurisdiction.net/>> retrieved 20 January 2013.

<sup>1296</sup> Internet & Jurisdiction, *Synthesis II* (December 2012) available online: <<http://www.Internetjurisdiction.net/wp-content/uploads/2012/12/Internet-Jurisdiction-Synthesis-II-December-2012.pdf>> retrieved 21 January 2013.

<sup>1297</sup> A Selyukh, ‘Obama executive order seeks better defense against cyberattacks’ (*Reuters*, 12 February 2013) available online: <<http://www.reuters.com/article/2013/02/13/us-obama-speech-cyber-idUSBRE91C03G20130213>> retrieved 17 February 2013.

<sup>1298</sup> National Security Council, ‘The Comprehensive National Cybersecurity Initiative’ available online: <<http://www.whitehouse.gov/cybersecurity/comprehensive-national-cybersecurity-initiative>> retrieved 17 February 2013.

platforms. The US for example, is giving some consideration to declarations about cyberspace,<sup>1299</sup> which have a focus upon cyber-attacks and cyber activities that could include acts of war. This is indicative of the trend in dealing with issues concerning the control of cyberspace; online activities that have strong parallels to offline activities are those which will be regulated, or which Governments will claim fall within their competence.

Jurisdictional elements<sup>1300</sup> are an undercurrent in the control and governance of online games and virtual worlds, but there is an additional jurisdictional element<sup>1301</sup> that must be considered. If each online game and virtual world is seeking to retain control of its own territory, and act almost as a quasi-state, then the jurisdictional issues which surround discussions on governing the Internet will also apply in cyberspace rather than solely between nation states and cyberspace. As such, it is perfectly possible – and most likely – that no sole system of regulation or governance can be introduced, and that each must be tailored to the specific online environment under examination. Nevertheless, a single system of guidelines could be beneficial, as could governing models similar to those adopted by professional sports.<sup>1302</sup> It is these issues that will form the discussion below, rather than the wider discussions of conflict of laws issues.

### **6.3. Regulation and Governance: The Nature of Control.**

A discussion and consideration of controlling behaviour in online games and virtual worlds is a multi-faceted one. Online games and virtual worlds have favoured a contractual approach, requiring users to bind themselves to rules and regulations. This approach ties together copyright law as the dominant controller of content and intellectual property rights, with contract law as the leading element of structured behaviour in virtual environments. The difficulty with this approach rests with the issue of enforcement.<sup>1303</sup> Given that the control is retained through the contract, the balance of power very much rests with the game provider, and as such, any element of enforcement, presumably must be conducted by the provider. However, there is a vested

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<sup>1299</sup> A Segal, Council on Foreign Relations Policy Innovation Memorandum No 2, 'Cybergovernance: The Next Step' (11 November 2011, New York) available online: <<http://www.cfr.org/cybersecurity/cyberspace-governance-next-step/p24397>> retrieved 20 January 2013.

<sup>1300</sup> Conflict of laws and jurisdictional control of cyberspace, albeit such a discussion is outside the scope of this work.

<sup>1301</sup> Not the conflict of laws issue, but the issue of jurisdiction of each game and world.

<sup>1302</sup> G Lastowka, *Virtual Justice: The New Laws of Online Worlds* (Yale University Press 2010) 113.

<sup>1303</sup> B Glushko, 'Tales of the (Virtual) City: Governing Property Disputes in Virtual Worlds' [2007] Berkeley Tech L J, Vol 22, 251.

interest in not acting against users because, by disciplining them, it could force them away from the virtual environment, thereby reducing the subscription base and income stream of the developer.

However, simply because the EULA approach is the one that has been dominant, this does not mean that it is the only approach that has been used in controlling online games and virtual worlds. Throughout their historical development there have been various attempts to control these spaces. *LambdaMOO*<sup>1304</sup> for example, relied upon a set of social norms and voting to enforce disciplinary actions and govern by majority.<sup>1305</sup> *Second Life* attempted to remain free from governance – but this, predictably, has now been altered.<sup>1306</sup> *Habbo* attempted to use a chain of moderators working behind the scenes but this experiment failed spectacularly in mid-2012.<sup>1307</sup> The issues encountered in virtual world governance have been similarly experienced by MMORPGs, although MMORPGs have fared little better, despite employing different methods including GameMasters<sup>1308</sup> to patrol certain areas and respond to requests from gamers.

It is unrealistic to expect a contractual agreement of between 20 and 40 clauses to deal with all elements of liability, property rights, behaviour, dispute resolution and rules of play. Undoubtedly, the various schemes that different virtual worlds and online games have employed to assist with the role of enforcement are a necessity to “give teeth” to the EULA and Terms of Service documents. In some respects this was unavoidable due to the enormous diversity in online games and virtual worlds; the experience of User A will be vastly different to the experience of User B, and each will have different priorities and aims for their virtual existence. This could range from merely inhabiting a virtual environment, to actively pursuing the highest skill levels, developing an avatar to become a legendary character or generating a virtual income. As such, there are a number of things that can impact upon the experience of an avatar and user – from changes made to the game environment to the interference of other users. Therefore, the EULA

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<sup>1304</sup> One of the first Virtual Worlds.

<sup>1305</sup> J L Mnookin, ‘Virtual(ly) Law: The Emergence of Law in LambdaMOO’ (June 1996) *Journal of Computer - Mediated Communication* 2(1) <http://jcmc.indiana.edu/vol2/issue1/index.html> > retrieved 17 February 2013.

<sup>1306</sup> R Reynolds, ‘The State of Second Life’ (*TerraNova*, 4 June 2007) available online:

<[http://terranova.blogs.com/terra\\_nova/2007/06/the\\_state\\_of\\_se.html](http://terranova.blogs.com/terra_nova/2007/06/the_state_of_se.html)> retrieved 17 February 2013.

<sup>1307</sup> R Seifert, ‘Striptease and cyber sex: My stay at Habbo Hotel’ *Channel 4 News* (12 June, 2012) available online: <<http://www.channel4.com/news/striptease-and-cyber-sex-my-stay-at-habbo-hotel>> retrieved 16 February 2013; Colmthecrazy, ‘Habbo Moderators’ (8 June 2010) available online:

<<https://help.habbo.com/entries/189751-Habbo-Moderators>> retrieved 16 February 2013.

<sup>1308</sup> GameMasters are characters that are operated by the game developers, and whom users can turn to for assistance in the game. See: Chapter 1 - Understanding MMORPGs. At 1.6.5. *Game Masters*.

is far from ideal in acting as the ‘gatekeeper’ of governance. For example, very few EULAs – if any – spell out the acceptability of ‘griefing’ or ‘gold farming’ yet in some games these are perfectly acceptable activities, whilst in other environments these are not permitted. It would seem that the range of potential influences and challenges to control must therefore be considered in broader terms rather than simply within the confines of the EULA – Rules of Play relationships.

There is also a wider element to this discussion. Online games and virtual worlds occupy part of cyberspace, and are therefore part of a wider discussion relating to governing cyberspace. There is no leading approach to this either, and this is part of the difficulty. The lack of territoriality of cyberspace poses additional challenges for conventional law-making. Nevertheless, attempts have been made to deal with elements of cyberspace.<sup>1309</sup> No such attempts have been made in relation to online games and virtual worlds yet in England and Wales. It is perfectly possible that these spaces could follow the example set by Barlow and declare themselves free from Governmental claims.<sup>1310</sup> It is not impossible that a Virtual World or MMORPG could seek to declare independence, and operate its own society, especially through the use of the EULA and associated Terms of Service or Codes of Conduct agreements as a set of virtual laws, for example.

### **6.3.1. Code is Law.**

No discussion of controlling cyber-communities, online games or cyberspace more broadly is possible without a consideration of the proposition that code is law. This is not per se a method of control such as that advanced by Risch or Lastowka, and instead, the advocate of the code approach – Lessig – suggests a system whereby it is possible – and perhaps even preferable – for state created law and the technological law of cyberspace i.e. the code, to operate collaboratively to produce a system of regulability.<sup>1311</sup> Lessig advocates a distinct, foundational interpretation of cyberspace, and advances consequent methods of regulation. Bernstorff for example, indicates

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<sup>1309</sup> For example ICANN and the Uniform Domain Name Dispute Resolution Policy; available online: <<http://www.icann.org/en/help/dndr/udrp>> retrieved 18 February 2013.

<sup>1310</sup> J P Barlow, ‘Declaration of the Independence of Cyberspace’ EFF (8 February 1996) available online: <<https://projects.eff.org/~barlow/Declaration-Final.html>> retrieved 17 February 2013.

<sup>1311</sup> Indeed, Lessig’s discussion of code includes considerations of how code can potentially affect the law and how the law can affect the code itself. See: L Lessig, ‘The Law of the Horse: What Cyberlaw Might Teach’ (1999) 113 Harv L Rev 501, 537 – 546.



that Lessig's work dominates because of the "new understanding of regulation"<sup>1312</sup> that is advanced. Hetcher meanwhile praises the constitutional approach Lessig adopts by raising the idea of an "unwritten, common understanding about fundamental social values and principles."<sup>1313</sup> The significance or dominance of the approach advocated by Lessig is immaterial to this work; of greater significance is Lessig's suggestion that code is law.<sup>1314</sup> There are several aspects to this idea, including four modalities that have to operate alongside one another to manifest change, each of which could impact upon regulability.<sup>1315</sup> Whilst the copyright provisions in England and Wales refers to code being a literary work forming part of computer programs,<sup>1316</sup> the meaning of code in its use by Lessig differs. Code in Lessig's sense refers to the architecture in which behaviour is constrained.<sup>1317</sup> This includes the notion that social norms and markets as well as law and architecture may impact upon behaviour.<sup>1318</sup>

Lessig suggests that, "the most effective way to regulate behaviour in cyberspace will be through the regulation of code – direct regulation either of the code of cyberspace itself or of the institutions that provide that code."<sup>1319</sup> In offering such an approach, Lessig highlights the example of transparent divisions in offices as a mechanism of policing the behaviour of those who work there.<sup>1320</sup> As such, for Lessig, code means not the literal code of the software program but the mechanisms through which behaviour is constrained and curtailed. Lessig's four modalities can all be deployed to produce desired changes but crucially, the regulation by architecture deprives an individual of any opportunity to choose compliance and obedience – there is no alternative option, and indeed to allow code as a form of regulation should be to allow, in effect, a 'perfect' community.<sup>1321</sup> This is because the only option for an individual in such a system would be to acquiesce and comply with the architectural controls.<sup>1322</sup>

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<sup>1312</sup> J von Bernstorff, 'The discovery of technological law in the digital Bukovina: Lawrence Lessig's *Code and other Laws of Cyberspace*' 2 German Law Journal (2001) available online:

<<http://www.germanlawjournal.com/index.php?pageID=11&artID=110>> retrieved 20 August 2014.

<sup>1313</sup> S Hetcher, 'Climbing the Walls of Your Electronic Cage' (2000) 98 Mich L Rev 1916.

<sup>1314</sup> L Lessig, *Code: Version 2.0* (Basic Books 2006).

<sup>1315</sup> L Lessig, 'The Law of the Horse: What Cyberlaw Might Teach' (1999) 113 Harv L Rev 501, 507. Not all four will be discussed here.

<sup>1316</sup> s3(1)(b) CDPA 1988.

<sup>1317</sup> L Lessig, 'The Law of the Horse: What Cyberlaw Might Teach' (1999) 113 Harv L Rev 501, 512-514.

<sup>1318</sup> D Rowland, U Kohl & A Charlesworth, *Information Technology Law* (4<sup>th</sup> edn, Routledge 2012) 7.

<sup>1319</sup> L Lessig, 'The Law of the Horse: What Cyberlaw Might Teach' (1999) 113 Harv L Rev 501, 513.

<sup>1320</sup> L Lessig, 'The Law of the Horse: What Cyberlaw Might Teach' (1999) 113 Harv L Rev 501, 513.

<sup>1321</sup> L Lessig, "The Zones of Cyberspace" (1996) 48 Stanford Law Review 1403, 1408

<sup>1322</sup> R Brownsword, 'Neither East nor West, Is Mid-West Best?' (2006) 3:1 SCRIPT-ed 1, 18.

The regulation of code and the regulability of cyberspace, are further considered by Lessig. Firstly, considering the impact of law upon architecture, and secondly, the impact of architecture upon the law, where it is suggested that, “Governments...can influence the design of cyberspace in ways that enhance government’s ability to regulate.”<sup>1323</sup> This raises questions about the code itself because whoever controls the property will potentially dictate who has the power to regulate. For example, if the code lies in the hands of the private companies, then this empowers government regulability because private companies are easier to influence than fragmented individual uses of websites<sup>1324</sup> - it is also more straightforward to place obligations on private companies as reforms to copyright in respect of ISP liability have demonstrated.<sup>1325</sup> Rowland et al imply that the use of code as a method of protecting values is far from desirable because where code is deployed to protect values in cyberspace, there is often an attempt to recreate traditional characteristics because of the operation of traditional law.<sup>1326</sup> Moreover, where there is such a situation, it effectively gives rise to a form of privatized control mechanisms, which break from the traditional law making processes, checks and balances.<sup>1327</sup>

Code, as architecture, therefore is capable of placing constraints upon users of cyberspace. For Lessig therefore, the combination of four modalities and how any one of these would be used to alter behaviour is significant. However the abilities of law to regulate code and code to regulate law are also significant. As such, code is not purely software code under Lessig’s scholarship but is also taken to mean architecture and by extension the physical constraints of what it is possible to do and what is not possible.

Lessig therefore advances a different position to that of cyber-libertarians,<sup>1328</sup> who suggest there ought to be no regulation of cyberspace. Indeed Lessig’s work questions the limits of regulability and highlights the potentially problematic nature of private control of public values such as copyright and privacy: “We should worry if architecture of code become imbalanced. We should

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<sup>1323</sup> L Lessig, ‘The Law of the Horse: What Cyberlaw Might Teach’ (1999) 113 Harv L Rev 501, 533.

<sup>1324</sup> L Lessig, ‘The Law of the Horse: What Cyberlaw Might Teach’ (1999) 113 Harv L Rev 501, 535.

<sup>1325</sup> ISPs are required to block access to websites where the court orders such action. See for example, the blocking of the Pirate Bay in the UK; *Dramatico Entertainment Limited et al. v British Sky Broadcasting et al.* [2012] EWHC 268 (Ch).

<sup>1326</sup> D Rowland, U Kohl & A Charlesworth, *Information Technology Law* (4<sup>th</sup> edn, Routledge 2012) 9.

<sup>1327</sup> M Burri, ‘Controlling New Media (without the law)’ in M E Price, S Verhulst and L Morgan (eds) *The Routledge Handbook of Media Law* (Routledge 2012) 355.

<sup>1328</sup> A Thirer, ‘What is cyber-libertarianism? (The Debate over Lessig’s Code at 10 Continues)’ (*The Technology Liberation Front*, 14 May 2009) available online: <<http://techliberation.com/2009/05/14/what-is-cyber-libertarianism-the-debate-over-lessigs-code-at-10-continues/>> retrieved 17 February 2013.

worry, that is if they respect private values but displace public values.”<sup>1329</sup> These concerns extend to questioning the role of those writing the code, who have only their own – or their employers’ interests to follow – and who craft privatized versions of copyright and contract.

The idea and approach adopted questions the constraints in existence, and identifies the importance of values – legal values – as these are the most likely to become displaced by other factors. The code Lessig examines is not purely code in a software sense – code can also mean the physical architecture by which we are all constrained by in the pursuit of everyday tasks. This is described as an equivalent to our physical, offline surroundings yet Lessig highlights that more than law controls and empowers the legal values central to our legal system: “The threats to values implicit in the law – threats raised by changes in the architecture of code – are just particular examples of a more general point: that more than law alone enables legal values, and law alone cannot guarantee them.”<sup>1330</sup>

As such, discussions of code will be referred to as the software code and is therefore distinct from the discussion of Lessig. The Lessigian code is important for discussions of cyberspace, and as a potential model for online games. In principle, it is suggested, given the numbers of online games, there should be little reason why they are treated so differently to the examples of AOL that Lessig cites.<sup>1331</sup> After all, if fewer, but more controllable entities are involved, that should provide greater influence on the government’s behalf because the control of code will be exercised privately rather than on a commons (and therefore public) model, and as such the governmental power will not be reduced.<sup>1332</sup> That ought to allow the government to influence the constraints built into the code – which would effectively operate as the technological law of cyberspace, and co-exist with the formal law created by the state lawmakers.<sup>1333</sup> This co-existence could also potentially avoid difficulties such as alterations being made to the code by those who dislike the in-built constraints.

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<sup>1329</sup> L Lessig, ‘The Law of the Horse: What Cyberlaw Might Teach’ (1999) 113 Harv L Rev 501, 528.

<sup>1330</sup> L Lessig, ‘The Law of the Horse: What Cyberlaw Might Teach’ (1999) 113 Harv L Rev 501, 546.

<sup>1331</sup> L Lessig, ‘The Law of the Horse: What Cyberlaw Might Teach’ (1999) 113 Harv L Rev 501, 508.

<sup>1332</sup> L Lessig, ‘The Law of the Horse: What Cyberlaw Might Teach’ (1999) 113 Harv L Rev 501, 534.

<sup>1333</sup> J von Bernstorff, ‘The discovery of technological law in the digital Bukovina: Lawrence Lessig’s *Code and other Laws of Cyberspace*’ 2 German Law Journal (2001) available online:

<<http://www.germanlawjournal.com/index.php?pageID=11&artID=110>> retrieved 20 August 2014.

### 6.3.2. *Law without Borders.*

The stance adopted by Lessig, differs from other perspectives that have been advocated. Barlow for example, in the mid-1990s made his position quite clear; the Internet was not to be controlled by Governments.<sup>1334</sup> His thesis quite clearly rested on the territoriality approach; cyberspace is not a territory with a Government. Nor is it a fixed area that can be controlled by one Government, therefore any such attempts would not be recognised. This view, whilst appealing, has a significant weakness; civil society relies upon the idea of control and there must be some authority to exert control<sup>1335</sup> and in games, authority is found in the EULAs, as a manifestation of the power of the game developers. A similar perspective was generated by Post and Johnson: cyberspace was, in their view, defined by an absence of territory.<sup>1336</sup> Consequently, this means it has to be treated differently when it comes to making laws or governing it.

This is by no means the dominant thought in dealing with issues of regulating and governing cyberspace, or parts of it. For example, Hunter indicates<sup>1337</sup> that Post and Johnson are incorrect in their suggestion that cyberspace ought to be treated differently,<sup>1338</sup> and claims exactly the opposite; that cyberspace should be treated in the same way as any other space. In this, Reed finds himself a supporter, indicating that the dominant approach in law making has advocated an approach of treating both online and offline as the same, and therefore following the same process.<sup>1339</sup> Whilst this is an interesting perspective, it is somewhat unreliable if applied to online games and virtual worlds. In our offline existences for example, there are rules, regulations, conventions and norms that we are expected to obey. However, this does not mean that everyone is obedient. Nothing can exist in the virtual world without the software code. Therefore, code is what allows actions, reactions, interactions and behaviour.

Treating cyberspace differently is an approach that would also, perhaps, submit to the broad declaration made by Barlow<sup>1340</sup> that Governments have no claim to cyberspace. The inherent

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<sup>1334</sup> J P Barlow, 'Declaration of the Independence of Cyberspace' EFF (8 February 1996) available online: <<https://projects.eff.org/~barlow/Declaration-Final.html>> retrieved 17 February 2013.

<sup>1335</sup> A Adrian, 'Civil Society in Second Life' (2009) *International Review of Law, Computers & Technology* 23(3) 231, 232.

<sup>1336</sup> D R Johnson and D G Post, 'Law and Borders – The Rise of Law in Cyberspace' (1996) 48 *Stan L Rev* 1367.

<sup>1337</sup> D Hunter, 'Cyberspace as Place and the Tragedy of the Digital Anticommons' [2003] 91 *Calif L Rev* 439, 448.

<sup>1338</sup> D R Johnson and D G Post, 'Law and Borders – The Rise of Law in Cyberspace' (1996) 48 *Stan L Rev* 1367.

<sup>1339</sup> C Reed, 'How to Make Bad Law: Lessons from Cyberspace' [2010] *The Modern Law Review*, Vol. 73(6) 903.

<sup>1340</sup> J P Barlow, 'Declaration of the Independence of Cyberspace' EFF (8 February 1996) available online: <<https://projects.eff.org/~barlow/Declaration-Final.html>> retrieved 17 February 2013.

problem with allowing the code to become all controlling is that there is a significant onus placed on those writing the software (game) code to think of the potential behaviours hundreds of thousands of players could engage in, and ensure that the code only permits those which the game owner of the code seeks to allow. This is a point which Lessig also touches upon when questioning the regulability of code.<sup>1341</sup> Such an approach would remove some freedoms for the users of online games and virtual worlds, but it would also reduce the pressure placed upon the EULA and on Rules of Conduct. In EULAs and Rules of Conduct, users are required to agree to behave in certain ways, only completing activities that the game developers wish them to.<sup>1342</sup> The EULA, whilst being fairly comprehensive in most instances has one significant vulnerability that the Code is Law<sup>1343</sup> approach does not; enforcement.<sup>1344</sup> For users who become victims of undesirable, or unpermitted behaviour, questions of justice, redress and fairness arise, and are connected not only to the contractual provisions, and rights to in-game content, but also to a wider sense of fairness and balance. Is it fair that these users be subjected to victimisation by other users who act in contravention of the ethos of the game? If it is not fair, what can these victims do?

In order to enforce the EULA, some additional system of governance and tracking is required, whereas the software code would do the job of enforcing such desirable behaviours providing it was written correctly. It is possible that this code could be hacked, allowing undesirable behaviours.<sup>1345</sup> Such acts would likely be in breach of the licence and acceptable behaviour policies of many games and virtual worlds, as well as most criminal law systems. This is a similar scenario to the events leading to the *Blizzard* suit against *MDY*<sup>1346</sup> in relation to the add-on that *MDY* had designed to run in *World of Warcraft*; the distinction here being that there was no hacking per se. Nevertheless, the claims made by *Blizzard* focussed on a breach of the EULA, and a resulting

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<sup>1341</sup> L Lessig, 'The Law of the Horse: What Cyberlaw Might Teach' (1999) 113 Harv L Rev 501, 528.

<sup>1342</sup> See for example, *Sony's EverQuest II* Code of Conduct; 'Play Nice Policies – Activity within *EverQuest II*.' Available online: <[https://help.station.sony.com/app/answers/detail/a\\_id/16213](https://help.station.sony.com/app/answers/detail/a_id/16213)> retrieved 29 August 2011.

<sup>1343</sup> L Lessig, *Code: Version 2.0* (Basic Books 2006).

<sup>1344</sup> B Glushko, 'Tales of the (Virtual) City: Governing Property Disputes in Virtual Worlds' [2007] Berkeley Tech L J, Vol 22, 251.

<sup>1345</sup> An example of such hacking can be seen with recent Twitter incidents: BBC News, 'Twitter tightens security after recent hacking spate' (23 May 2013) available online: <<http://www.bbc.co.uk/news/technology-22634176>> retrieved 12 June 2013.

<sup>1346</sup> *MDY Indus., LLC v. Blizzard Entertainment, Inc.*, 2010 WL 5141269, 97 U.S.P.Q.2d (BNA) 1001 (9th Cir. Dec. 14, 2010).

breach of copyright.<sup>1347</sup> It is possible that any hacking could be successfully pursued under this route, as well as under computer misuse legislation.<sup>1348</sup>

Risch in particular suggests that there is an alternative perspective we can adopt in terms of the idea that code should be a dominant regulatory mechanism and indicates that this principle can be expanded upon and adapted further; that the software code is more than just law, and he advocates that this code is the, “ultimate impartial rule.”<sup>1349</sup> However, whilst it is intriguing to view this with a much wider perspective - in that it can form a system of governance and control - there are also some pitfalls to this. Firstly, this suggestion relies upon the premise that the software code will be flawless, and will operate as it is designed to without fault. This is often not the case – the prevalence of software bugs being one indicator of the likely weaknesses adopted here.

Secondly, there is a much more dangerous notion that is attached to this. If the software code is the sole regulator – it is what sets the boundaries on activity and possibility – then the coder is the one with the power. This could allow abuses of the code to suit the particular needs of a particular coder.<sup>1350</sup> This is where Lessig indicates that there ought to be some interplay between the state-made law, and the private control of code influenced by state law. As Risch himself highlights, there are difficulties with this approach primarily because changing the software code is straightforward, and can be completed easily, and it is therefore open to potential abuses.<sup>1351</sup> This is something that Bartle also comments upon, showing that those users and providers who do not give respect to the software code of a particular game or world could gain power and influence others very easily through positions of dominance, especially in guilds.<sup>1352</sup> This raises another issue; how would such a system be accountable, and what rights would it seek to protect? Again, an area where it is feasible, and potentially desirable for the government or state to indicate

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<sup>1347</sup> *MDY Indus., LLC v. Blizzard Entertainment, Inc.*, 2010 WL 5141269, 97 U.S.P.Q.2d (BNA) 1001 (9th Cir. Dec. 14, 2010).

<sup>1348</sup> Computer Misuse Act 1990.

<sup>1349</sup> M Risch, ‘Virtual Rule of Law’ [2009] 112 West Virginia Law Review 1, 37.

<sup>1350</sup> One such example of abuses by coders is altering the code to provide an avatar with greater power over other avatars, and therefore the ability to rape avatars in online games. B T Duranske, “Virtual Rape” Claims Bring Belgian Police to Second Life’ (*Virtually Blind*, 24 April 2007), available online: <<http://virtuallyblind.com/2007/04/24/open-roundtable-allegations-of-virtual-rape-bring-belgian-police-to-second-life/>> retrieved 20 July 2012.

<sup>1351</sup> M Risch, ‘Virtual Rule of Law’ [2009] 112 West Virginia Law Review 1, 38.

<sup>1352</sup> R Bartle and M Davies, ‘Gamers don’t want any more grief’ *The Guardian* (London, 15 June 2006) available online: <<http://www.guardian.co.uk/technology/2006/jun/15/games.guardianweeklytechnologysection2>> retrieved 15 February 2013.

what is acceptable, and alter the law to ensure that those responsible for the code are compliant; in effect ensuring that there are layers of control and layers of regulability.<sup>1353</sup> Nevertheless, a software-code approach raises several further points - would regulation focus solely on the activities of users, and associated contractual issues? Or would it also protect more fundamental rights, such as those suggested by Koster<sup>1354</sup> whilst retaining a theoretical justification in adjudicating disputes? These issues are part of the challenge of determining an appropriate system of governance for online interactive platforms, particularly one where users rights in in-game content are frequently ignored or subverted through weaknesses in copyright provision for computer generated works, but also potentially unfair contract terms.

### 6.3.3. *Liberty v Scepticism: An Evolution?*

This problem is partially explained when the term cyberspace is considered in greater depth; the meaning of cyberspace is still open to interpretation or debate, with different perspectives increasingly common. Gillen considers the regulatory approaches for cyberspace through a consideration of what is meant by cyberspace.<sup>1355</sup> The construction of cyberspace is a difficulty in itself because viewing the theft or destruction of a virtual sword in *World of Warcraft* through the definition of rights in an offline world makes such issues seem trivial. This again leads to questions over enforcement, but wider questions surrounding views of cyberspace such as those adopted by cyber-libertarians<sup>1356</sup> or cyber-sceptics.<sup>1357</sup> Fundamentally, the resounding conclusion is that there is not a current understanding of cyberspace or cyber-interactions that produces a model of cyberspace which lends itself to regulation, governance and ultimately, control. Gudamuz suggests that the starting point ought to be technology,<sup>1358</sup> whereas others such as Mayer-Schonberger advocate a need for a reshaping of the discipline in order to reshape the regulatory framework.<sup>1359</sup> Gillen indicates the need to consider regulating cyberspace from an autopoietic

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<sup>1353</sup> K Barker, 'Online Games and IP. Battle of the Forms to Social Norms: Reconceptualising and Re-layering?' *SCRIPTed* (Forthcoming, 2013).

<sup>1354</sup> R Koster, 'Declaration of the Rights of Avatars' in J M Balkin and B S Noveck (eds), *The State of Play: Law, Games and Virtual Worlds* (New York University Press 2006) 67.

<sup>1355</sup> M Gillen, 'Lawyers and Cyberspace: Seeing the Elephant?' (2012) 9:2 *SCRIPTed* 131, 132.

<sup>1356</sup> A Thirer, 'What is cyber-libertarianism? (The Debate over Lessig's Code at 10 Continues)' *The Technology Liberation Front* (14 May 2009) available online: <<http://techliberation.com/2009/05/14/what-is-cyber-libertarianism-the-debate-over-lessigs-code-at-10-continues/>> retrieved 17 February 2013.

<sup>1357</sup> See for example: E Morozov, *The Net Delusion: How Not to Liberate the World* (Penguin, 2012). See also the film, *The Social Network* (2010).

<sup>1358</sup> A Gudamuz, *Networks, Complexity and Internet Regulation: Scale-free Law* (Edward Elgar 2011).

<sup>1359</sup> V Mayer-Schonberger, 'The Shape of Governance: Analyzing the World of Internet Regulation' (2003) *Va J Int'l L* 43, 605, 611.

perspective;<sup>1360</sup> focussing on communication and language first. Interestingly, the difficulty with this approach is that there has yet to be anything that identifies the language and medium of cyberspace. As such, it would be incredibly challenging to seek to apply the model in a regulatory way at present. This approach would however, move away from viewing the theft or destruction of virtual items as insignificant. From the perspective of gamers and residents of virtual worlds this perhaps has some merit, in the long-term which reflects the traditional legal perspective of reaction rather than of proactivity.

Lastowka meanwhile considers the issues surrounding governance and regulation of virtual worlds from a more distant perspective, highlighting the elements which must be considered, and the divergent stances that could be adopted, suggesting that cyberlaw is about to embark upon a more solid route.<sup>1361</sup> It is conceivable that considering online games and virtual worlds as a distant corner of cyberspace would enable them to be controlled in the same way as the remainder of the Internet. However, the leading problem with this is the distinctiveness of online games<sup>1362</sup> and virtual worlds compared to emails, browsing, and Internet shopping. In a sense, the characteristics of online games and virtual worlds put them apart from the rest of cyberspace whilst at the same time needing cyberspace in order to exist. Hunter and Lastowka consider this, and suggest that the question in need of an answer relates to whether or not cyberspace is a place.<sup>1363</sup> If it is a place, then it is possible that the territoriality approach of applying laws from the offline spaces to cyberspace would be the leading method adopted, despite the issues with this. To an extent this has already begun to occur – not through statute and legislative intervention, but through disputes being brought by users to the courts. Judges in the US,<sup>1364</sup> China<sup>1365</sup> and South Korea<sup>1366</sup> have all seen fit to apply existing legal rules to these online games

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<sup>1360</sup> M Gillen, 'Lawyers and Cyberspace: Seeing the Elephant?' (2012) 9:2 SCRIPTed 131, 146.

<sup>1361</sup> G Lastowka, 'Foreword: Paving the Path of Cyberlaw' (2011) William Mitchell Law Review, Vol 38(1) 6.

<sup>1362</sup> M Bell, 'Toward a Definition of Virtual Worlds' (2008) J V W R 1(1); K Barker, 'MMORPGing, Law and Lingo' in Freeman M and Smith F (eds) *Current Legal Issues: Law and Language* (Vol 13, OUP 2013).

<sup>1363</sup> F G Lastowka and D Hunter, 'The Laws of Virtual Worlds' [2004] 92 Cal L Rev 1.

<sup>1364</sup> *Bragg v Linden Research Inc.* (487 F.Supp 2d 593 E.D. Penn) [2007]; *MDY Indus., LLC v. Blizzard Entertainment, Inc.*, 2010 WL 5141269, 97 U.S.P.Q.2d (BNA) 1001 (9th Cir. Dec. 14, 2010).

<sup>1365</sup> BBC News, 'Game theft' led to fatal attack' (31 March 2005)

<<http://news.bbc.co.uk/1/hi/technology/4397159.stm>> retrieved 8 August 2011.

<sup>1366</sup> P Si-soo, 'Ruling to Boost Sale of Cyber Money' (*The Korea Times*, 10 January 2010) available online:

<[http://www.koreatimes.co.kr/www/news/nation/2010/01/116\\_58775.html](http://www.koreatimes.co.kr/www/news/nation/2010/01/116_58775.html)> retrieved 16 February 2013;

J Light, 'Play money is real money says High Court' (*CNN Money*, 22 January 2010) available online:

<<http://moremoney.blogs.money.cnn.com/2010/01/22/play-money-is-real-money-says-high-court/>> retrieved 16 February 2013.



and Virtual Worlds. Whilst this is not particularly satisfactory, it is necessary to accept that this situation will not be resolved immediately.

An often cited example of how technology requires the law to adapt is that of the aviation industry.<sup>1367</sup> Technological and inventive developments required the law to consider how best to regulate this new industry but the solution was not immediate – it was a gradual process. Justice Benjamin Cardozo succinctly stated that new inventions and innovations provide new customs and new laws.<sup>1368</sup> As such, following this theory, and applying it to virtual worlds and online games, the first phase has been completed – the technologies are working and allowing access to such environments. At present, the regulatory systems present in these diverse spaces are a confused mix of contractual provision and social norm. Accordingly, therefore, Cardozo's approach of three elements suggests that when applied to online games and virtual worlds, customs are the current practice. New laws for Virtual Worlds and online games have not been developed – or even considered to date in the vast majority of states; the exceptions are China<sup>1369</sup> and South Korea.<sup>1370</sup> It would seem that Virtual Worlds and online games are in a state of flux in terms of regulation and governance; relying on customs rather than on new laws.

New customs and new laws arise through a reactive process with the law<sup>1371</sup> – this has been evidenced by the vast majority of technological innovation in history; from the introduction of aeroplanes<sup>1372</sup> through to electronic commerce and mobile data consumption.<sup>1373</sup> The same is quite likely to be applicable to Virtual Worlds and online games. However, in order for these spaces to be considered as part of a distinct industry, the catalyst for separate consideration and distinct, specific regulation needs to begin now. If the Internet / cyberspace cannot – or is not – considered a separate place, then any arguments or suggestions of applying a territorial approach are erased. There is some evidence for suggesting that this interpretation is valid. Firstly, each online game or Virtual World developer claims that the users and residents are subject to their particular rules whilst present in the game or world. This is evidenced by the ability of these

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<sup>1367</sup> G Lastowka, *Virtual Justice: The New Laws of Online Worlds* (Yale University Press 2010) 69.

<sup>1368</sup> B Cardozo, *The Nature of the Judicial Process* (Cosimo Books, August 2009) 62.

<sup>1369</sup> Z Tingting and D Moller, 'Legislation Proposed to Protect Virtual Property' (*China Through A Lens*, 26 January 2004) available online: <<http://www.china.org.cn/english/2004/Jan/85502.htm>> retrieved 22 June 2012.

<sup>1370</sup> C L Kim, 'South Korea: Copyrights: Linking to images does not infringe: protection of game character upheld' (2010) WCRR 5(4) 14.

<sup>1371</sup> H T Markey, 'Science and Law – Toward A Happier Marriage' (1977) 59 J Pat Off Soc'y 343, 346.

<sup>1372</sup> F G Lastowka and D Hunter, 'The Laws of Virtual Worlds' [2004] 92 Cal L Rev 1.

<sup>1373</sup> For example, the Data Protection Act 1998.

spaces to terminate access for users who have contravened the rules – as was the situation with Marc Bragg at the will of *Second Life*.<sup>1374</sup> Secondly, the legal systems of our offline worlds have done very little to proactively engage with online worlds and games to the extent that there is an air of deregulation about them. This has led to an approach whereby the developers of online games and virtual worlds are almost sovereigns in their own right. Lastowka highlights this by stating that, “Virtual world owners are essentially the sovereign lords of their fantastic jurisdictions.”<sup>1375</sup> If this is indeed the reality, then it must surely also be the situation that each virtual space or online game is indeed a jurisdiction or state in its own right. As such, each will be entitled to claim independence from anything and everything, - similar to the actions of Paddy Roy Bates claiming a concrete platform off the coast of England in 1966 before declaring independence<sup>1376</sup> - and therefore can introduce rules, regulations and laws as they desire to do so. Such an approach of laissez-faire action by Governments and states seems to be acquiescing to the declaration of John Perry Barlow in the late 1990s.<sup>1377</sup>

An alternative interpretation of cyberspace and of how we interact with it stems from Frissen, who states, “Virtualisation affects patterns of meaning. This will have a severe impact on the traditional legitimacy of the organisational pattern of politics and public administration.”<sup>1378</sup> Frissen appears to view cyberspace as having a ‘top-down’ governing approach, and this is directly resonant to the offline regulatory structures. Whilst this works well in our offline existences, imposing such regulation in online games and virtual worlds would directly contradict their purposes. The point raised, however, is a significant one; rather than viewing cyberspace as a language and a medium whose structure has yet to be determined, Frissen suggests that more and more of our lives will become virtual, and as such this will pose not only a regulatory challenge in online spaces but also a regulatory shift in our offline experiences.<sup>1379</sup> Cyberspace is far less structured than our offline world and therefore the same systems of Government will not operate well in cyberspace. There have been several demonstrations of the resistance to an imposed Governmental claim to cyberspace, and this rejection of public-administration in virtual spaces is

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<sup>1374</sup> *Bragg v Linden Research Inc.* (487 F.Supp 2d 593 E.D. Penn) [2007].

<sup>1375</sup> G Lastowka, *Virtual Justice: The New Laws of Online Worlds* (Yale University Press 2010) 194.

<sup>1376</sup> J Goldsmith and T Wu, *Who Controls the Internet?* (OUP 2008) 66.

<sup>1377</sup> J P Barlow, ‘Declaration of the Independence of Cyberspace’ EFF (8 February 1996) available online: <<https://projects.eff.org/~barlow/Declaration-Final.html>> retrieved 17 February 2013.

<sup>1378</sup> P Frissen, ‘The Virtual State: Postmodernisation, informatisation and public administration’ in B Loader (ed), *The Governance of Cyberspace: Politics, Technology and Global Restructuring* (Routledge 1997) 125.

<sup>1379</sup> P Frissen, ‘The Virtual State: Postmodernisation, informatisation and public administration’ in B Loader (ed), *The Governance of Cyberspace: Politics, Technology and Global Restructuring* (Routledge 1997) 125.

a clear indicator that the virtual communities and inhabitants are disinterested in a parallel structure of regulation and control to that which they are subjected to in the offline world. Interestingly, this seems to have been deliberately avoided by online games and virtual worlds such as *SecondLife* and *World of Warcraft*. Moreover, *LambdaMOO* did not opt for a system of administration that reflected a Governmental approach, but preferred a system of social norms.<sup>1380</sup> This rejection of the offline model strongly suggests that cyber-inhabitants view their space differently, and expect it to be governed and controlled differently. This perhaps makes sense given that there are different concerns and challenges that arise from activities that are distinct from those which happen in the offline world. It is also important to remember that the current status quo suggests users have no claim to copyright in in-game content, and despite the persuasive arguments to the contrary,<sup>1381</sup> even if they did, such rights under current governance systems would be difficult to enforce. This compounds the unfairness of the position of users.<sup>1382</sup>

#### 6.4. The Battle of the Forms: Challenging Control?

The predominant method of exerting influence and control in online games and virtual worlds remains within a contractual framework. However, whilst this is the situation, the EULAs do not comprehensively provide for adequate binding dispute resolution systems,<sup>1383</sup> nor do they provide protections or guidance in the event that a user suffers some form of harm to his avatar, property or account. The activities that occur in the offline world are different to those that occur within online interactive environments, and it is therefore necessary to outline the specific behaviours that cause concern over the current systems of governance. The online behaviours have distinct impacts upon a virtual existence, and whilst physical harm does not affect the user, it does affect their representative, or proxy, in the online environment.

Specific behaviours and activities occur in online games and Virtual Worlds; some of this in contravention of the EULA clauses. Real-Money Trading is the first example, and involves the

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<sup>1380</sup> J L Mnookin, 'Virtual(ly) Law: The Emergence of Law in LambdaMOO' (June 1996) *Journal of Computer - Mediated Communication* 2(1) <http://jcmc.indiana.edu/vol2/issue1/index.html>> retrieved 17 February 2013.

<sup>1381</sup> See: Chapter 4 - MMORPGing & Copyright. At 4.8. *Subsets of Creativity – A new context for user creativity?*

<sup>1382</sup> See: Chapter 5 - Contractual Displacement of Proprietary Interests: EULAw? 5.5. *Standard Terms – Fairness and Balance?*

<sup>1383</sup> Albeit the dispute resolution requirement was held invalid in *Bragg v Linden Research Inc.* (487 F.Supp 2d 593 E.D. Penn) [2007]. See: Chapter 5 - Contractual Displacement of Proprietary Interests: EULAw? At 5.4.2. *Dispute Resolution*.

process of selling in-game items for real money. These transactions are not permitted by all online games and virtual worlds. Nevertheless, gamers do engage in these transactions, supported by strong theoretical claims,<sup>1384</sup> and a lack of enforcement action being taken by game developers. The support for such actions by users is even greater under some copyright constructions that indicate users are entitled to rights in the in-game content, which, as a result, negates potential infringement claims by the developers. Real-Money Trading<sup>1385</sup> is just one such activity in terms of the challenges posed to the regulatory framework of online games.

Whilst these aspects of gaming activity have been discussed elsewhere in this work, they serve as brief, prescient examples here of the challenges such activity poses to the system of governance present in online games and virtual worlds. This is particularly notable in light of the challenges these activities create for regulatory mechanisms. These forms of activity all pose challenges to the existing systems of control, and this will be briefly considered before alternative governance approaches are discussed below.

#### **6.4.1. RMT.**

RMT or is the process whereby users of online games or residents of Virtual Worlds use real currency i.e. GB Pounds or US Dollars, to purchase items that they can use in their online existences.<sup>1386</sup> Whilst users engage in this practice, and seek to do so to further their skill and abilities in their game or world of choice, the majority of End User Licence Agreements does not permit such trading, and this behaviour therefore challenges control of these environments. It is clearly a breach of the EULA terms, with attached proprietary issues. If EULAs do not permit such behaviour, this has implications for the legitimacy of such trading. Similarly, engaging in activity which involves the trade of in-game items is potentially problematic when users are trading things which they are not the owners of. More significantly, for the users, if activity such as this is outlawed in the EULA, users engaging in it will therefore be in breach of their agreement, and risk their game accounts by pursuing such actions.

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<sup>1384</sup> See: Chapter 2 - Property Matters: Virtually Justified? At 2.6. *Lockean Theory of Labour* and 2.7. *Theory for Parity?*

<sup>1385</sup> Hereafter RMT.

<sup>1386</sup> D Spohn, 'Gaming for Money: Trading Game Assets' available online:  
<<http://Internetgames.about.com/cs/gamingnews/a/gameassets.htm>> retrieved 17 February 2013.

There is no regulation of this element of gaming – developers state that their users are not to engage in such activity but do not stop this activity, and therefore appear to implicitly endorse it as it adds another element to the game and ensures that users remain content with their gaming experience. However, for the users, they take risks and when they become victims, there is little they can do to seek recompense. Game developers will not intervene in individual disputes, nor do they actively patrol and regulate such activities. However, the exception to this is *RuneScape*, where developers have actively introduced measures to eradicate botting and gold farming.<sup>1387</sup> There are no direct contractual relationships between users in online games<sup>1388</sup> and no virtual courts<sup>1389</sup> to determine guilt. In China, there are examples of physical violence being inflicted upon users of games where virtual items are involved – in China, one gamer lost his life and another was imprisoned for life over a dispute relating to a sword.<sup>1390</sup> In Europe, teenagers have been convicted of theft and assault for stealing passwords and virtual items in gaming accounts.<sup>1391</sup> These examples indicate that there are significant grounds upon which to act and to consider governance in online games to safeguard the interests of users, who are consumers – and producers<sup>1392</sup> – as well as the developers. This form of activity, whilst not contractually permitted poses issues of control.

#### 6.4.2. *Kill Stealing.*

Kill stealing could potentially be dealt with through the use of the EULA, however, the EULA is not a direct contractual agreement between users – it is between a user and the developer: therefore, a potential breach of contract claim against a user by a user would be a difficult case. It would not, however, be insurmountable, as the *Satanita*<sup>1393</sup> has indicated. The court in this case

<sup>1387</sup> M Gerhard, 'Anti-Gold farming measures' *RuneScape News* available online:

<<http://services.runescape.com/m=news/anti-gold-farming-measures>> retrieved 18 February 2013; M

Gerhard, 'Bot-busting Update: Legal Proceedings' *RuneScape News* available online:

<<http://services.runescape.com/m=news/bot-busting-update-legal-proceedings>> retrieved 17 February 2013.

<sup>1388</sup> See: Chapter 5 - Contractual Displacement of Proprietary Interests: EULA? At 5.2. *The EULA Relationships*.

<sup>1389</sup> F Alemi, 'An Avatar's Day In Court: A Proposal for Obtaining Relief and Resolving Disputes in Virtual World Games' [2007] UCLA J L & Tech 6.

<sup>1390</sup> BBC News, 'Game theft' led to fatal attack' (31 March 2005)

<<http://news.bbc.co.uk/1/hi/technology/4397159.stm>> retrieved 18 February 2013.

<sup>1391</sup> A R Lodder, 'Conflict Resolution in Virtual Worlds: General Characteristics and the 2009 Dutch Convictions on Virtual Theft' in K Cornelius and D Hermann (eds), *Virtual Worlds and Criminality*, available online:

<[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1590144](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1590144)> retrieved 18 February 2013.

<sup>1392</sup> S Humphreys, 'Norrath: New Forms, Old Institutions' (2009) *Games Studies: The International Journal of Computer Game Research* 9(1); S Humphreys, 'Productive users, intellectual property and governance: The challenges of computer games' (2005) *Media Arts Law Review* Vol 10(4) 299, 304.

<sup>1393</sup> *Clarke v Earl of Dunraven* [1897] AC 59. Hereafter *Satanita*.

adopted a public policy approach to the formation of a contract rather than a formal application of contract law to impose a contractual agreement and relationship.<sup>1394</sup> Koffman and MacDonald indicate that the situation in the *Satanita* was one arising out of a public policy motivation towards fairness to the parties.<sup>1395</sup> Nevertheless, whilst this is an unusual approach, it is not inconceivable that it could be relied upon in a gaming context, especially if there is some common agreement between the parties involved, albeit not a formal, contractual one. The overwhelming difficulty would arise in contradicting the agreement reached. Additionally, as according to the EULAs,<sup>1396</sup> users have no intellectual property rights,<sup>1397</sup> the basis of the claim would also be difficult to establish.<sup>1398</sup> In order to resolve issues of kill stealing, it would be necessary to involve the platform provider to bring a claim on third party grounds,<sup>1399</sup> which potentially complicates the situation. It would also be difficult to prove which user committed a certain act of kill-stealing, most especially due to the gamer-tags used, and the use of aliases, although identifying the culprit avatar may be more straightforward. This activity, like RMT, whilst not permitted by the contractual controls still occurs, yet also poses control challenges.

#### 6.4.3. *Gold Sinks or Drains.*

If game developers can change the boundaries of value and desirability at will, this seems rather unfair to users who have toiled to obtain goods and currency. Again, the control and power of the game developer is overwhelming compared to the situation of the users, and as such, the use of sinks indicates that online games and virtual worlds hold themselves out as different to the rest of cyberspace, but also indicates that they believe themselves to be distinct from everything else; worlds in their own rights. This indication again gives rise to concerns of regulation and control – developers use the code to change their scarcity levels, but who is overseeing this? At present, it seems that the developer sets the standard but also completes the process of oversight, as far as it exists.

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<sup>1394</sup> *Clarke v Earl of Dunraven* [1897] AC 59.

<sup>1395</sup> L Koffman and E Macdonald, *The Law of Contract* (7<sup>th</sup> edn, OUP 2010) 12.

<sup>1396</sup> See: Chapter 5 - Contractual Displacement of Proprietary Interests: EULAw? At 5.4.1. *Ownership Issues*.

<sup>1397</sup> Although see: Chapter 5 – Contractual Displacement of Proprietary Interests: EULAw? At 5.5. *Standard terms – Fairness and Balance?* Where the discussion suggests that the EULAs contain unfair terms which are likely to be unenforceable.

<sup>1398</sup> It would most likely be a Third-Party claim, assuming the EULA provisions were enforceable.

<sup>1399</sup> J Fairfield, 'Third Party Beneficiaries and Other Fantastical Beasts in Virtual Worlds' (*TerraNova*, 14 April 2009) retrieved 16 February 2013.

There is another, more concerning element to this. If a user creates an item outside of the game platform, but then seeks to upload it into the game or world of choice and use it to support his gaming ambitions, presumably the item will be relatively rare or possibly even unique. Not only will the vast majority of games and virtual worlds claim ownership of this item,<sup>1400</sup> and the property interests in it, but they will then be able to determine the value of this item without any consultation or compensation to the user. There is an example of this derived from *Ultima Online*, whereby non-player characters were equipped with a different type of armour that users could not obtain. However, instead of being desired, the armour was not considered valuable, and drains were used to decay the armour.<sup>1401</sup> Such game elements are used to encourage gamers to remain engaged yet this poses challenges for the norms of control – these alterations are made to the software at the will of the developers, and so challenge the systems of control relating to the value of game items. There is no regulation of the market controls – again suggesting that there is scope for alteration.

#### 6.4.4. Griefing.

If a user has created an item and uploaded it into the game, it is not inconceivable that a griever could destroy it or steal it, thereby acquiring through theft (and illegal activity in the game) a valuable asset. This could also give rise to potential proprietary issues, specifically those of copyright. Whilst the EULA states no user will have any rights, the licence that is contained within the EULA for users, allows them to benefit from the use of the intellectual property whilst they are members of the gaming environment. However, if griefing is not permitted activity, there will be a contravention of the EULA or the rules of play, and if this occurs, then there will most likely be copyright infringement as well, and this could, for example, be through using a temporary copy.<sup>1402</sup>

Advancing a revised system of social norm has been suggested as one option for dealing with issues such as griefing,<sup>1403</sup> and to that end some online games have responded by introducing systems whereby there is a system of democratic election and rule to direct the administration of

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<sup>1400</sup> See: Chapter 5: Contractual Displacement of Proprietary Interests: EULAw? At 5.4.1. *Ownership Issues*.

<sup>1401</sup> Z Booth Simpson, 'The In-Game Economics of *Ultima Online*' (1999) available online: <<http://www.mine-control.com/zack/uecon/uecon.html>> retrieved 15 February 2013.

<sup>1402</sup> See: Chapter 4 - MMORPGing & Copyright. At 4.5. *Games, CDPA and Temporary Copies*.

<sup>1403</sup> C Reed, *Internet Law: Text, Cases and Materials* (CUP 2004) 2.

the game.<sup>1404</sup> However, this has not been the situation in the most popular games and virtual worlds, suggesting that again the platform providers are unwilling to become involved. Despite this, the widely-held belief is that games and virtual worlds will develop and evolve into online societies.<sup>1405</sup> If this development does occur along these lines, the challenges will be greater, and potentially an even larger emphasis will be placed on social norms and the role of the developer in maintaining order and control. Griefing is another example of activity that is not covered by the contractual elements and poses challenges for control in virtual environments.

#### 6.4.5. Gold farming.

There are additional implications derived from activity such as gold farming, which relate specifically to the items users may create during their engagement in an online environment. If a user creates an item, which is then replicated and sold, for example, through gold farming, what rights will the creating user have? The contractual imbalances indicate that a user would be able to do very little – copyright vests (under the EULA terms) usually with the developer. Additionally, even if a user claims copyright, the user will almost be entirely dependent upon the developer for assistance in enforcing rights.<sup>1406</sup> A further element relates to the use of bots to perform gold farming activity. Such bots will usually also be used in contravention of EULA clauses, and potentially also infringing the copyright of developers which is held in the entire product.<sup>1407</sup>

However, as the EULA expressly outlaws such activities, and indeed for *World of Warcraft*, outlaws any chance of engaging in the trade of game items,<sup>1408</sup> it is possible that a claim for breach of contract could succeed.<sup>1409</sup> Again, the problems relate to the contractual relationships between the parties – it will, for example, be a series of users who are engaged in the farming activities on

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<sup>1404</sup> See for example *Seed*, a MMORPG introduced in May 2006; R Bartle and M Davies, ‘Gamers don’t want any more grief’ *The Guardian* (London, 15 June 2006) available online: <<http://www.guardian.co.uk/technology/2006/jun/15/games.guardianweeklytechnologysection2>> retrieved 15 February 2013.

<sup>1405</sup> R Bartle and M Davies, ‘Gamers don’t want any more grief’ *The Guardian* (London, 15 June 2006) available online: <<http://www.guardian.co.uk/technology/2006/jun/15/games.guardianweeklytechnologysection2>> retrieved 15 February 2013.

<sup>1406</sup> See for example: *Hernandez v Internet Gaming Entertainment*, U.S. Dist. Ct. Southern District of Florida, Case No: 07-CIV-21403-COHN/SELTZER [2007].

<sup>1407</sup> *MDY Indus., LLC v. Blizzard Entertainment, Inc.*, 2010 WL 5141269, 97 U.S.P.Q.2d (BNA) 1001 (9th Cir. Dec. 14, 2010).

<sup>1408</sup> See: Chapter 5 - Contractual Displacement of Proprietary Interests: EULAw? At 5.4.1 *Ownership Issues*.

<sup>1409</sup> Under for example, the legacy of *Clarke v Earl of Dunraven* [1897] AC 59.



behalf of other users. As such, whilst there may be some ‘wrong’ inflicted, it may not necessarily be directed against any particular user, and therefore differs from grieving, kill stealing and ninja-looting. This aspect of gaming activity also challenges the contractual systems of control but relies upon enforcement.

This issue has also formed the basis of litigation, by a user against a company who engaged in the process of farming and selling gold in *World of Warcraft*.<sup>1410</sup> Hernandez brought proceedings against IGE who operated a website whereby users could sell their gold for real currency. This allowed other users to circumvent the progression and menial tasks in the game environment. Hernandez claimed that this activity undermined the value that was in his currency and items, and that this devaluation applied to all other users who did not engage in RMT. Hernandez also claimed that IGE were in breach of the *World of Warcraft* EULA almost constantly, and therefore undermined the purpose of the EULA because it was designed to protect users from RMT activities. IGE settled the case, agreeing not to engage in such activity for a period of five years.<sup>1411</sup>

Nevertheless, whilst this suit settled, it raises a significant aspect in potential game disputes – that there is a potential for a class of third party beneficiaries to be found in relation to the gamers on the basis that gamers agree contracts with only the game developers.<sup>1412</sup> Duranske stipulates that this argument potentially has merit, especially if there is support from the game developer in user disputes.<sup>1413</sup> This idea of governance and redress returns to the all-dominant EULA, and it is from this that the third party idea stems. However, this argument finds less support from Fairfield<sup>1414</sup> and Risch,<sup>1415</sup> indicating that whilst there is potential, the reality is likely to be somewhat different and this is another example of the failure of the EULA to protect those it ought to, and to provide solutions to potential problems.

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<sup>1410</sup> *Hernandez v Internet Gaming Entertainment*, U.S. Dist. Ct. Southern District of Florida, Case No: 07-CIV-21403-COHN/SELTZER [2007].

<sup>1411</sup> B Duranske, ‘Hernandez v IGE settles’ (*Virtually Blind*, 27 August 2008) available online:

<<http://virtuallyblind.com/2008/08/27/hermandez-ige-settles/>> retrieved 16 February 2013.

<sup>1412</sup> See for example: M Risch, ‘Virtual Third Parties’ [2009] 25 Santa Clara Computer & High Tech L J 415.

<sup>1413</sup> B Duranske, ‘Hernandez v IGE settles’ (*Virtually Blind*, 27 August 2008) available online:

<<http://virtuallyblind.com/2008/08/27/hermandez-ige-settles/>> retrieved 16 February 2013.

<sup>1414</sup> J Fairfield, ‘Anti-Social Contracts: The Contractual Governance of Virtual Worlds’ (2008) 53 McGill LJ 427; G Lastowka, ‘MDY v Blizzard Opinion’ (*TerraNova*, 29 December 2010) available online:

<[http://terranova.blogs.com/terra\\_nova/2010/12/legal-commentators-in-the-blogosphere-eg-nic-suzor-technollama-rebecca-tushnet-venkat-eric-have-already-offered-some.html](http://terranova.blogs.com/terra_nova/2010/12/legal-commentators-in-the-blogosphere-eg-nic-suzor-technollama-rebecca-tushnet-venkat-eric-have-already-offered-some.html)> retrieved 16 February 2013.

<sup>1415</sup> M Risch, ‘Virtual Third Parties’ [2009] 25 Santa Clara Computer & High Tech L J 415.

All of these forms of game activity pose challenges not only to the proprietary interests of users, but also to the wider systems of control and governance in online games and virtual worlds. As such, it is apparent that the software, and the contractual aspects of governance do not per se provide an adequate system of control. Consequently, there have been a number of alternative approaches advocated that may address the challenges posed by activity such as kill-stealing and RMT.

## 6.6. The EULA v The Alternatives.

Online games and virtual worlds have a number of different regulatory models.<sup>1416</sup> Different online games and virtual worlds have adopted different methods for dealing with problems that arise between users in relation to behaviour and interaction. *Second Life* for example has introduced a system of forums whereby users can inform *Linden Research Inc* of issues that they are having, which will then be investigated.<sup>1417</sup> This, whilst a worthwhile mechanism of support, is highly dependent upon the developer being willing to investigate and take action where appropriate. In contrast, *Habbo* has a system of moderators working to review the chats that are being held in its environment at any given time.<sup>1418</sup> However, the futility of this system was exposed in June 2012 when *Habbo* went offline due to the revelation that the children and teenagers who use *Habbo* were being subjected to explicit conversations and grooming.<sup>1419</sup> Meanwhile, *World of Warcraft* uses Game Masters which are employees who patrol the environment in the event that their help and assistance is required by a gamer.<sup>1420</sup> The *Blizzard* website refers to them as ‘customer service professionals,’ which seems to indicate that they do not deal with disputes but instead offer assistance to gamers in difficulty.<sup>1421</sup> In *EverQuest II* there

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<sup>1416</sup> N Suzor, ‘Order Supported By Law: The Enforcement of Rules in Virtual Communities’ (2012) *Mercer Law Review* 63(2) 523, 530.

<sup>1417</sup> *Second Life* Support available online: <<https://support.secondlife.com/?lang=en>> retrieved 16 February 2013.

<sup>1418</sup> Colmthecrazy, ‘Habbo Moderators’ (8 June 2010) available online: <<https://help.habbo.com/entries/189751-Habbo-Moderators>> retrieved 16 February 2013.

<sup>1419</sup> R Seifert, ‘Striptease and cyber sex: My stay at Habbo Hotel’ (*Channel 4 News*, 12 June, 2012) available online: <<http://www.channel4.com/news/striptease-and-cyber-sex-my-stay-at-habbo-hotel>> retrieved 16 February 2013.

<sup>1420</sup> WoWWiki, ‘Game Master’ available online: <[http://www.wowwiki.com/Game\\_Master](http://www.wowwiki.com/Game_Master)> retrieved 16 February 2013.

<sup>1421</sup> Daxxari, ‘What does a Game Master really do?’ *World of Warcraft* (22 January 2013) available online: <[http://us.battle.net/wow/en/blog/8501406/What\\_Does\\_A\\_Game\\_Master\\_Really\\_Do-1\\_22\\_2013](http://us.battle.net/wow/en/blog/8501406/What_Does_A_Game_Master_Really_Do-1_22_2013)> retrieved 16 February 2013.

is also a system of Game Masters; however this is supplemented with guides who are players who voluntarily help others out.<sup>1422</sup>

The EULA, whilst appearing to act as a constitutional document, provides the limitations on the rights a user may have in a particular space, and the regulation of behaviour is very much left to the norms or acceptability in a particular space.<sup>1423</sup> Van Kokswijk advances a similar argument, outlining that virtual and physical worlds seem to be blending more and more but internal regulation alone is insufficient to deal with the issues arising from this blend.<sup>1424</sup> This argument is advanced by the fact that legislation is reactive,<sup>1425</sup> and stances that ‘rules are made to be broken.’ Interestingly, van Kokswijk suggests that common-sense approaches will be more successful as they allow fall-back positions of common sense which look to the future, rather than enforcing legislative means which are based on the past.<sup>1426</sup> This is ever true in the face of the cyber-realm, whose laws – to the extent there are any – have developed through analogy to other areas. Lastowka considers that this is not necessarily a problem as this is often how bodies of rules have developed where technologies are concerned, and cites the development of measures relating to cars as an example.<sup>1427</sup> However, this argument draws a very fine distinction from the argument advanced by Easterbrook in 1996 when he suggested that there is no such thing as a law of cyberspace unless you can distinguish it from the law of the horse.<sup>1428</sup> Developments to date have indicated that the law, as it is, will be applied to cyberspace until such time as there is a dedicated body of cyberlaw. This is, however, far from ideal when considering the interests of users and gamers.

The different in-game or in-world mechanisms indicate that there is assistance available. However, the predominant emphasis is on assisting the users rather than being concerned with resolutions to property theft, infringement, breach of contract or grieving, for example. Consequently, the mechanisms introduced are not wholly concerned with governance or

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<sup>1422</sup> N Stephens, ‘EverQuest 2: Guides and Game Masters’ (*Examiner.com*, 28 June 2010) available online:

<<http://www.examiner.com/article/EverQuest-2-guides-and-game-masters>> retrieved 16 February 2013.

<sup>1423</sup> S Humphreys, ‘Ruling the Virtual World. Governance in massively multiplayer online games’ (2008) *European Journal of Cultural Studies* 11(2): 147, 154.

<sup>1424</sup> J van Kokswijk, ‘Social Control in Online Society’ *International Conference on Cyberworlds* (2010) available online: <[http://www.kokswijk.nl/agenda/files/CW2010-JvK\\_v1.pdf](http://www.kokswijk.nl/agenda/files/CW2010-JvK_v1.pdf)> retrieved 15 February 2013, 241.

<sup>1425</sup> H T Markey, ‘Science and Law – Toward A Happier Marriage’ (1977) 59 *J Pat Off Soc’y* 343, 346.

<sup>1426</sup> J van Kokswijk, ‘Social Control in Online Society’ *International Conference on Cyberworlds* (2010) available online: <[http://www.kokswijk.nl/agenda/files/CW2010-JvK\\_v1.pdf](http://www.kokswijk.nl/agenda/files/CW2010-JvK_v1.pdf)> retrieved 15 February 2013, 244.

<sup>1427</sup> G Lastowka, ‘Foreword: Paving the Path of Cyberlaw’ (2011) *William Mitchell Law Review*, Vol 38(1) 3.

<sup>1428</sup> F H Easterbrook, ‘Cyberspace and the Law of the Horse’ (1996) *U Chi Legal F* 207.

regulation. The problems that are faced by these models and approaches leads to some concern over their suitability, and as such, alternatives have been considered in various different ways.

#### *6.6.1. Virtual Courts.*

This is not an approach to governance or regulation, but is rather a potential method which could be used as a form of enforcement under the current system, albeit with a number of amendments. Virtual courts could – in theory – reduce the number and frequency of disputes arising in offline courts. The virtual courtrooms would seek to deal with disputes such as avatar slaying, ninja looting and kill-stealing, but would also consider wider issues that are more paramount such as the impact of gold farming and the potential detriment that could be experienced by users. For instance, it could be the situation that such a court would be called upon to determine issues of substantive offline law and their applicability to online incidents. This is one particular approach that could follow the example of South Korea in introducing a distinct police presence to deal with disputes arising from online games and virtual worlds.<sup>1429</sup> This is not the only proactive step taken by the South Korean authorities however; there have also been instructions issued to the developers and providers of MMORPGs to alter their EULA clauses, indicating that there is some awareness that the terms and conditions are not always desirable or fair to the users' interests.<sup>1430</sup>

This presupposes that either a new set of common laws of virtual worlds are introduced, which – similar to the Berne Convention<sup>1431</sup> – outline minimum standards, or that offline laws are suitable for application to online disputes and activities taking place within these online environments. For virtual courts to be considered, they would be at best an in-world or in-game dispute resolution method, otherwise their very nature would be questioned, and the current situation does not lend itself to such a system of governance. In any event, such an imposition would be contrary to the idea of territorial governance.

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<sup>1429</sup> M Ward, 'Does Virtual Crime Need Real Justice?' (*BBC News*, 29 September 2003) <<http://news.bbc.co.uk/1/hi/technology/3138456.stm>> retrieved 16 February 2013; DWT, 'MMORPG worm a threat to virtual swag bag' (*Privacy & Security Law Blog*, 24 August 2005) available online: <<http://www.privsecblog.com/archives/identity-theft-60-mmorpg-worm-a-threat-to-virtual-swag.html>> retrieved 16 February 2013.

<sup>1430</sup> U Yoon, 'Real Money Trading in MMORPG Items From a Legal and Policy Perspective' *Journal of Korean Judicature*, (2008) Vol. 1, 418, 440.

<sup>1431</sup> The Berne Convention for the Protection of Literary and Artistic Works, 1886. Hereafter Berne Convention.

Virtual Courts could play a role in the system of governance although their predominant roles would incorporate less governance and more enforcement. It is potentially desirable that virtual courtrooms be introduced to deal with virtual disputes, as it could ease the burden on the offline courtrooms, and could also provide a dedicated forum for the application and development of a body of rules specifically applicable to a particular environment or world – the virtual courtroom could be further developed so as to be based around a tribunal model. Whilst this suggestion does use an offline model, it is based on the assumption that specific rules will be developed and applied that are suited to the online environment rather than based on the offline laws and reasoning that are applied in a piecemeal manner to online disputes, which can be seen with the *MDY* judgment.<sup>1432</sup> Houweling and Shaffer suggest that the judgment uses real property reasoning and analogy in determining copyright infringement,<sup>1433</sup> which is an example of undesirability in developing a system of rules and governance for online, cross-jurisdictional spaces. It is suggested that, at present, what exists is a system that is dependent on the EULA and Codes of Conduct, but these are developing and emerging into quasi-constitutions and therefore, it is possible – and perhaps desirable – that this develops into a common law, but a virtual common law which is suited to the spaces it seeks to play a role in. Fairfield argues ardently that the Codes of Conduct ought to be replaced with a virtual common law that develops over time.<sup>1434</sup> Whilst this idea has merit, especially in relation to the implementation of virtual courtrooms, as virtual courtrooms need a body of law to refer to and uphold, the difficulty is the length of time it will take to develop, and what will fill the void in the meantime, especially as the development of bodies and rules relating to aviation and the motor industry have taken decades to emerge.<sup>1435</sup>

### 6.6.2. *Theory of Interration and a Declaration of Rights.*

Castronova draws a distinction between different types of online environment; differentiating among them depending on whether they are open worlds or closed worlds.<sup>1436</sup> An open world

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<sup>1432</sup> *MDY Indus., LLC v. Blizzard Entertainment, Inc.*, 2010 WL 5141269, 97 U.S.P.Q.2d (BNA) 1001 (9th Cir. Dec. 14, 2010).

<sup>1433</sup> M Houweling and M Shaffer, 'Touching and Concerning Copyright: Real Property Reasoning in *MDY Industries, Inc. v. Blizzard Entertainment, Inc.*' (2011) *Santa Clara L Rev* 51, 1063.

<sup>1434</sup> J Fairfield, 'Anti-Social Contracts: The Contractual Governance of Virtual Worlds' (2008) 53 *McGill LJ* 427, 459.

<sup>1435</sup> G Lastowka, 'Foreword: Paving the Path of Cyberlaw' (2011) *William Mitchell Law Review*, Vol 38(1) 3; G Lastowka, *Virtual Justice: The New Laws of Online Worlds* (Yale University Press 2010) 69.

<sup>1436</sup> E Castronova, 'The Right to Play' in J M Balkin and B S Noveck (eds), *The State of Play: Law, Games and Virtual Worlds* (New York University Press 2006) 79.

would be a space whereby real-world law would be applicable to the space irrespective of the nature of that space. This regulation by real-world or offline laws would allow disputes to be determined by any legal jurisdiction, whereas a closed world would be a different space, without that regulation. The closed world would be regarded as having a separate existence, and it could regulate its space in whichever way it would deem appropriate, so that disputes could not be brought under offline, real-world law and all disputes would have to be resolved in the virtual environment.

This theory is based around the Theory of Interration i.e. the creation of space in which play will be possible – and is closely connected to acts of incorporation.<sup>1437</sup> It would be the role of Governments to protect the rights and freedoms of users outside of the closed worlds. This theory pre-supposes that there are rights and freedoms granted to users in these so-called closed worlds. The suggestion that there is an act of Government which requires the creation of play spaces is very similar to the theory advanced by Huizinga<sup>1438</sup> in the 1930s surrounding the Magic Circle approach to governing spaces.<sup>1439</sup> However, the most interesting element of this theory proposed by Castronova rests on the idea of rights and freedoms of the users that must be protected by the Government. As Koster outlines in his Declaration of Rights of Avatars,<sup>1440</sup> the exercise of creating such a document is nothing other than a theoretical exercise because it will require a shift in the mind-set of game developers in order to introduce such a thing.<sup>1441</sup> It would also require the introduction of some body to oversee its implementation<sup>1442</sup> and to ensure compliance, which in virtual worlds and online games is another challenging element, especially if, as Castronova suggests, open world disputes could be raised wherever there is the appropriate jurisdiction.<sup>1443</sup>

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<sup>1437</sup> E Castronova, 'The Right to Play' in J M Balkin and B S Noveck (eds), *The State of Play: Law, Games and Virtual Worlds* (New York University Press 2006) 80.

<sup>1438</sup> J Huizinga, *Homo Ludens*, 1938, 13; E Castronova, *Synthetic Worlds: Business and Culture of Online Games* (University of Chicago Press 2006) 147.

<sup>1439</sup> J Fairfield, 'The Magic Circle' (2009) 11 Vand J Ent & Tech L 823, 825.

<sup>1440</sup> R Koster, 'Declaration of the Rights of Avatars' in J M Balkin and B S Noveck (eds), *The State of Play: Law, Games and Virtual Worlds* (New York University Press, New York 2006) also available online: <<http://www.raphkoster.com/gaming/playerrights.shtml>> retrieved 16 February 2013.

<sup>1441</sup> R Koster, 'Declaration of the Rights of Avatars' in J M Balkin and B S Noveck (eds), *The State of Play: Law, Games and Virtual Worlds* (New York University Press 2006) 67.

<sup>1442</sup> Lastowka makes comparisons with sporting bodies: G Lastowka, *Virtual Justice: The New Laws of Online Worlds* (Yale University Press 2010) 69.

<sup>1443</sup> E Castronova, 'The Right to Play' in J M Balkin and B S Noveck (eds), *The State of Play: Law, Games and Virtual Worlds* (New York University Press 2006) 79.

Tseng however highlights a further problem with the Theory of Interration; Castronova only provided for two distinct categories of world; open such as *Second Life* and closed such as *World of Warcraft*.<sup>1444</sup> There was no consideration of other spaces that could develop as a blend of these two types; and create a third category of hybrids. The third category does not fit within the defined lines through which the interrattion theory can operate. Tseng suggests that the most appropriate method of addressing the question of governance of online interactive spaces has two aspects to it; firstly adopt the Magic Circle, and secondly, introduce a statute of interrattion which would allow developers to choose from a range of options, which would allow hybrid environments to operate between closed and open worlds.<sup>1445</sup>

This modified suggestion has some interesting opportunities contained within it. Firstly, it seems to supersede the overall authority of the EULA and therefore of the game developers. It also indicates that arguments levied by Johnson and Post,<sup>1446</sup> and Lastowka<sup>1447</sup> that online games and virtual worlds must be treated differently, are unsound. This would also potentially alleviate the concerns raised by Glushko, that the largest weakness of the EULA is that it remains unenforceable.<sup>1448</sup> Given the difficulties of enforcing the provisions of the EULA, it seems likely that a leading suggestion would be to replace its dominant form with something else but something which allows the developers to customize it to suit the needs of their particular environment.

However, there is a significant flaw with this approach, and even the modified method – whilst there would be a distinction between the spaces, and therefore a division between when disputes can and cannot be dealt with, there is also a larger question of which law would be applied to the dispute in question, especially as Castronova suggested that the dispute could be dealt with in any court or venue with jurisdiction.<sup>1449</sup> This seems to indicate that whilst interrattion pays no attention to boundaries other than those which it introduces, there is also no recognition of physical boundaries because any venue with jurisdiction could be any court in any legal system.

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<sup>1444</sup> Y S Tseng, 'Governing Virtual Worlds: Interrattion 2.0' (2011) 35 Wash U J L & Pol'y 547.

<sup>1445</sup> Y S Tseng, 'Governing Virtual Worlds: Interrattion 2.0' (2011) 35 Wash U J L & Pol'y 547, 566.

<sup>1446</sup> D R Johnson and D G Post, 'Law and Borders – The Rise of Law in Cyberspace' (1996) 48 Stan L Rev 1367; D G Post, *In Search of Jefferson's Moose – Notes on the State of Cyberspace* (OUP 2009).

<sup>1447</sup> G Lastowka, *Virtual Justice: The New Laws of Online Worlds* (Yale University Press 2010) 102.

<sup>1448</sup> B Glushko, 'Tales of the (Virtual) City: Governing Property Disputes in Virtual Worlds' [2007] Berkeley Tech L J, Vol 22, 251.

<sup>1449</sup> E Castronova, 'The Right to Play' in J M Balkin and B S Noveck (eds), *The State of Play: Law, Games and Virtual Worlds* (New York University Press 2006) 79.

This is far from ideal in determining resolutions, but also in developing a system of control for Virtual Worlds. Tseng however is not the only one to offer a modified version of intertation;<sup>1450</sup> Balkin also offers an amended theory of intertation,<sup>1451</sup> specifically in how it could suit smaller virtual worlds and suggests that the most suitable user of intertation would be in scenarios whereby the predominant activity in a particular space is transactions for virtual goods that involve real money. This has greater merit, especially with the emphasis placed on the transactional aspects of online games and virtual worlds, and the suggestion that a user may develop expectations of proprietary interests.<sup>1452</sup>

The theory in itself is an interesting idea, but it is far from refined and complete, and seems to contradict the idea of treating virtual worlds and online games differently, simply introducing a way of defining when a dispute can and cannot arise yet it still seeks to apply offline law to online spaces. If intertation is to define the categories of online world and environment, and EULAs are to remain god-like, for closed worlds, this surely requires a significant emphasis to be placed on precise definitions and categorisation so as to reduce the potential for developers to change their category to avoid disputes when it is convenient. This is irrespective of the fact that theories such as the magic circle, are paradoxical.<sup>1453</sup> Moreover, this does not solve the issues with EULAs, or governance, and deals with only a small element of it. However, it does contradict the arguments advanced by Wu that cyberspace isn't different<sup>1454</sup> and suggests a move away from online and offline parity. However there is a larger issue which Reed indicates poses a potentially significant challenge to authority in cyberspace; the enforcement of law,<sup>1455</sup> for if there is a failure to enforce then the authority which the law has is weakened.<sup>1456</sup>

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<sup>1450</sup> Y S Tseng, 'Governing Virtual Worlds: Intertation 2.0' (2011) 35 Wash. U. J. L & Pol'y 547.

<sup>1451</sup> J M Balkin, 'Law and Liberty in Virtual Worlds' in J M Balkin and B S Noveck (eds), *The State of Play: Law, Games and Virtual Worlds* (New York University Press 2006) 108.

<sup>1452</sup> B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA Publishing 2008) 75; S Humphreys, 'Discursive constructions of MMOGs and some implications for policy and regulation.' (2009) Media International Australia 130: 53, 62.

<sup>1453</sup> J A T Fairfield, 'The God Paradox' (2009) 89 B U L Rev 1017.

<sup>1454</sup> J Goldsmith and T Wu, *Who Controls the Internet?* (OUP 2008).

<sup>1455</sup> But see N Suzor, 'Order Supported By Law: The Enforcement of Rules in Virtual Communities' (2012) Mercer Law Review 63(2) 523, 530; N Suzor, 'The Role of the Rule of Law in Virtual Communities' (2010) Berkeley Technology Law Journal 25(4), 1818.

<sup>1456</sup> C Reed, *Making Laws for Cyberspace*, (OUP 2012) 59.



Furthermore, the idea of a theory of interration pays little attention to the suggestion of a Declaration of the Rights of Avatars.<sup>1457</sup> This again has some initial merit, although, like many other similar documents, it would surely also be dependent upon developers and environments signing up to it in order for it to be enforceable across multiple spaces. The largest concern is that it would need to be an overarching document, and would need to include sufficient scope for allowing it to apply to a vast spectrum of online spaces and games. To this end, it seems likely that the introduction of such a Declaration<sup>1458</sup> would need consent from a number of parties, and significant negotiation unless it were to form part of the Theory of Interration,<sup>1459</sup> so that the rights and freedoms would not apply to closed worlds given that the interration approach would not be applicable to such spaces.

### 6.6.3. Social Norms.

The use of social norms to dictate behaviour in online games and virtual worlds has been considered since the early worlds of *LambdaMOO*.<sup>1460</sup> The experiment of allowing users and virtual world residents to regulate and control their own behaviour failed spectacularly with Mr Bungle, and the rape of the female avatars.<sup>1461</sup> Whilst there was a failure of norms to prevent the rape initially, the norms failed a second time over the discipline to be handed out to the perpetrator; the community gathering to decide on punishment, only for this to be superseded by a community leader afterwards.<sup>1462</sup> Maltz suggests that this failure is a result of the difference in the power of programming, which allowed the perpetrator in this instance to overpower the victims<sup>1463</sup> and highlights the vulnerabilities caused by activities such as hacking. However, it is not the only

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<sup>1457</sup> R Koster, 'Declaration of the Rights of Avatars' in J M Balkin and B S Noveck (eds), *The State of Play: Law, Games and Virtual Worlds* (New York University Press, New York 2006) also available online: <<http://www.raphkoster.com/gaming/playerrights.shtml>> retrieved 16 February 2013.

<sup>1458</sup> R Koster, 'Declaration of the Rights of Avatars' in J M Balkin and B S Noveck (eds), *The State of Play: Law, Games and Virtual Worlds* (New York University Press, New York 2006) also available online: <<http://www.raphkoster.com/gaming/playerrights.shtml>> retrieved 16 February 2013.

<sup>1459</sup> E Castronova, 'The Right to Play' in J M Balkin and B S Noveck (eds), *The State of Play: Law, Games and Virtual Worlds* (New York University Press 2006) 80.

<sup>1460</sup> J L Mnookin, 'Virtual(ly) Law: The Emergence of Law in LambdaMOO' (June 1996) *Journal of Computer-Mediated Communication* 2(1) <<http://jcmc.indiana.edu/vol2/issue1/index.html>> retrieved 17 February 2013 2010.

<sup>1461</sup> R MacKinnon, 'Virtual Rape' *Journal of Computer Mediated Communication* Vol 2(4) (1997) available online: <<http://jcmc.indiana.edu/vol2/issue4/mackinnon.html#References>> retrieved 20 January 2013.

<sup>1462</sup> J Dibbell, *My Tiny Life: Crime and Passion in a Virtual World* (Fourth Estate Ltd 1998) available online: <<http://www.juliandibbell.com/articles/a-rape-in-cyberspace/>> retrieved 16 February 2013.

<sup>1463</sup> T Maltz, 'Customary Law and Power in Internet Communities' (1996) *Journal of Computer Mediated Communication* Vol 2(1) available online: <http://jcmc.indiana.edu/vol2/issue1/custom.html> retrieved 16 February 2013.

example where norms have been introduced as methods to govern online games and virtual worlds; the use of norms in *Second Life* has also failed. The norms included the ability to set parameters on what the property of a particular avatar can and cannot be used for in the *Second Life* environment. As Stoup highlights, these norms include both code-based and social norms. For example, the ability to indicate how other avatars should behave when using the property is a social norm whereas setting limits on the uses of property are coded software norms.<sup>1464</sup>

However, the non-coded norms have a significant weakness, and carry a greater burden with them because they require someone to monitor the visitors to the property in order to determine whether there has been compliance or not. This is constant activity which has to happen twenty-four hours a day otherwise it is possible that the norms will be contravened. The need to monitor the norms has led to the creation of groups that police the environments and deal with breaches of the norms. However, these are not officially sanctioned, and are groups of like-minded vigilante-esque avatars.<sup>1465</sup> The development of such groups which are potentially akin to griefers indicates that the use of norms is not particularly successful or problem free, although Reed issues a compelling case for making appropriate regulation and governance for online activity.<sup>1466</sup>

Nevertheless, failures of norms, and the desire to have control, indicates changes in governing mechanisms of online games and virtual worlds, and increasing reliance on the EULA. Yet Gilbert advocates that the EULA should not be the sole element of governance, and a reliance upon offline law should also be avoided in favour of a combined system, using the EULA – albeit in a modified form – supplemented by a common law to supplement the contractual provisions.<sup>1467</sup> It therefore seems that whilst there are some positive indicators that these systems of control will be introduced if citizens and residents of online games and virtual worlds are left to self-govern, there are also difficulties with this approach. Reed suggests that cyberspace should not be treated as a place that Governments seek to influence as it can lead to a system of bad laws which are not suited to their intended purpose, and that instead, social norms – similar to those used in

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<sup>1464</sup> P Stoup, 'Development and Failure of Social Norms in Second Life' (2008) 58 Duke LJ 311, 325.

<sup>1465</sup> P Stoup, 'Development and Failure of Social Norms in Second Life' (2008) 58 Duke LJ 311, 328.

<sup>1466</sup> C Reed, *Making Laws for Cyberspace*, (OUP 2012).

<sup>1467</sup> B J Gilbert, 'Getting to Conscionable: Negotiating Virtual Worlds' End User Licence Agreements without Getting Externally Regulated' (2009) available online: <[http://works.bepress.com/brendan\\_gilbert/1](http://works.bepress.com/brendan_gilbert/1)> retrieved 16 February 2013.

*LambdaMOO* - are one mechanism which can give effect to good regulation, reflecting the expectations and wishes of the users.<sup>1468</sup>

#### **6.6.4. In-House Regulation – Oversight?**

Lastowka has indicated<sup>1469</sup> an alternative method to social norms or the Law of Interration, and considered introducing a system similar to that of governing professional sports bodies. This system of control would work in an oversight capacity, but could potentially include a system of accountability and review in the event that there is a dispute. However, whilst this could work well, there would be a need to introduce some form of mechanism whereby the oversight body would have the authority to hold users and / or game developers accountable. This system could operate alongside the virtual courtroom<sup>1470</sup> if such a system were implemented so that there is a hierarchical system for dealing with disputes of varying degrees.

This presupposes that there is some form of enforceable agreement in place, yet from the disputes that have arisen before the courts to date, it seems that the EULA exists as a document behind which game developers and platform providers can hide, choosing to regulate their spaces from a distance. As such, the EULA may be a valid contractual document but it is not necessarily enforceable. For there to be any organisation acting as an oversight group, it would be necessary to reconsider the basis of the EULA and, to continue with the analogy to professional sport, it could be useful to consider a Code of Conduct that would be binding upon users and developers alike. This could then form the basis of the oversight group, and would provide a framework. However, it seems that such a system would not address the issues of copyright or user rights, and would most probably focus upon the activity and behaviour of users in relation to other users. As such, it is likely that the organisation would not be able to deal with all aspects of online gaming and virtual worlds, therefore the potential usefulness is somewhat limited.

Another pitfall of this approach would be the in-house regulatory aspect carried out by the game developer and platform provider. There are a number of mechanisms that have developed in various spaces that are designed to ease the problems users and residents experience during their

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<sup>1468</sup> C Reed, *Internet Law: Text, Cases and Materials* (Cambridge: CUP, 2004) 2.

<sup>1469</sup> G Lastowka, *Virtual Justice: The New Laws of Online Worlds* (Yale University Press 2010), 102.

<sup>1470</sup> F Alemi, 'An Avatar's Day In Court: A Proposal for Obtaining Relief and Resolving Disputes in Virtual World Games' [2007] UCLA J L & Tech 6.

time online. However, there have been some significant failings – *LambdaMOO*<sup>1471</sup> and *Habbo*<sup>1472</sup> being two examples. It is problematic to expect the developers to play a role in regulating when they have thus far proved unable or unwilling to do so. For example, the *Second Life Community* expressly states that the developer will not become involved in disputes between users.<sup>1473</sup> This position has not been adopted by *Blizzard* in relation to *World of Warcraft* disputes, although there are some indications that the developer may have been willing to intervene in relation to the interests of the gamers in the *Hernandez* suit.<sup>1474</sup> Nevertheless, if *Blizzard* had been proactive in policing the activities of users, the suit need not have happened.

## 6.7. The Magic Circle, and Play Spaces?

In discussing the framework of governance that exists for online games and Virtual Worlds, it is necessary to consider the background context of two interdependent elements which are the stalwarts of online games; copyright and contract. However, whilst these may be the ‘teeth’ of governance, there are other elements which ought to be included as well. There are two theories which are relevant in the governance paradigm, firstly, the Magic Circle<sup>1475</sup> and secondly, the Theory of Play,<sup>1476</sup> as the two dominant perspectives. The Magic Circle approach is one which suggests there is a distinction between the real and the virtual, and that this division will be a useful one in deciding which set of rules and regulations applies to the real, and which applies to the virtual. The second theory, the Theory of Play is a similar argument, advocating that there are defined spaces in which we engage in activities of play,<sup>1477</sup> and games are such spaces therefore regulation and the need for it is questionable. For example, the values attached to the in-game items and game accounts indicate that many users believe there is something more to their gaming

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<sup>1471</sup> R MacKinnon, ‘Virtual Rape’ (1997) *Journal of Computer Mediated Communication* Vol 2(4) available online: <<http://jcmc.indiana.edu/vol2/issue4/mackinnon.html#References>> retrieved 20 January 2013.

<sup>1472</sup> R Seifert, ‘Striptease and cyber sex: My stay at Habbo Hotel’ (*Channel 4 News*, 12 June, 2012) available online: <<http://www.channel4.com/news/striptease-and-cyber-sex-my-stay-at-habbo-hotel>> retrieved 16 February 2013.

<sup>1473</sup> R Linden, ‘Transactions and disputes between Residents’ *Second Life Community* available online: <<http://community.secondlife.com/t5/English-Knowledge-Base/Transactions-and-disputes-between-Residents/ta-p/799395>> retrieved 16 February 2013.

<sup>1474</sup> B Duranske, ‘Hernandez v IGE settles’ (*Virtually Blind*, 27 August 2008) available online: <<http://virtuallyblind.com/2008/08/27/hermandez-ige-settles/>> retrieved 16 February 2013.

<sup>1475</sup> J Fairfield, ‘The Magic Circle’ (2009) 11 *Vand J Ent & Tech L* 823.

<sup>1476</sup> E Castronova, ‘The Right to Play’ (2004) 49 *N Y L Sch L Rev* 185, 200 - 205.

<sup>1477</sup> J Huizinga, *Homo Ludens* (1938), 13; E Castronova, *Synthetic Worlds: Business and Culture of Online Games* (University of Chicago Press 2006) 147.

than mere play. Furthermore, the disputes appearing in courts<sup>1478</sup> over items of gaming property further support this, as do various theories of property.<sup>1479</sup> Perhaps the strongest evidence of the difficulties with advocating that online games are spaces of play arises with the real-world consequences of gaming behaviour, especially when it is manifested as violence against the person.<sup>1480</sup> Similarly, the Magic Circle approach is questionable on the basis of the distinction it draws – how do we define what is real and what is virtual, and how do we ensure that the categories are rigid enough to be enforced without being too flexible and ineffective? In any discussion of governance, it is necessary to consider the theories applicable to such spaces, irrespective of the discussion of contradictory evidence elsewhere.

The Magic Circle approach is one which indicates that problems arising in virtual worlds and online games should, as far as possible, be resolved within the game or world in which the issue appears. The Magic Circle requires there to be a division between what is considered the virtual world and the real world.<sup>1481</sup> This division then necessitates where the law will and will not apply, and endeavours to keep virtual worlds from the enclaves of offline law. Fairfield<sup>1482</sup> and van Kokswijk argue that this division is not helpful, and is rejected almost universally by commentators.<sup>1483</sup> Hickman and Hickman criticise the idea of distinguishing between the real and virtual, and suggest that this is no longer feasible in an ever-connected society,<sup>1484</sup> whilst Duranske makes his objections more explicit; stating categorically that it is, “absurd to think that the real-world laws don’t apply in a virtual world.”<sup>1485</sup> The strongest indicator that this theory or ideal is impractical and unsuitable stems from the challenges to the EULA that have been raised; the strongest indicator arising in *Bragg v Linden*,<sup>1486</sup> and the upholding of user rights subsisting in

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<sup>1478</sup> *Bragg v Linden Research Inc.* (487 F.Supp 2d 593 E.D. Penn) [2007]; *Eros, LLC, v. John Doe*, US Dist. Ct. Middle District of Florida, Case No: 8:07-cv-1158-T-24TGW [2007]; *Hernandez v Internet Gaming Entertainment*, U.S. Dist. Ct. Southern District of Florida, Case No:07-CIV-21403-COHN/SELTZER [2007]; *BlackSnow Interactive v. Mythic Entertainment Inc.*, No. 02-00112 (C.D. Calif.) [2002].

<sup>1479</sup> See generally: Chapter 2 - Property Matters: Virtually Justified?

<sup>1480</sup> B Slattery, ‘Woman jailed for murdering avatar’ *Washington Post* (Washington, 27 October 2008) available online: <[http://articles.washingtonpost.com/2008-10-27/news/36838980\\_1\\_maple-story-electronic-data-avatar](http://articles.washingtonpost.com/2008-10-27/news/36838980_1_maple-story-electronic-data-avatar)> retrieved 18 February 2013; BBC News, ‘Chinese Gamer Sentenced to Life’ (8 June 2005) <<http://news.bbc.co.uk/1/hi/4072704.stm>> retrieved 18 February 2013.

<sup>1481</sup> J Fairfield, ‘The Magic Circle’ (2009) 11 Vand J Ent & Tech L 823; E Castronova, ‘The Right to Play’ (2004) 49 N Y L Sch L Rev. 185, 200 - 205; J M Balkin, ‘Law and Liberty in Virtual Worlds’ (2004) 49 N Y L Sch L Rev 63, 73 - 76.

<sup>1482</sup> J Fairfield, ‘The Magic Circle’ (2009) 11 Vand J Ent & Tech L 823, 826.

<sup>1483</sup> J van Kokswijk, ‘Social Control in Online Society’ (2010) available online:

<[http://www.kokswijk.nl/agenda/files/CW2010-JvK\\_v1.pdf](http://www.kokswijk.nl/agenda/files/CW2010-JvK_v1.pdf)> retrieved 15 February 2013, 241.

<sup>1484</sup> T Hickman and K Hickman, ‘The Myth of the Magic Circle’ (2012) UC Irvine Law Review Vol 2, 537, 541.

<sup>1485</sup> B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA Publishing 2008) 74.

<sup>1486</sup> *Bragg v Linden Research Inc.* (487 F.Supp 2d 593 E.D. Penn) [2007].

virtual items. If the Magic Circle theory applied to online games and virtual worlds, it is perhaps possible to see that a court would not have heard the case, simply because there would be nothing to determine, as the Magic Circle would indicate that the law does not apply to Virtual Worlds; therefore there could be no case to answer. There is other evidence that can be used to refute the idea that the Magic Circle approach is one with considerable merit; in our digital society, the distinctions between the real and the virtual are ever-blurred, not least with initiatives like Amazon Coin,<sup>1487</sup> which makes it harder to draw a clear line between the two.

Duranske advances his opposition to the Magic Circle approach by suggesting that it is for the game or world to choose whether it is to benefit from the protection of offline laws or not,<sup>1488</sup> and then act accordingly. This seems rather similar to the suggestion advocated by Castronova in the early conception of the Law of Interration.<sup>1489</sup> However, Duranske then counters his argument by indicating that regardless of the situation, and regardless of whether offline law applies, the law will ignore the situation in online games and virtual worlds because “it is just a game.”<sup>1490</sup> If this is the case, perhaps it is unrealistic to consider the Magic Circle theory, and consider these spaces as little more than virtual environments that are created for pleasure, and to provide a dedicated space for play, as suggested by Castronova.<sup>1491</sup> This suggestion is far from realistic – these spaces have evolved and are now considered part of our existence. As such, it is perfectly reasonable to consider them to be valuable and something over which control must be exerted in some form.<sup>1492</sup> Perhaps the question that ought to be asked in determining whether the offline law should be applied is: “did the user, *reasonably* believe that it was really ‘just a game’?”<sup>1493</sup> This could lead to a situation where issues of proprietary interests are genuinely contested for both developers and users. Similarly, it is possible that, by asking this question, users and gamers will answer that they did not believe them to be merely games. If this is the answer then the issues become even more apparent, although as Humphreys indicates, there is a

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<sup>1487</sup> Amazon, ‘Introducing Amazon Coins: A New Virtual Currency for Kindle Fire’ (5 February 2013) available online: <<http://www.amazonappstoredev.com/2013/02/introducing-amazon-coins.html>> retrieved 16 February 2013.

<sup>1488</sup> B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA Publishing 2008) 74.

<sup>1489</sup> E Castronova, *Synthetic Worlds: Business and Culture of Online Games* (University of Chicago Press 2006) 147.

<sup>1490</sup> B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA Publishing 2008) 76.

<sup>1491</sup> E Castronova, ‘The Right to Play’ in J M Balkin and B S Noveck (eds), *The State of Play: Law, Games and Virtual Worlds* (New York University Press 2006) 79.

<sup>1492</sup> D L Burk, ‘Authorization and governance in virtual worlds’ *First Monday* (2010) Vol. 15(5); S Humphreys, ‘Ruling the Virtual World. Governance in massively multiplayer online games’ (2008) *European Journal of Cultural Studies* 11(2): 147.

<sup>1493</sup> B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA Publishing 2008) 75.

compelling case to support the claim that users are also creators and producers.<sup>1494</sup> It is to this end, that there have been experiments carried out to see if it is possible for users to benefit from rights in game-property.<sup>1495</sup>

## **6.8. Governance: Layers of Control?**

It is apparent that the various suggestions for alternative methods of governing online games and virtual worlds differently are all potentially flawed in some way. Nevertheless, there is possibly a mechanism for reconsidering them and their position in relation to the law and the software code which controls them. Copyright subsists in the software code, and as nothing can exist in a virtual world or online game without this software code; it is a potential form of regulation. As such this forms a situation whereby code is both law and property – the software code is potentially the true mechanism of control therefore the true balance of power rests with the developers and providers., Mayer-Schonberger, however, considers that there are a number of potential steps that can be taken to increase the regulability of virtual worlds and online games, one method of which is to consider limiting the ability of European citizens to participate in non-European environments.<sup>1496</sup> This is a potential method but it is not problem free, and faces the effervescent difficulty of enforcement. Mayer-Schonberger has also considered the issues of regulation and governance more widely, and instead of viewing governance as a two-dimensional issue;<sup>1497</sup> there is a need to consider layers of governance, in the same way that it is necessary to see the relationships between code, law and property as layered.<sup>1498</sup>

In discussing issues relating to online games and virtual worlds, and the proprietary interests, there is perhaps an underlying question as to whether or not there is any real legal issue to be addressed or considered. The prior discussions of contract and copyright have shown this to be

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<sup>1494</sup> S Humphreys, 'Discursive constructions of MMOGs and some implications for policy and regulation.' (2009) *Media International Australia* 130: 53, 62.

<sup>1495</sup> S Humphreys and Others, 'Fan based production for computer games: User led innovation, the 'drift of value' and the negotiation of intellectual property rights' (2005) *Media International Australia* incorporating *Culture and Society* February, Issue 114, 16; S Humphreys and J Banks, 'The labour of user co-creation. Emerging social network markets?' (2008) *Convergences* 14(4): 401.

<sup>1496</sup> V Mayer-Schonberger, 'Virtual Heisenberg: The Limits of Virtual World Regulability' (2009) 66 *Wash & Lee L Rev* 1, 8.

<sup>1497</sup> V Mayer-Schonberger, 'The Shape of Governance: Analyzing the World of Internet Regulation' (2003) *Va J Int'l L* 43, 605, 642.

<sup>1498</sup> K Barker, 'Online Games and IP. Battle of the Forms to Social Norms: Reconceptualising and Re-layering?' *SCRIPTed* (Forthcoming, 2013).

exactly the contrary. There are both contractual and proprietary issues in relation to online games. The current contractual paradigm is potentially unfair, with numerous EULA clauses being indicative of contractually unfair terms. Similarly, where copyright issues therefore have arisen, it is evident that there are strong claims to be made by the users of these environments as to their intellectual property rights. These issues, whilst perhaps not obvious, do therefore exist. Yet copyright and contract are only two elements to online games. Questions concerning control arise out of this evidently legally weak paradigm, especially where gaming activity prejudices proprietary claims users may hold. As such, the control, and therefore governance concerns are also an undercurrent to the contract and copyright difficulties.

The systems of controlling behaviour in online spaces are heavily premised on contractual compliance and lack any real methods of enforcement, or indeed any willingness to enforce on behalf of the developers.<sup>1499</sup> This is something which becomes particularly apparent where the systems of governance in each of the four online environments are considered. There is no universal police force patrolling online environments unlike the situation in our offline environments.<sup>1500</sup> The users therefore have very few methods of redress where systems of control fail, and this is exacerbated in light of the indicative unfair arbitration terms in the EULAs. These too, are of little assistance to aggrieved or wronged users. Consequently, alternatives to the current systems of control and regulation are possible. Some of these, such as virtual courts,<sup>1501</sup> are designed to be restorative rather than preventive yet preventive systems, such as coded controls built into the software also could be used. Whilst the game developers, and therefore the software coders could potentially alter the software code which comprises the games and worlds, this would require a greater level of design. Were a game provider to build in constraints into the software code, this could introduce a willingness on the part of developers to become involved in control and governance of their platforms. Despite this, there are potential problems with the modification of software code, after all, the code, were it to be written in this way would be used not only as a rule-maker, but enforcer. This would see game developers becoming involved in controlling their environments in manners which they have thus far avoided. Yet, this

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<sup>1499</sup> A Adrian, 'Beyond grieving: virtual crime' (2010) *Computer & Security Law Review* 26, 641; 645; C Holahan, 'The Dark Side of Second Life' (*BusinessWeek*, 21 November 2006) available online: <<http://www.businessweek.com/stories/2006-11-21/the-dark-side-of-second-lifebusinessweek-business-news-stock-market-and-financial-advice>> retrieved 20 December 2010.

<sup>1500</sup> J Elliott, 'Help – Somebody Robbed My Second Life Avatar!' *JVW Research* 1(1) 2008, 7.

<sup>1501</sup> F Alemi, 'An Avatar's Day In Court: A Proposal for Obtaining Relief and Resolving Disputes in Virtual World Games' [2007] *UCLA J L & Tech* 6.



could potentially also enable a system of oversight to be introduced at a state-level because, this could allow states to legislate to ensure that there is a consistent standard across all platforms. In this way, the software code would be the control within an environment, but it would be directed by state legislation.<sup>1502</sup> Software coded control, therefore, whilst possible may not be desirable.<sup>1503</sup> Yet this leaves users in a precarious position given the difficulties with copyright and contract, and especially control.

Alternative approaches to gaming, such as theories of play, suggest that the law should not concern itself with these aspects at all because they should be little else than play spaces.<sup>1504</sup> Nevertheless, they are more than this – the value and wealth they attract,<sup>1505</sup> and the attention they receive is significant. It is however, apparent that the current systems of control are inadequate, and place an emphasis on copyright and contract, rather than control. It is therefore perhaps time to consider a different approach to governance, and governance structures. It is suggested that one such approach could constitute a layered approach of governance,<sup>1506</sup> which would potentially allow for a more reflective and balanced system but also one which allows users to resolve grievances in an appropriate forum. For example, in the offline, physical world, there are different tiers to the courts system – this reflects different levels of seriousness and importance of the cases heard at the different levels.<sup>1507</sup> In introducing contract and property systems to online games and virtual worlds, the developers have sought to maximise their own interests whilst benefitting from offline legal mechanisms.<sup>1508</sup> As such, they have themselves indicated a willingness to be governed and controlled – at least in part – by the offline systems they have subscribed to. Consequently, it is possible to envisage a hybrid approach to controlling these spaces,<sup>1509</sup> utilising not only online regulatory tools, but also offline regulatory tools in a layered

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<sup>1502</sup> L Lessig, 'The Law of the Horse: What Cyberlaw Might Teach' (1999) 113 Harv L Rev 501, 537 – 546.

<sup>1503</sup> And has been criticised by Risch in particular: M Risch, 'Virtual Rule of Law' [2009] 112 West Virginia Law Review 1, 37.

<sup>1504</sup> E Castronova, 'The Right to Play' (2004) 49 N Y L Sch L Rev 185, 200 - 205.

<sup>1505</sup> See Chapter 2: Property Matters: Virtually Justified? At 2.7. *Theory for Parity?*

<sup>1506</sup> K Barker, 'Online Games and IP. Battle of the Forms to Social Norms: Reconceptualising and Re-layering?' *SCRIPTed* (Forthcoming, 2013).

<sup>1507</sup> Courts and Tribunals Judiciary, 'Structure of the Courts System' (2014) available online: <<http://www.judiciary.gov.uk/about-the-judiciary/the-justice-system/court-structure/>> retrieved 20 August 2014.

<sup>1508</sup> This is particularly evident through the use of contractual agreements that displace proprietary interests; S Humphreys, 'Productive users, intellectual property and governance: The challenges of computer games' (2005) *Media Arts Law Review* Vol 10(4) 299.

<sup>1509</sup> A Koch, 'Nowhere and Now Here: Hybrid Nature of Communities and Spaces' *NETCOM* 18(3) 2004, 171, 173. Also suggested by A Murray and C Scott, 'Controlling the new media. Hybrid approaches to new forms of power' (2002) 65(4) *MLR* 491.

structure. This approach could also make efficient use of copyright, contract, software code and control.

Whilst developers choose copyright and contract, both of these mechanisms should be amended to reflect an appropriate balance of interests between the users and the developers. The EULA terms which are indicative of unfairness should also be revised to ensure that, whilst contractual terms, they are valid contractual terms. Similarly, as a corollary to that, the copyright approach ought to be altered to reflect the role of users alongside that of developers, particularly where users contribute content to the virtual world or online game. And where this occurs, there should be a different contractual basis for the users and developers, reflecting the differences in copyright also. These two alterations are essentially one of a number of layers which could be used as a regulatory tool to ensure that – copyright, contract, code and control – operate efficiently and collectively in a collaborative regulatory manner.

Other appropriate layers of control also ought to be considered, meaning that there should be something other than copyright, and contractually required arbitration proceedings to resolve disputes. Control could include a range of initiatives, from software written controls to give effect to the restrictions and limitations envisaged by ‘play nice policies’ and codes of conduct,<sup>1510</sup> to patrols by avatars controlled by the game developer,<sup>1511</sup> with powers to address behaviour outside of the envisaged game scope. This could encompass changes being made to the software code of a particular environment to prevent certain types of behaviour, and therefore, preventing the user having any choice as to compliance.<sup>1512</sup> Similarly, if an in-world or in-game set of avatars were used to patrol various areas, this could be effective in preventing behaviours that are undesirable. In this way, this could be a form of prevention designed to limit the effects of kill-stealing or ninja-looting for example. This could then be a method whereby the gaming activities that could potentially affect proprietary interests are addressed before they have a significant impact. As such, this type of system would operate at a lower level to for example, other mechanisms designed to resolve proprietary disputes over game items, or copyright in game items.

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<sup>1510</sup> See for example: *Sony’s EverQuest II Code of Conduct*; ‘Play Nice Policies – Activity within *EverQuest II*.’ Available online: <[https://help.station.sony.com/app/answers/detail/a\\_id/16213](https://help.station.sony.com/app/answers/detail/a_id/16213)> retrieved 29 August 2011.

<sup>1511</sup> EVELOPEDIA, ‘Escalation to a senior Game Master’ <[http://wiki.eveonline.com/en/wiki/Escalation\\_to\\_a\\_senior\\_Game\\_Master](http://wiki.eveonline.com/en/wiki/Escalation_to_a_senior_Game_Master)> retrieved 30 July 2010.

<sup>1512</sup> L Lessig, ‘The Zones of Cyberspace’ (1996) 48 *Stanford Law Review* 1403, 1408.

Disputes concerning the trade of items, or the intellectual property rights in game items could then be considered at a level higher than the play level. This would escalate these disputes so that they occur not at a level where the avatar patrols happen. Such disputes could be dealt with, under an in-built system of resolution for each game environment. Appropriate in-world dispute resolution provisions, could be run by members of the game or world itself.<sup>1513</sup> These could take effect in a manner similar to the eBay resolution centre,<sup>1514</sup> where members can informally attempt an agreement prior to raising the seriousness of the dispute, and involving a third party. In this instance, this would not only mean that there was some party other than the users in dispute involved, but would also allow an effective method of redress between users, who do not contract with one another under the current EULA paradigms. Such a system could operate in-world, and would be akin to arbitration but would be world or game specific and be focussed upon dealing with the particular characteristics of each environment individually. This could also potentially address difficulties in ensuring consistency across platforms. Such systems would also operate at different levels to the copyright-contract systems, and would be premised on in-world operation to keep disputes confined to a particular environment. This would necessitate a revised system of EULAs and contractual terms.

Where these methods of control are insufficient, it is also possible to envisage a further layer where disputes relating to these environments are dealt with, and this, according to Alemi<sup>1515</sup> could be more reflective of the offline systems of control that developers have indicated they are willing to subscribe to. For example, virtual courts could be established in each environment to deal with issues relating to the EULA provisions or for addressing complaints that could not be resolved through avatar patrols, or through the member resolutions centre. This could therefore deal with more serious issues – contractual disputes between the users and developers for example, or situations such as that which arose in *LambdaMOO* where there was a breach of norm, and simulated sexual assault. Such a system could form the bridge between the virtual and the real world systems. Such a system would also operate at a different layer to the member resolution system, and would be distinct from the offline systems. It would however, broadly fall

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<sup>1513</sup> V Mayer-Schonberger, 'The Authority of Law in Times of Cyberspace' *Journal of Law, Technology & Policy*, No 1 (2001) 11.

<sup>1514</sup> See for example: eBay Resolution Centre <<http://resolutioncentre.ebay.co.uk/>> retrieved 8 August 2012; E van den Heuvel, 'Online dispute resolution as a solution to cross-border e-disputes: an introduction to ODR' (August 2000) available online: <<http://www.oecd.org/internet/consumer/1878940.pdf>> retrieved 8 August 2012.

<sup>1515</sup> F Alemi, 'An Avatar's Day In Court: A Proposal for Obtaining Relief and Resolving Disputes in Virtual World Games' [2007] *UCLA J L & Tech* 6.

within the hierarchy of layered controls, and would tie together contract and copyright, as well as software code and control.

These elements – software code, copyright, contract and control – ought to operate in combination, but a combination which is effective, layered and which offers a balance between the position and interests of the users and the developers. Copyright and contract currently operate interdependently. To an extent, code (as the software code protected by developers) and the control exerted by contractual terms also operate conjunctively but they do not operate to produce a balanced position between users and developers, and therefore ought to change. In combining to produce change, control can potentially also be achieved, and whilst it is unrealistic to expect that these disputes will disappear, it is perhaps realistic to expect that they be addressed at appropriate levels.

Layers of control is not a new idea per se, but the application of such a suggestion to online games and virtual worlds sees new developments in this respect. Mayer-Schonberger identifies a triangular situation in which layers and levels are central to mechanisms of control.<sup>1516</sup> Similarly, Solum & Chung identify a number of stages in their hierarchical model,<sup>1517</sup> albeit both Mayer-Schonberger, and Solum and Chung discuss this in the context of internet architecture rather than in the context of governing online games. Equally, it is suggested here, that layers would be an appropriate mechanism for addressing the imbalances between the positions of the developer and the user of online games and virtual worlds.<sup>1518</sup> Solum and Chung consider that there are six vertical layers concerning the architecture that comprises the Internet,<sup>1519</sup> whereas Mayer-Schonberger suggests that there are three types of governance: state-centred; self-regulation and trans or supra-national regulation.<sup>1520</sup> This triumvirate is criticised for the distinctiveness of each of type of governance. Seemingly, this triumvirate do not per se work collectively or collaboratively, and instead seek to challenge one another. Whilst layers of control may be a solution, the layers must have the support and input of various actors – both in-world and offline,

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<sup>1516</sup> V Mayer-Schonberger, 'The Shape of Governance: Analyzing the World of Internet Regulation' (2003) *Va J Int'l L* 43, 605, 635.

<sup>1517</sup> L B Solum & M Chung, 'The Layers Principle: Internet Architecture and the Law' 79 *Notre Dame L Rev* 815 (2004) 816.

<sup>1518</sup> K Barker, 'Online Games and IP. Battle of the Forms to Social Norms: Reconceptualising and Re-layering?' *SCRIPTed* (Forthcoming, 2013).

<sup>1519</sup> L B Solum & M Chung, 'The Layers Principle: Internet Architecture and the Law' 79 *Notre Dame L Rev* 815 (2004) 816.

<sup>1520</sup> V Mayer-Schonberger, 'The Shape of Governance: Analyzing the World of Internet Regulation' (2003) *Va J Int'l L* 43, 605, 630.

or as the Panel on Cooperative Governance Mechanisms has suggested, there ought to be distributed groups that work together.<sup>1521</sup> Therefore, a hybrid system of layers, involving self-regulation i.e. members resolution centres, but also state-regulation i.e. traditional contractual and copyright systems or, oversight, ought to be considered. A collaborative system may be more successful than Mayer-Schonberger has suggested the triumvirate has been to date in relation to the governance of the Internet more generally.<sup>1522</sup> Indeed, it has been stated that cyberspace offers an opportunity for the law to elevate itself, and a reconstituted set of layers may facilitate this: “Cyberspace will not demolish the authority of law, but rather reinvent it, and elevate it, if you want, to its own level of hyper-reality.”<sup>1523</sup>

The relationships between contract, copyright, code and control have multiple considerations to take into account when determining a potential governance or regulatory method. Nevertheless, it is important to consider all of these in light of change – both the desire and need for it. The distinction between the offline and the online is becoming increasingly blurred<sup>1524</sup> and it would be somewhat short-sighted to ignore the offerings of real-world law<sup>1525</sup> and what it can do for online games and virtual worlds. However, that does not mean that complacency and satisfaction with a far from ideal solution is something that should continue. If it is necessary to treat cyberspace and particular elements of cyberspace differently, then some thought must be given to how this can be done, with particular attention falling on the practicalities rather than theories. The status quo in relation to online games and virtual worlds and the inter-reliance of copyright and contract is no longer working. If the offline law is unsuitable, and it is possible that the EULA is invalid on the basis of potential unfairness,<sup>1526</sup> copyright will provide rights in the in-game property,<sup>1527</sup> but this does not solve the difficulty of governing behaviours which contravene acceptable behaviours, and which have an impact upon the proprietary interests.

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<sup>1521</sup> Panel on Global Internet Cooperation and Governance Mechanisms, ‘Towards a Collaborative, Decentralized, Internet Governance Ecosystem’ (Internet Society, May 2014) available online: <<http://www.internetsociety.org/sites/default/files/Internet%20Governance%20Report%20iPDF.pdf>> retrieved 1 June 2014.

<sup>1522</sup> V Mayer-Schonberger, ‘The Shape of Governance: Analyzing the World of Internet Regulation’ (2003) *Va J Int’l L* 43, 605, 635.

<sup>1523</sup> V Mayer-Schonberger, ‘The Authority of Law in Times of Cyberspace’ *Journal of Law, Technology & Policy*, No 1 (2001) 23.

<sup>1524</sup> R Brownsword, ‘The Shaping of Our Online Worlds: Getting the Regulatory Environment Right’ (2012) *Int’l J L & Info Tech* Vol 20 (4) 249, 252.

<sup>1525</sup> B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA Publishing, Chicago 2008) 74.

<sup>1526</sup> See: Chapter 5 - Contractual Displacement of Proprietary Interests: EULaw? At 5.5. *Standard terms – Fairness and Balance?*

<sup>1527</sup> See: Chapter 4 - MMORPGing & Copyright. At 4.10. *In-Game Copyrights?*

Accordingly, if the layers of regulation and governance are considered, it is sensible to conclude that they must apply to deal with disputes in virtual worlds and online games at different levels to address various problems. For example, it would be impractical and unfeasible for a user to lodge proceedings against another user, involving the developer in order to advance a third party beneficiary argument over a small amount of virtual currency. However, where the items at stake are to the value of hundreds of thousands of dollars, the issues are no longer as trivial, and in the offline world, would likely be met with proceedings. Therefore, whilst the system in place at present is far from perfect, it is perhaps better than no system at all. Layers of regulation which encompass hybrid systems - state-centred governance, self-governance and international governance working collectively should be considered. It is possible to apply this to online games and virtual worlds. In terms of developing the law relating to virtual worlds and online games, it is possible that the present situation will remain, although the balance between the different regulatory interests may shift. It would, however, be desirable if this were to happen through a modification of the EULA to make provision for users' rights, and a more accurate reflection of the realities of proprietary interests.<sup>1528</sup>

A revised consideration of the EULA would lead to a revised consideration of the relationship between copyright and contract in online games and virtual worlds, particularly necessary in light of the decision in *MDY v Blizzard*<sup>1529</sup> – simply because there is an infringement of the licence agreement does not mean that there is copyright infringement. There ought to also be greater consideration made of the rights of users in relation to copyright ownership, as this is something more than a nexus.<sup>1530</sup> This should act as a catalyst for change. The current situation with software code, control, copyright and contract is far from perfect. However, it does provide a structure, albeit one which is calling for change.

## 6.9. Conclusion.

Currently there are a number of different perspectives relating to the governance of online games and Virtual Worlds – some of which stem from the definitions and attitudes adopted towards

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<sup>1528</sup> See generally: Chapter 4 - MMORPGing & Copyright.

<sup>1529</sup> *MDY Indus., LLC v. Blizzard Entertainment, Inc.*, 2010 WL 5141269, 97 U.S.P.Q.2d (BNA) 1001 (9th Cir. Dec. 14, 2010).

<sup>1530</sup> J Fairfield, 'Nexus Crystals: Crystallizing Limits on Contractual Control of Virtual Worlds' [2011] William Mitchell Law Review Vol 38(1) 43, 49.

these spaces – but most of which arise simply because online games pose a challenge to the status quo of established law. The distinction can be drawn between in-world mechanisms,<sup>1531</sup> real-world mechanisms<sup>1532</sup> and suggested alternatives<sup>1533</sup> that could be adopted and trialled.

There are a number of difficulties with governing online environments and it is apparent that adopting the traditional approach of applying offline mechanisms to fit the online spaces we now inhabit is no longer suitable. This applies to the contractual – copyright status quo that developers rely upon. SABIP highlighted that this is not a desirable situation and that the inter-reliance and inter-dependence ought to be reconsidered.<sup>1534</sup> New and alternative mechanisms of control and governance ought to be considered and proactively encouraged so that the balance between the users' interests and those of the game developers becomes reflective of fairness.

Part of this change in attitude will require a more significant shift on the part of those who have responsibility for enacting this reform. Those who deal with the law, and must adapt it, should have an understanding of exactly what they are dealing with.<sup>1535</sup> If there is a lack of understanding of these online interactive environments, or even a lack of clarity in the terminology, producing a system of governance that is appropriate and effective will be difficult. Svantesson highlights the nature of these issues, "The results of technology-ignorance in the legal community can be devastating, with cases being decided and lost based on unsound arguments from the parties and/or unsound reasoning by the courts."<sup>1536</sup> This is an astute observation, but not a surprising one – the law has treated technological developments with some disdain and has subsequently been caught off-guard by the speed of change and challenge to the regulatory status quo. This was judicially recognised in the US in 1997 by Preska J, "Judges and legislators faced with adapting existing legal standards to the novel environment of cyberspace struggle with terms and concepts that the

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<sup>1531</sup> For example; community regulation as adopted in *LambdaMOO*; *Second Life's* forum system; Developer control through sinks and drains; Avatarian hierarchies as adopted in *Seek*.

<sup>1532</sup> The current approach adopted is that of applying offline law to online spaces and issues; cyber police squad adopted in South Korea but all entrenched in the idea that the EULA and the Game Developer are dominant and all-controlling

<sup>1533</sup> Virtual courts advocated by Alemi; Virtual Common Law; an oversight body similar to those governing professional sports; redrafted and reconsidered EULAs to allow user-user contractual relationships; game developers playing a leading role in policing their environments.

<sup>1534</sup> SABIP, 'The Relationship between Copyright and Contract Law' (July 2010) <<http://www.sabip.org.uk>>.

<sup>1535</sup> K Barker, 'MMORPGing, Law and Lingo' in Freeman M and Smith F (eds) *Current Legal Issues: Law and Language* (Vol 13, OUP 2013) 425.

<sup>1536</sup> D Svantesson, 'A legal method for solving issues of Internet regulation' (2011) *Int'l J L & Info Tech* Vol. 19(3) 2.

average . . . five-year-old tosses about with breezy familiarity.”<sup>1537</sup> In reconceptualising the governance frameworks of online games and virtual worlds, it is necessary to deal with them using the language and terminology, and concepts which they have developed, and which have meaning in cyberspace.

The diversity in the various attempts made at controlling online games and virtual worlds all demonstrate one common theme: a desire to use the EULA as the leading tool. This has not been particularly successful as yet. Glushko eloquently states that there is a major flaw with the EULA; an inability to enforce its provisions and this leads to the failure of governance systems.<sup>1538</sup> If the EULA cannot be enforced in cyberspace in the same way that it could be enforced in our offline existences, it is necessary to stop treating cyberspace in the same way as the offline world is treated. A failure of the EULA has significant implications; copyright fails in Virtual Worlds and online games; behaviour is not controlled and, therefore, it is necessary to think differently, and think not just “outside the box” but outside the EULA.

A potential lack of balance within contractual agreements, coupled with the potential unenforceability of the EULA terms means that it becomes incredibly difficult to stipulate which behaviours are acceptable, for use in enforcing acceptable behaviours. Disputes will potentially escalate. Various alternative approaches have been put forward; it is time to give them wider consideration. Virtual worlds and online games almost provide the perfect opportunity to test alternative mechanisms for controlling cyberspace, and the value of alternative approaches cannot be understated. A lack of effective and appropriate governance systems could lead to a situation whereby the systems are open to exploitation and abuse, which in turn could encourage or breed unrest, dissatisfaction and a form of cyber-anarchy.<sup>1539</sup> Effective and appropriate systems of regulation, giving recognition to all levels of creative endeavour, including user copyrights and realistic systems of enforcement, are desirable.

The discussion in Chapter 6 has explored some potential alternatives to the contract-copyright system of governance and control in MMORPGs and Virtual Worlds. The research has added to

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<sup>1537</sup> *American Libraries Ass’n v. Pataki*, 969 F. Supp. 160, 170 (S.D.N.Y. 1997) (Preska, J.).

<sup>1538</sup> B Glushko, ‘Tales of the (Virtual) City: Governing Property Disputes in Virtual Worlds’ [2007] *Berkeley Tech L J*, Vol 22, 251.

<sup>1539</sup> D Rowland, ‘Cyberspace – A Contemporary Utopia?’ 1998 (3) *The Journal of Information, Law and Technology (JILT)* available online: <<http://www.law.warwick.ac.uk/jilt/98-3/rowland.html>> retrieved 20 December 2010.



our knowledge of alternative mechanisms for control, which may reflect an improved situation for users in these spaces. The discussion here has built upon prior discussions relating to balance and claims for user rights in in-game properties,<sup>1540</sup> and has drawn upon a consideration of the practical examples and challenges posed by a range of diverse environments, which are at present controlled by a fragmented set of legal rules. This chapter has explored a number of competing interests in these environments, and distinct levels of engagement and activity, which do not make for a straightforward regulatory situation. Nevertheless, there is a common theme amongst all of these MMORPGs and Virtual Worlds; the reliance upon the EULA, and the difficulties in enforcing user rights. It is seen that in light of previous discussions of user copyright, and the imbalances in EULA clauses, that there is a need for altering the current situation, and the changes must provide effective and appropriate forms of regulation. The suggestion here is that software code and contract be altered to work conjunctively with copyright in providing a system of control, but also a system providing balanced proprietary interests and layers of governance to improve the experience of users of these virtual environments.

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<sup>1540</sup> See: Chapter 4 – MMORPGing & Copyright. At 4.8. *Subsets of Creativity – A new context for user creativity?*

## *Conclusion*

### **Copyright in MMORPGs – Balanced Interests?**

#### **i. Introduction.**

Virtual Worlds and online games are social, immersive environments but these spaces are also computer programs and therefore these creative entities benefit from the protection of copyright as literary works under the Copyright Act 1988.<sup>1541</sup> Copyright in these creative spaces is inherently connected to the contractual agreements that are the dominant method of controlling such environments. These End User Licence Agreements<sup>1542</sup> are standard form agreements imposed by the copyright-holding game developers but which seek to control every aspect of these spaces. This work questions the contractual displacement of automatically arising proprietary interests in in-game content. In challenging the existing paradigm, this work has made a significant and original contribution in this field. This research has drawn together elements of theory, copyright and contract to examine the strength of the claims for copyright to exist for users as well as for developers. This research has rebutted the position adopted by online game developers in their contractual agreements that users are not entitled to rights in in-game items.<sup>1543</sup> It has also identified a growing body of work relating to the value users attach to in-game content, and drawn upon this in assessing the fairness of the situation in which users find themselves. It has also examined within the contractual framework alternative potential mechanisms which govern these online environments in a more balanced manner, reflective of the interests and positions of both users and developers.

What is apparent from the preparation of this thesis is that there are two diverse elements of law applicable: copyright and contract. What is also evident is that these two merge, leaving a system of governance in an almost quasi-state manner. This research combines both of these legal strands, and these fragmented legal rules to practical examples of gaming activity and interaction, adding to our knowledge of the contract – copyright governance paradigm in MMORPGs and Virtual Worlds. The legal issues framed in the displacement of copyright in online games and Virtual Worlds have been considered in terms of the current legal provision. As these spaces develop,

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<sup>1541</sup> Copyright, Designs and Patents Act 1988, s3(1)(b). Hereafter CDPA.

<sup>1542</sup> Hereafter EULAs.

<sup>1543</sup> See: Chapter 5 - Contractual Displacement of Proprietary Interests: EULAw? At 5.4.1 *Ownership Issues*.

online activity grows still further and user-generated content sharing becomes the norm, copyright is likely to evolve and the current governance approach will also evolve to reflect a more-balanced stance for users in terms of their proprietary claims to in-game items.

The established norm in this area is that the developers of online games and Virtual claim all proprietary interests. This work has examined the potential for user rights in MMORPGs and Virtual Worlds from a copyright and contract perspective, identifying theoretical justifications and analysing contractual – and behavioural - restrictions to claims under the law of England and Wales. It is seen that the status quo of developer domination is unfair to the users, and deprives them of their potential proprietary interests, and the attached value.

## **ii. The Research.**

In examining the framework surrounding users' rights, Chapters 1 and 2 provide the foundations, outlining respectively the different spaces the theoretical basis for the discussion to follow. Chapter 1 outlines the scope of MMORPGs and Virtual Worlds, and introduces the main concepts and entities that will be the subject of discussion, offering an appreciation of the parties and environments involved, including how they differ. The discussion here emphasises the implications of disputes which have arisen in relation to property elements of these environments. This opening chapter provides the context for the theoretical and legislative concepts of fairness to be discussed.

Chapter 2 – 'Property Matters: Virtually Justified?' builds upon Chapter 1 and examines three proprietary theories<sup>1544</sup> which offer justifications for users' rights, and adds a fourth dimension, concluding that these are not the only basis for interests, but that users also value their contributions. As a result of this 'value,' justification could therefore also rest on a Value Theory basis. This chapter demonstrates that there are justifications under each of the three theories examined, but the strongest justifications for users rights arise from a combination of Lockean Labour Theory and the Value Theory. Lockean Labour Theory and Value Theory provide the strongest theoretical and philosophical appreciations of balance, and are the premise upon which users claim proprietary interests in in-game items. This theoretical approach to user claims

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<sup>1544</sup> Utilitarian Theory, Hegel's Personality Theory and Lockean Labour Theory.

emphasises the disproportion between users and developers, based on the efforts expended by each party. This chapter outlines theoretical justifications, providing a platform for discussions of copyright, but also contractual fairness.

Chapter 3 – ‘Digital Copyright: 1988 or Web 2.0?’ develops the theoretical elements of this work, and discusses the protective copyright regime applicable to online games and Virtual Worlds as software items. This chapter identifies the legislative framework which is applicable to these entities, but questions the use of copyright as the leading option. Chapter 3 outlines the legal developments relating to games, and considers the challenge posed by Web 2.0, assessing how this may impact upon copyright more generally as a protective right, and the implications this may have. This discussion includes critique of recent reviews of intellectual property, which have not discussed MMORPGs or Virtual Worlds in the same way as, for example, illegal downloads have been considered. The third chapter examines the development of protection under copyright for software creations, and identifies further issues to be resolved in a discussion of practical examples of gaming activity and content in Chapter 4 – ‘MMORPGing Copyright.’

Chapter 4 – ‘MMORPGing & Copyright’ discusses several aspects of copyright to assess claims for copyright in MMORPGs and Virtual Worlds through a number of practical examples. Firstly, this chapter considers the copyright protection available to whole products such as online games. This discussion indicates that these products are protected as literary works under copyright, and addresses issues such as the potential for infringement in these items. It is seen from the research that there is some debate surrounding whether online games and Virtual Worlds would benefit from alternative copyright protection under, for example, multimedia works. This develops the critical stance adopted in Chapter 3 concerning the reform of copyright. Chapter 4 offers an understanding of users’ rights in copyright, considers their claims to moral rights, and also whether they are potentially derivative rights holders. This wider focus also entertains discussion of activities which may impact upon proprietary interests in these games and worlds, but which fall foul of the EULAs. It is after all, not just copyright, but the rights of the users more widely which are tied to the EULA, and which are affected by the unjustifiable imbalances between the rights of users’ and those of developers. It is seen that not only do users have strong claims for copyright in in-game items, but the current situation is unfair as moral rights are not attributable for computer generated works. This compounds the unfairness identified in the following chapter; Chapter 5 – ‘Contractual Displacement of Proprietary Interests: EULAw?’ The dual

approach to copyright in Chapter 4 reflects the dual approach to proportionality, and both the theoretical and legislative approaches to fairness are developed in this chapter.

Chapter 5 – ‘Contractual Displacement of Proprietary Interests: EULAw?’ introduces the contractual framework surrounding MMORPGs and Virtual Worlds in a critical manner. This analysis offers an understanding of the imbalances between users and developers, and restrictions on the ability of users to claim rights in in-game items. It also examines these clauses from the legislative fairness perspective, considering whether these agreements are fair agreements, or whether specific clauses are potentially unfair under the Unfair Terms in Consumer Contracts Regulations.<sup>1545</sup> The research demonstrates the unjustifiable imbalance between the parties to the EULA, which arises out of the lack of negotiation and produces a significant advantage for the developers. Chapter 5 builds upon chapters 2, 3 and 4 in assessing the fairness of EULA clauses and the potential for proprietary claims. Such a discussion extends the knowledge of the relationship between copyright and contract in MMORPG and Virtual World EULAs.

The consideration of practical examples in Chapter 5, and the associated application of fragmented legal rules, demonstrates the challenges of structuring a legal framework for these spaces. Chapter 5 considers the UTCCR, and their potential application to EULA clauses. The research examines the balance of bargaining positions between users and developers, and this reflects both theoretical perceptions of fairness, but also legislative perceptions. The research identified that EULAs and EULA displacements of proprietary interests are problematic. This chapter espouses that these agreements are unfair in themselves, but also contain unfair terms which require users to contract out of their rights. It therefore forms the basis for the discussion to follow in Chapter 6: ‘Governance Structures and the Alternatives.’

Chapter 6 – ‘Governance Structures and the Alternatives’ builds upon Chapters 4 and 5 by considering the current governance approach to MMORPGs and Virtual Worlds. In this chapter the discussion initially considers the nature of regulation in cyberspace, and the current forms of regulation – through contractual agreements<sup>1546</sup> before considering activities and gaming behaviour which challenges the rights users have in these environments. The unjustifiable imbalance between the rights of users’ and developers is a constant undertone to the discussion

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<sup>1545</sup> SI 1999/2083 Unfair Terms in Consumer Contracts Regulations 1999. Hereafter UTCCR.

<sup>1546</sup> See: Chapter 5 – Contractual Displacement of Proprietary Interests: EULAw?

in this chapter, which offers an understanding of the governance approaches used in MMORPGs and Virtual Worlds. This is extended through discussion of some potential alternative approaches to governance which would be more reflective of balanced interests. This builds upon the theoretical and legislative approaches to fairness, but also the copyright framework and resulting copyright claims users may be entitled to make. The most problematic element of the contractual-copyright framework relates to oversight and enforcement. Fundamentally, an action, reaction or activity is permitted by the code, which is written by the developers, therefore the developers have little interest in policing these environments or their contracts. The EULAs are the governance systems of choice; acting almost as social and proprietary mechanisms, yet also purportedly dealing with a comprehensive range of claims for copyright.

Chapter 6 considers both the copyright issues and governance of property rights in light of the EULA stance, and fairness. It is seen that there ought to be reconsideration of the current situation, paying particular attention to possible alternative governance mechanisms which separate control of these online spaces and the attribution and allocation of rights, and which seeks to redress the current unjustifiable imbalance between users and developers. The research demonstrates that in redressing the imbalance between users and developers there ought to be a shift in the approach to governing online spaces. This research also highlights the overwhelming trend of using EULAs as the leading tools of governance despite the significant weaknesses in their enforceability, and their unfair terms.

A number of activities threaten user rights in online environments, but the EULAs do not per se deal with these, and it is seen from testing the rationale that the framework ought to change to be more reflective of a fairer system for users, based upon both legislative and theoretical claims assessed in this research. Drawing together contractual analysis with the copyright claims demonstrates that the current system of contractual copyright displacement and control is fundamentally disproportionate – both theoretically and legislatively – to users' rights in MMORPGs and Virtual Worlds.

### iii. Future research?

Given the limitations of this work,<sup>1547</sup> which include: limited consideration of jurisdictional issues; an analysis of a limited number of EULAs; and a focus upon only proprietary issues, there is significant scope for potential future research in a number of diverse legal areas. The context of this work is one which lends itself to the consideration of jurisdictional issues, and the conflict of laws. However, the precise focus of this work rests upon copyright under the law of England and Wales. As such, this work does not consider jurisdictional issues in any depth.<sup>1548</sup> Jurisdictional discussions encompass wider considerations, including Internet governance more generally<sup>1549</sup> and which could form the basis of potential future work.

It is possible that further research could be completed on any of the limitations. A much wider survey of online interactive environment EULA agreements could be undertaken. Similarly, given the recent reviews of copyright and intellectual property within England and Wales,<sup>1550</sup> and the consultation on European copyright changes,<sup>1551</sup> there is significant scope for further research in the field of copyright. One potential element of this could include a wider consideration of the inter-relationship between copyright and contract in digital properties. Copyright is contractually controlled in these environments, and therefore given the recent suggested reforms of Consumer

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<sup>1547</sup> See above: Introduction – Brave New World(s)? At: vi. *Scope of this work*.

<sup>1548</sup> But see generally: L Collins and Others, *Dicey, Morris, and Collins on the Conflict of Laws*. (15<sup>th</sup> edn, Sweet & Maxwell 2012); U Kohl, *Jurisdiction and the Internet – Regulatory Competence over Online Activity* (Cambridge University Press 2007); A Cabasso, 'Piercing Pennoyer with the Sword of a Thousand Truths: Jurisdictional Issues in the Virtual World' (2011-2012) 22 *Fordham Intell Prop Media & Ent LJ* 383; J T Kunze, 'Regulating Virtual Worlds Optimally: The Model EULA' (2008-2009) *N W J Tech & Intell Prop* 102; B J Gilbert, 'Getting to Conscionable: Negotiating Virtual Worlds' End User Licence Agreements without Getting Externally Regulated' (2009) available at: <[http://works.bepress.com/brendan\\_gilbert/1](http://works.bepress.com/brendan_gilbert/1)> retrieved 16 February 2013; D R Johnson and D G Post, 'Law and Borders – The Rise of Law in Cyberspace' (1996) 48 *Stan L Rev* 1367; T Schulz, 'Carving Up the Internet: Legal Orders and the Public / Private International Law Interface' (2008) *EJIL Vol.* 19(4) 799; J Goldsmith and T Wu, *Who Controls the Internet?* (OUP 2008); J Goldsmith, 'Against Cyberanarchy' (1998) 65 *U Chi L Rev* 119; J Reidenberg, *Technology and Internet Jurisdiction*; (2005) 153 *U Pa L Rev* 1951; C Reed, *Making Laws for Cyberspace*, (OUP, 2012).

<sup>1549</sup> But see generally: C Marsden, *Net Neutrality: Towards a Co-Regulatory Solution* (Bloomsbury Academic 2010); J Goldsmith and T Wu, *Who Controls the Internet?* (OUP 2008); Y F Lim, *Cyberspace Law: Commentaries and Materials* (2<sup>nd</sup> edn, OUP 2007).

<sup>1550</sup> A Gowers, 'The Gowers Review of Intellectual Property: Independent Review' (December 2006) <[http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06\\_gowers\\_report\\_755.pdf](http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf)> retrieved 17 October 2009; I Hargreaves, 'Digital Opportunity: A review of Intellectual Property and Growth' (2011) available online: <<http://www.ipo.gov.uk/ipreview.htm>> retrieved 14 December 2012.

<sup>1551</sup> The Intellectual Property Office, 'Copyright in Europe: Call for Views' (July 2013) available online: <<http://www.ipo.gov.uk/consult-2013-copyright-europe.pdf>> retrieved 20 July 2013.

Protection Laws<sup>1552</sup> and copyright,<sup>1553</sup> it is also possible that future research in relation to the role of copyright in online environments would be valuable.

This research did not seek to examine other aspects of activity within MMORPGs and Virtual Worlds. Nevertheless, there is a building body of work which considers some aspects of criminal law<sup>1554</sup> which could be relevant to MMORPGs. Whilst there have been several incidents where criminal regulation has been called upon to deal with virtual worlds and online games,<sup>1555</sup> the criminal law falls outside of the scope of this work, although such examples may be cited. Other potential research includes aspects of the criminal law as applied to online gaming activity. Equally, with the interest in financial elements of online gaming, regulatory approaches would also potentially form the subject of further research. The impact of governance mechanisms in self-declaring online jurisdictions would also be something for further exploration, especially in light of the expansion of cyberspace, and the increasing reliance upon the Internet.

#### **iv. Concluding Remarks**

This thesis has evaluated the subsistence of copyright in Massively Multiplayer Online Role Playing Games, and the displacement of proprietary interests of users under the current copyright-contract framework. This work has sought to identify justifications for proprietary interests for users in in-game content by considering theory, and copyright provisions. This work has also contributed to our understanding of the unfair contractual terms arising in governance frameworks adopted by game developers. The research here has drawn upon the copyright-contract framework and the analysis of potentially unfair terms to consider alternatives to reliance

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<sup>1552</sup> Draft Consumer Rights Bill (BIS/13/925) 12 June 2013, available online:

<<https://www.gov.uk/government/publications/draft-consumer-rights-bill>> retrieved 15 June 2013.

<sup>1553</sup> See for example: HM Government, 'Modernising Copyright: Government Response to consultation on copyright exceptions and clarifying copyright law.' IPO, December 2012, available online:

<<http://www.ipo.gov.uk/response-2011-copyright-final.pdf>> retrieved 20 January 2013.

<sup>1554</sup> See for example: O S Kerr, 'Criminal Law in Virtual Worlds.' University of Chicago Legal Forum, GWU Law School Public Law Research Paper No. 391 [2008] <<http://ssrn.com/abstract=1097392>> retrieved 12 December 2010; A Adrian, 'Beyond grieving: virtual crime' (2010) Computer & Security Law Review 26, 641; S Brenner, 'Fantasy: The Role of Criminal Law in Virtual Worlds,' [2008] Vanderbilt Journal of Entertainment and Technology Law 11 No 1, 37.

<sup>1555</sup> See for example: O S Kerr, 'Criminal Law in Virtual Worlds.' University of Chicago Legal Forum, GWU Law School Public Law Research Paper No. 391 [2008] <<http://ssrn.com/abstract=1097392>> retrieved 12 December 2010; A Adrian, 'Beyond grieving: virtual crime' (2010) Computer & Security Law Review 26, 641; S Brenner, 'Fantasy: The Role of Criminal Law in Virtual Worlds,' [2008] Vanderbilt Journal of Entertainment and Technology Law 11 No 1, 37.



upon the licensing agreements which deprives users of their rights in in-game content. In doing this, this thesis has attempted to answer the following question: “Is there ownership in MMORPGs: The fairness of the copyright-contract approach for users?”

In completing this research, consideration of several aspects was required, involving an examination of a selection of EULAs. Such analysis involved applying legal rules to practical examples in order to test the central hypothesis of this work. This research has examined the wider contractual-copyright paradigm which currently controls in-game content. It is seen from the research that Value Theory can be used as a basis for justifying user interests in in-game content. The subsequent analysis of the application of copyright law to examples of gaming activity suggests that user interests in in-game content is possible. This work has demonstrated that there are two approaches of fairness which can be used to support claims for user interests. Firstly, theoretical and philosophical justifications suggest that users ought to be entitled to make claims to the in-game items they have used and developed, and a failure to recognise these rights is unfair. Secondly, this research demonstrates that the legislative approach to fairness found within the Unfair Terms in Consumer Contracts Regulations 1999 indicates that terms within EULAs may be unfair to users and potentially non-binding. This research offers an understanding of the contractual approach to proprietary interests, and the wider governance of these spaces, which potentially threaten user-rights.

This thesis has drawn upon various practical examples and challenges to highlight the difficulties of structuring the legal framework around a fractured set of rules but also a diverse range of environments within the online-gaming genre. It is seen from the research that fairness has been examined in two ways: theoretical fairness and legislative fairness. These concepts of fairness have influenced and provided the basis for a detailed analysis for copyright claims users may have in game items. This research has offered an understanding of the unjustifiable balances from a theoretical perspective; if a user expends labour and invests in game items, that user ought to be entitled to proprietary interests in those items.

Similarly, this thesis has also offered an understanding of the application of legislative unfairness to EULAs, which suggests that EULA clauses requiring users to waive rights in in-game items may be unfair. This is based on the imbalance between users – or consumers – and game developers particularly where there is a distinct lack of negotiation over contract terms, resulting

in a distinct advantage for one of the parties; usually in this context, the game developer. When these theoretical and legislative approaches to fairness are combined, there is a disproportion between the interests of the parties involved, and therefore a compelling case can be made for user rights in in-game items and properties. The research and hypothesis tested in this work adds to our understanding of how these spaces rely upon contractual allocations of rights, and concludes the current system of fragmented rules is detrimental to the interests of the users of MMORPGs and Virtual Worlds. It also highlights that EULA provisions, whilst necessary to access online games, may not contain binding contractual terms.

## Glossary

Avatar / Character	The graphical representation of the user in games.
Blizzard Entertainment	Publisher and developer of <i>World of Warcraft</i> .
Bots	A software application that is robotic and can run automated tasks over the internet to simulate human activity.
Botting	Automated game play using Bots.
Brussels Regulation	Set of rules outlining which courts will have jurisdiction in legal disputes between members of the European Union or European Free Trade Association.
Closed World	A MMORPG or Virtual World which is regarded as having an existence separate from others, and which is therefore separate from Governmental control.
Code	The literary work of computer software which is protected by the Copyright Designs and Patents Act 1988
Code of Conduct	The specific rules and regulations applicable to members and users of a specific online game or Virtual World. Each game and world has a distinct Code of Conduct.
Colin McRae Rally 3	A rally racing video game, played on consoles and distinct from MMORPGs and Virtual Worlds.
Copyleft	The practice of making a work available for modification, and requiring all subsequent versions of it to be similarly free for modification also.
Creative Commons	Non-profit organization responsible for developing several licenses which allow creators to indicate which rights they share and which are reserved in their creative works.
Derivative Works	A creation which contains significant elements of a pre-existing work, or which is based upon previous works. The derivative work will usually also be capable of protection under copyright law.
Developer / Platform Provider	Those responsible for the process of creating video games.

Diablo 3	The third instalment of an action-based, role-playing PC game.
eBay	Online auction site.
End User License Agreement	Contractual agreements which all users are required to agree to before they can access the full MMORPG or Virtual World of their choice.
EVE Online	A player driven, space based, role-playing game.
EverQuest II	A fantasy based MMORPG.
Farmer	User of a MMORPG or Virtual World who engages in the process of gold farming.
Gold Drain / Gold Sink	The process by which the economy of a MMORPG or Virtual World is managed. Typically sinks are used to remove value from items that can be measured against the value of gold within a particular environment.
Gold Farming	A lucrative activity which requires the playing of MMORPGs to earn in-game currency in vast quantities which is then sold to other users for real currency.
Gowers Review	Independent review of the intellectual property system in the UK undertaken by Andrew Gowers in 2005 and published in 2006.
Griefer	A player / avatar in MMORPGs who derives pleasure from interfering with the gameplay of others. This can involve harassment and irritation and often uses the game aspects in unintended manners.
Griefing	Activity carried out by Grieferers.
Guild Wars 2	A MMORPG set in a fantasy world which features a storyline response to player actions.
Habbo	A social networking based game which is predominantly aimed at teenagers.
Hargreaves Review	An independent review of intellectual property and growth conducted by Professor Ian Hargreaves, and commissioned by Prime Minister David Cameron in 2010.

IGE	Internet Gaming Entertainment. An eBay-style internet auction site focussing exclusively on items and gold from MMORPGs and Virtual Worlds.
In-Game Items / Virtual Goods	Intangible items in online games and communities, for example: potions, swords, shields and hairstyles.
LambdaMOO	One of the earliest online communities. It is an object oriented community, established in the earlier 1990s. It was also the location of the ‘Virtual Rape’ reported by Julian Dibbell.
Legend of Mir 3	A sprite-based three-dimension MMORPG which is incredibly popular in South Korea and China.
Level Ups	These events occur when a character or game account has earned enough experience points to move to the next level.
Linden Dollars	The currency used in <i>Second Life</i> which is exchangeable for real currency.
Lineage II	A MMORPG based around several ‘sagas’ which has developed a large fan-base in South Korea and China.
Loot	The intangible items and gold taken from other players in MMORPGs or Virtual Worlds, especially that which is obtained from enemies.
Machinima	A cinematic production which is generated from ‘real-time’ computer graphics, especially computer games and MMORPGs. This can also include such graphics compiled to create short-videos.
Magic Circle	A theory advanced by Edward Castronova which suggests that the fantasy world is protected from the real world.
MMORPG	Massively multiplayer persistent online role playing games, involving hundreds of thousands of players around the world who are connected to the game through computers and the Internet.
Moral Rights	Moral rights are rights granted to copyright owners, and include the right of attribution or paternity, and the right not to be subject to derogatory treatment.
MUD	Multi-User Dungeons. These were the predecessors to MMORPGs.

Netizen	A person who is actively engaged with online communities.
Ninja-Looting	This term refers to a number of common looting practices in MMORPGs.
Online Game	A game played over the Internet, and which requires an Internet connection.
Open World	A MMORPG or Virtual World which would be subject to the laws of the 'real world' irrespective of what those laws may be. Open worlds are the opposite of Closed Worlds.
Raid	Usually this refers to a mission type within MMORPGs which require users to co-operate to defeat a particularly powerful opponent for example.
Reputation / Experience Points	These are awarded to users of games when they complete certain activities, or have collected certain items. Points are required to improve your reputation in the environment, but also to allow progression through the game.
RMT	Real Money Trading. This involves using real currency to purchase in-game items rather than collecting them or developing sufficient experience points. It is also the motivation for gold-farming.
Rome I Regulation	This Regulation governs the choice of law within the European Union and sets out the law which is to be used to interpret contracts which are entered into by parties in different countries.
Runescape	A medieval fantasy MMORPG.
Scarcity	The economic problem of having seemingly unlimited resources in an environment which is actually limited in its resources. In some games, scarcity is used to retain the interest of users, and also to control the demand for items.
Scripted	Games which include a pre-defined sequence of events which are triggered by the actions of the user / player. These games usually require users to complete tasks in a certain order to progress through the game. Usually MMORPGs are scripted.

Scripting	The process of writing game code. For example, in <i>Second Life</i> , users can ‘script’ their own code to add to the environment.
Second Life	A massively popular virtual world.
Social Norms	Beliefs as to how a space should be controlled and governed which are shared by the members of a particular space.
Station Exchange	The official Sony platform through which Sony game items are traded.
Sulake	The developer and provider of Habbo.
Terms of Service / Terms of Use	The rules and regulations that a user must abide by in order to use a particular service.
Theory of Interration	The idea that a space for play will be created, and which will be protected by Governments.
Toading	To be ‘kicked out’ of a MMORPG, deleted or killed.
Ultima Online	A graphical MMORPG.
Unscripted	An environment which does not require a user to follow a standard sequence of events; usually Virtual Worlds are unscripted.
User / Player Worlds.	Those who subscribe to MMORPGs and Virtual Worlds.
User-Generated Content	Content which is generated and created by users of MMORPGs and Virtual Worlds, and then used within these environments.
Virtual Worlds	Online interactive environments which simulate real world environments, and which provide their users with greater freedoms than MMORPGs.
World of Warcraft	A MMORPG, developed by Blizzard Entertainment.
Zynga	A provider of social games.

## Bibliography

### Books:

- Alexander G S and Penalver E M, *An Introduction to Property Theory* (CUP 2012).
- Adeney E, *The Moral Rights of Authors and Performers: An International and Comparative Analysis* (OUP 2006).
- Anderson T L and McChesney F S (eds) *Property Rights: Cooperation, Conflict and Law* (Princeton University Press 2003) 6.
- Aplin T, *Copyright Law in the Digital Society - The Challenges of Multimedia* (Hart Publishing 2005).
- Aplin T and Davis J, *Intellectual Property Law Text, Cases and Materials* (1<sup>st</sup> edn, OUP 2009).
- Bainbridge D, *Intellectual Property Law* (7<sup>th</sup> edn, Pearson Longman 2009).
- Bainbridge D, *Introduction to Information Technology Law* (6<sup>th</sup> edn, Pearson Longman 2008).
- Bainbridge D, *Legal Protection of Computer Software* (5<sup>th</sup> edn, Tottel Publishing 2008).
- Bainbridge D, *Software Copyright Law* (4<sup>th</sup> edn, Butterworths 1999).
- Balkin J M and Noveck B S (eds), *The State of Play: Law, Games and Virtual Worlds* (New York University Press 2006).
- Barker K, "MMORPGing, Law and Lingo" in Freeman M and Smith F (eds) *Current Legal Issues: Law and Language* (Vol 13, OUP 2013) 433.
- Bartle R, *Designing Virtual Worlds* (New Riders Game, 2003).
- Becker L, *Property Rights* (Routledge 1977).
- Bently L and Sherman B, *Intellectual Property Law* (2<sup>nd</sup> edn, OUP 2004).
- Bently L and Sherman B, *Intellectual Property Law* (3<sup>rd</sup> edn, OUP 2009).
- Bently L and Sherman B, *Intellectual Property Law* (4<sup>th</sup> edn, OUP 2014).
- Biegel S, *Beyond Our Control? Confronting the Limits of Our Legal System* (MIT Press 2001).
- Boldrin M and Levine K D, *Against Intellectual Monopoly* (CUP 2008).
- Boellstorff T et al, *Ethnography and Virtual Worlds: A Handbook of Method* (Princeton University Press 2012).
- Bradgate R, *Commercial Law* (2<sup>nd</sup> edn, Butterworths 1995).
- Bright S, 'Unfairness and the Consumer Contract Regulations' in Burrows A and Peel E (eds) *Contract Terms* (OUP 2007).



- Brownsword R, *Contract Law: Themes for the Twenty-first Century* (2<sup>nd</sup> edn, OUP 2006).
- Burrell R and Coleman A, *Copyright Exceptions – The Digital Impact* (CUP 2005).
- Burri M, ‘Controlling New Media (without the law)’ in Price M E, Verhulst S and Morgan L (eds) *The Routledge Handbook of Media Law* (Routledge 2012).
- Cardozo B, *The Nature of the Judicial Process* (Cosimo Books, August 2009).
- Carr H and Arnold R, *Computer Software: Legal Protection in the UK* (2<sup>nd</sup> edn, Sweet & Maxwell 1992).
- Cass R A and Hylton K, *Laws of Creation – Property Rights in the World of Ideas* (Harvard University Press 2013).
- Castronova E, ‘The Right to Play’ in Balkin J M and Noveck B S (eds), *The State of Play: Law, Games and Virtual Worlds* (New York University Press 2006).
- Castronova E, *Synthetic Worlds: Business and Culture of Online Games* (University of Chicago Press 2006).
- Child J W, ‘The Moral Foundations of Intangible Property’ in A D Moore (eds) *Intellectual Property: Moral, Legal and International Dilemmas* (Rowman and Littlefield 1997).
- Christie A and Gare S (eds), *Blackstones’ Statutes on Intellectual Property* (9<sup>th</sup> edn, OUP, 2008).
- Collins English Dictionary* (HarperCollins 2006).
- Collins L and Others, *Dicey, Morris, and Collins on the Conflict of Laws*. (15<sup>th</sup> edn, Sweet & Maxwell 2012).
- Cornish W R, *IP Omnipresent, Distracting, Irrelevant?* (Clarendon Law Lectures, OUP 2004).
- Cornish W R and Llewelyn D, *Intellectual Property: Patents, Copyright, Trademarks and Allied Rights* (6<sup>th</sup> edn, Thomson Sweet & Maxwell 2007).
- Couser J, ‘Cyber property’ in A Murray and M Klang (eds) *Human Rights in the Digital Age* (Cavendish Publishing, 2005). Coteanu C, *Cyber Consumer Law and Unfair Trading Practices* (Ashgate Publishing Ltd 2005).
- Crawford G, Gosling V K and Light B (eds), *Online Gaming in Context: The Social and Cultural Significance of Online Games* (Routledge 2011).
- Crisp R and Chappell T, ‘Utilitarianism’ in *Concise Routledge Encyclopedia of Philosophy* (Routledge 2000).
- Cunnington R, ‘Contract Rights as Property Rights’ in A Robertson (ed), *The Law of Obligations: Connections and Boundaries* (Routledge Cavendish 2004).
- Cvetkovski C, *Copyright and Popular Media* (Palgrave MacMillan 2013).

- Dannenberg R and Others, *Computer Games and Virtual Worlds: A New Frontier in Intellectual Property Law* (ABA Publishing 2010).
- Davies G, *Copyright and the Public Interest* (2<sup>nd</sup> edn, Thomson Sweet & Maxwell 2002).
- Davis J, *Intellectual Property Law* (3<sup>rd</sup> edn, OUP 2009).
- Dibbell J, *My Tiny Life: Crime and Passion in a Virtual World* (Fourth Estate Ltd 1998).
- Dibbell J, *Play Money* (Basic Books 2007).
- Drahos P and Mayne R (eds), *Global Intellectual Property Rights: Knowledge, Access and Development* (Palgrave MacMillan 2002).
- Duranske B T, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA Publishing 2008).
- Edwards L and Waelde C (eds), *Law and the Internet* (3<sup>rd</sup> edn, Hart Publishing 2009).
- Edwards L and Waelde C (eds), *Law and the Internet: Regulating Cyberspace* (Hart Publishing 1997).
- Eechoud M van and Others, *Harmonizing European Copyright Law: The Challenges of Better Law Making* (Kluwer Law International 2009).
- Franda M, *Governing the Internet – the Emergence of an International Regime* (Lynne Rienner Publishers 2001).
- Furmiston M, *Cheshire, Fifoot and Furmiston's Law of Contract* (16<sup>th</sup> edn, OUP 2012).
- Garner B A (eds), *Blacks' Law Dictionary* (8<sup>th</sup> edn, Thomson West 2004).
- Goldsmith J and Wu T, *Illusions of A Borderless World: Who Controls the Internet?* (OUP 2008).
- Goldstein P, *International Copyright Principles, Law and Practice*, (OUP 2001).
- Goode R, *Commercial Law* (3<sup>rd</sup> edn, LexisNexis Butterworths 2004).
- Grant R, *John Locke's Liberalism* (University of Chicago Press 1987).
- Gray K and Gray S F, 'The Idea of Property in Land' in S Bright and J K Dewar (eds), *Land Law: Themes and Perspectives* (OUP 1998).
- Gudamuz A, *Networks, Complexity and Internet Regulation: Scale-free Law* (Edward Elgar, Cheltenham 2011).
- Hansen H C (eds), *Intellectual Property Law and Policy* (Vol 10 Hart Publishing 2008).
- Harris J W, *Property and Justice* (OUP 2002).

Hatzis A N, 'An Offer You Cannot Negotiate: Some Thoughts on the Economics of Standard Form Consumer Contracts' in Collins H (ed), *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law* (Kluwer Law International 2008).

Hoglund G and McGraw G, *Exploiting Online Games – Cheating Massively Distributed Systems* (Software Security Series, Pearson Education Inc 2008).

Howells G and Weatherill S, *Consumer Protection Law* (2<sup>nd</sup> edn, Ashgate Publishing Ltd 2005).

Huizinga J, *Homo Ludens* (1938).

Bernt Hugenholtz P, 'Adapting Copyright to the Information Superhighway' in P Bernt Hugenholtz (eds), *The Future of Copyright in a Digital Environment* (Kluwer Law International 1996).

Huxley A, *Brave New World* (1931).

Jenkins H, *Convergence Culture: Where Old and New Media Collide* (New York University Press 2006).

Katsh E, *Law in a Digital World* (OUP 1995).

Koffman L and Macdonald E, *The Law of Contract* (7<sup>th</sup> edn, OUP 2010).

Koster R, 'Declaration of the Rights of Avatars' in Balkin J M and Noveck B S (eds), *The State of Play: Law, Games and Virtual Worlds* (New York University Press, New York 2006).

Kohl U, *Jurisdiction and the Internet – Regulatory Competence over Online Activity* (Cambridge University Press 2007).

Laslett P (ed), *John Locke: Two Treatises of Government* (Cambridge University Press 1988).

Lastowka G, *Virtual Justice: The New Laws of Online Worlds* (Yale University Press, 2010).

Lawson R, *Exclusion Clauses and Unfair Contract Terms* (9<sup>th</sup> edn, Sweet & Maxwell 2008).

Lessig L, *Code: Version 2.0* (Basic Books 2006).

Lessig L, *Free Culture* (Penguin Press 2004).

Lessig L, *The Future of Ideas...The Fate of the Commons in a Connected World* (Vintage Books 2002).

Levinson P, *The Soft Edge – A Natural History and Future of the Information Revolution* (Routledge 2005).

von Lewinski S, *International Copyright Law and Policy* (OUP, Oxford, 2007).

LIBERTY, *Liberating Cyberspace – Civil Liberties, Human Rights and the Internet* (Pluto Press 1999).

Lim Y F, *Cyberspace Law: Commentaries and Materials* (2<sup>nd</sup> edn, OUP 2007).

- Lloyd I, *Information Technology Law* (5<sup>th</sup> edn, OUP 2008).
- Lloyd I, *Legal Aspects of the Information Society* (Butterworths 2000).
- Lyons D, *In the Interest of the Governed: A Study in Bentham's Philosophy of Utility and Law* (Clarendon Press 1991).
- Macdonald E, *Exemption Clauses and Unfair Terms* (2<sup>nd</sup> edn, Tottel Publishing 2006).
- Macleod J K, *Consumer Sales Law* (2<sup>nd</sup> edn, Routledge Cavendish 2007).
- MacQueen H, Waelde C, and Laurie G, *Contemporary Intellectual Property Law and Policy* (OUP 2008).
- MacQueen H, Waelde C, Laurie G and Brown A, *Contemporary Intellectual Property Law and Policy* (2<sup>nd</sup> edn, OUP 2011).
- Marsden C, *Net Neutrality: Towards a Co-Regulatory Solution* (Bloomsbury Academic 2010).
- McClean D and Ruiz Abou-Nigm V, *The Conflict of Laws* (8<sup>th</sup> edn, Sweet & Maxwell 2012).
- McKendrick E, *Contract Law: Texts, Cases and Materials* (3<sup>rd</sup> edn, OUP 2008).
- McKendrick E, *Contract Law: Texts, Cases and Materials* (4<sup>th</sup> edn, OUP 2010).
- McKendrick E, *Contract Law – Text, Cases and Materials* (5<sup>th</sup> edn, OUP, Oxford, 2012).
- Morgan R and Burden K, *Legal Protection of Software: A Handbook* (EMIS Professional Publishing 2002).
- Morozov E, *The Net Delusion: How Not to Liberate the World* (Penguin, 2012).
- Mulcahy L and Tillotson J, *Contract Law in Perspective* (4<sup>th</sup> edn, Cavendish Publishing 2004).
- Mulligan J and Patrovsky B, 'Developing online games: an insider's guide' (New Riders, Indiana, 2003).
- Murray A, *Regulating Cyberspace: Control In the Online Environment* (Routledge-Cavendish 2007).
- Murray A and Klang M (eds), *Human Rights in the Digital Age* (Cavendish Publishing, 2005).
- Negroponte N, *Being Digital* (Hodder & Stoughton 1996).
- Nozick R, *Anarchy, State and Utopia* (Basic Books 1974).
- Peel W E, *Treitel: The Law of Contract* (13<sup>th</sup> edn, Sweet & Maxwell 2011).
- Penner J E, *The Idea of Property in Law* (Clarendon Press 1997).
- Perry J R, *A Dialogue on Personal Identity and Immortality* (Hackett Publishing Company 1978).

- Ponte L M and Cavenagh T D, *Cyberjustice: Online Dispute Resolution (ODR) for e-commerce* (Pearson Education Inc 2005).
- Post D G, *In Search of Jefferson's Moose – Notes on the State of Cyberspace* (OUP 2009).
- Proudhon P J (D Kelly and B Smith (trans)), *What is Property? An Inquiry into the Principles of Right and of Government* (CUP 1994).
- Reed C, *Internet Law: Text, Cases and Materials* (CUP 2004).
- Reed C, *Making Laws for Cyberspace*, (OUP, 2012).
- Reed C and Angel J (eds), *Computer Law* (6<sup>th</sup> edn, OUP 2007).
- Rimmer M, *Digital Copyright and the Consumer Revolution – Hands Off My iPod* (Edward Elgar Publishing Limited 2007).
- Richards P, *Law of Contract* (3rd edn, Pearson Education Ltd 2009).
- Robbins S and Bell M, *Second Life for Dummies* (John Wiley & Sons. Oxford 2008).
- Rosenblatt W, Trippe B and Mooney S, *Digital Rights Management: Business and Technology*, (M & T Books 2002).
- Rosen L, *Open Source Licensing: Software Freedom and Intellectual Property Law* (Prentice Hall, London, 2004).
- Rowland D, Kohl U & Charlesworth A, *Information Technology Law* (4<sup>th</sup> edn, Routledge 2012).
- Samuelson P, 'Five Challenges for Regulating the Global Information Society' in C Marsden (eds), *Regulating the Global Information Society* (Routledge 2000).
- Scassa T, 'Acknowledging Copyright's Illegitimate Offspring: User-Generated Content and Canadian Copyright Law' in Geist M (Ed), *The Copyright Pentalogy* (Ottawa University Press 2012).
- Sealy L S and Hooley R J A, *Commercial Law Text, Cases and Materials* (4<sup>th</sup> edn, OUP 2009).
- Simmons A J, *The Lockean Theory of Rights* (Princeton University Press, 1992).
- Singsangob A, *Computer Software and Information Licensing in Emerging Markets* (Kluwer Law International 2003).
- Smith A, *An Inquiry into the Nature and Causes of The Wealth of Nations*, Vol 2 (W Strahan and T Cadell, 1778).
- Smith M and Kellock P, *Communities in Cyberspace* (Routledge 2002).
- Spence M, *Intellectual Property* (Clarendon Law Series, OUP 2007).
- Stamatoudi I, *Copyright and Multimedia Works* (CUP 2002).

- Stokes S, *Digital Copyright: Law and Practice* (3<sup>rd</sup> edn, Hart Publishing 2009).
- O'Sullivan D, *Wikipedia: A New Community of Practice* (Ashgate 2009) 177.
- Taylor T L, *Play Between Worlds – Exploring Online Game Culture* (The MIT Press 2006).
- Torremans P (eds), *Copyright Law: A Handbook of Contemporary Research* (Edward Elgar Publishing Ltd 2007).
- Torremans P, *Holloyak and Torremans Intellectual Property Law* (5<sup>th</sup> edn, OUP 2008).
- Torremans P, *Holloyak and Torremans Intellectual Property Law* (7<sup>th</sup> edn, OUP 2013).
- Trebilcock M and Dewees D, 'Judicial control of standard form contracts' in Burrows P and Veljanowski C (eds), *The Economic Approach to Law* (Butterworths 1982).
- Wayner P, *Digital Copyright Protection* (AP Professional 1997).
- Westkamp G, 'Authors Rights and Internet Regulation: the end of the public domain or constitutional reconceptualization?' In M P Pugatch, *The Intellectual Property Debate: Perspectives from the Law, Economics and Political Economy* (Edward Elgar Publishing Ltd 2006).
- Williams A, Calow D and Higham N, *Digital Media: Contracts, Rights and Licensing* (2<sup>nd</sup> edn, Sweet & Maxwell 1998).
- Williams G, *Salmond on Jurisprudence* (11<sup>th</sup> edn, Sweet & Maxwell 1957).
- Yee N, 'The Psychology of MMORPGs: Emotional Investment, Motivations, Relationship Formation, and Problematic Usage' In Schroeder R and Axelsson A (eds), *Avatars at Work and Play: Collaboration and Interaction in Shared Virtual Environments* (Springer-Verlag 2006).
- Yu P K, *Intellectual Property and Information Wealth: Copyright and Related Rights* (Praeger Publishers, 2007).

## Journal Articles:

- Abrahams N, 'Media Laws for Virtual Worlds' [2007] U New S Wales 30(1) 295  
<<http://www.austlii.edu.au/au/journals/UNSWLJ/2007/18.pdf>> retrieved 28 April 2010.
- Abramovitch S and Cummings D, 'Virtual Property, Real Law – The Regulation of Property in Video Games: Part 1' [2010] Ent L R 414.
- Abramovitch S and Cummings D, 'Virtual property, real law: the regulation of property in video games: Part 2' (2010) Ent L R 52.
- Adams J, 'Digital Age Standard Form Contracts Under Australian Law; "Wrap" Agreements, Exclusive Jurisdiction, and Binding Arbitration Clauses' [2004] 13 Pac Rim L & Pol'y J 503.
- Adrian A, 'Beyond grieving: virtual crime' (2010) Computer & Security Law Review 26, 641.
- Adrian A, 'Civil Society in Second Life' (2009) International Review of Law, Computers & Technology 23(3) 231.
- Adrian A, 'Who Owns the Copyright In Multi-Author Interactive Works?' [2003] Ent L R 35.
- Alemi F, 'An Avatar's Day In Court: A Proposal for Obtaining Relief and Resolving Disputes in Virtual World Games' [2007] UCLA J L & Tech 6.
- Allgrove B and MacGrath P, 'Pool Cues and Computer Games: The 'look and feel' Debate Played Out in the Court of Appeal' Magazine of the Society for Computers & the Law (June / July 2007) 18(2) 28.
- Akester P, 'Digital Rights Management in the 21<sup>st</sup> Century' [2006] EIPR 159.
- Akester P and Lima F, 'The Economic Dimension of the Digital Challenge: A Copyright Perspective' [2005] IPQ 69.
- Ang S, 'The Idea-Expression Dichotomy and Merger Doctrine in the Copyright Laws of the US and the UK' (1994) 2 Int'l J L & Info Tech Vol 2(2) 111.
- Arias A V, 'Life, Liberty and the Pursuit of Swords and Armor: Regulating the Theft of Virtual Goods' [2008] Emory L J Vol 57, 1301.
- Arnold C, 'Copying Ideas in Computer Programs,' (1995) International Yearbook of Computers, Law and Technology 9, 187.
- Arora A, 'Unfair contract terms and unauthorised bank charges: a banking lawyer's perspective' (2012) J B L (1) 44, 57.
- Atkins R D, 'Copyright, Contract, and the Protection of Computer Programs' [2009] International Review of Law, Computers and Technology 23:1 143.
- Attridge D M, 'Copyright Protection for Computer Programs' [2000] EIPR 563.

- Baldrica J, 'Mod as Heck: Frameworks for Examining Ownership Rights in User-Contributed Content to Video Games and a more principled evaluation of expensive appropriation in user-modified videogame projects' (2007) *Minn J L Sci & Tech*, 8(2) 681.
- Ballabh A, 'Paracopyright' [2008] *EIPR* 138.
- Balkin J M, 'Law and Liberty in Virtual Worlds' (2004) 49 *N Y L Sch L Rev* 63.
- Balkin J M, 'Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds' (2004) *Virginia L Rev* 90(8) 2043.
- Bakels R B, 'Software Patentability: What Are the Right Questions?' [2009] *EIPR* 514.
- Bakos Y and Others, 'Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts' NYU Law and Economics Research Paper No. 09-40. (2009). Available at SSRN: <http://ssrn.com/abstract=1443256> retrieved 12 December 2010.
- Bandey B, 'Over Categorization in Copyright Law – Computer and Internet Programming Perspectives' [2007] *EIPR* 461.
- Barczewski M, 'International Framework for Legal Protection of Digital Rights Management Systems' [2005] *EIPR* 165.
- Barfield W, 'IPRs in Virtual Environments: Considering the Rights of Owners, Programmers and Virtual Avatars' [2005] *bePress Legal Series* No: 861 <<http://law.bepress.com/eps/861>> retrieved 24 June 2010.
- Barker K, 'MMORPGing - The Legalities of Game Play.' (2012) *European Journal for Law and Technology*, Vol. 3, No. 1.
- Barker K, 'Online Games and IP. Battle of the Forms to Social Norms: Reconceptualising and Re-layering?' *SCRIPTed* (Forthcoming, 2013).
- Bartle R A, 'Virtual Worldliness: What the Imaginary Asks of the Real' [2004] *N Y L Sch L Rev* 20.
- Beale H and Dugdale T, 'Contracts between Businessmen: Planning and the Use of Contractual Remedies' (1975) 2 *Brit J Law & Soc* 45.
- Becker L, 'Deserving to Own Intellectual Property' (1993) *Chicago-Kent L Rev* 68, 609.
- Bell M, 'Toward a Definition of Virtual Worlds' *JVW Research* 1(1) 2008.
- Bently L, 'Authorship of Popular Music in UK Copyright Law' (2008) *Information, Communication and Society*.
- Bently L, 'Copyright's Futures: To Expand or Contract?' [1999] *DTLJ* 11.
- Bently L and Burrell R, 'Copyright and the Information Society in Europe: A Matter of Timing as Well as Content' (1997) *CMLR* 34, 1197.



von Bernstorff J, 'The discovery of technological law in the digital Bukovina: Lawrence Lessig's *Code and other Laws of Cyberspace*' 2 German Law Journal (2001) available online: <<http://www.germanlawjournal.com/index.php?pageID=11&artID=110>> retrieved 20 August 2014.

Berry M, 'The Global Dimensions of Virtual Work' Saint Louis University Law Journal Vol. 54: 472.

Blazer C, 'The Five Indicia of Virtual Property' (2006-2007) 5 Pierce L Rev 137.

Bloomfield R, 'World of Bizcraft' JVWR Vol 2, No 3 (2009).

Boonk M and Lodder A R, 'Virtual Worlds: Yet Another Challenge to IP Law' (2007) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1079970](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1079970)> retrieved 11 May 2010.

Bradshaw S, Bowyer A and Haufe P, 'The Intellectual Property implications of low-cost 3D printing.' *SCRIPTed*, (2010) 7 (1), 5.

Bray O and Pickford L-J, 'The UTCCR: Coming to Terms with a Grey Area' (2009) *CTLR* 15(2), 26.

Braun N, 'The Interface Between the Protection of Technological Measures and the Exercise of Exceptions to Copyright and Related Rights: Comparing the Situation in the United States and the European Community' [2003] *EIPR* 496.

Brenner S, 'Fantasy: The Role of Criminal Law in Virtual Worlds,' [2008] *Vanderbilt Journal of Entertainment and Technology Law* 11 No 1, 37.

Breyer S, 'The uneasy case for copyright: A study of copyright in books, photocopies, and computer programs' (1970) 84:2 *Harv L R* 281.

Brown B, 'The Idea / Expression Dichotomy and the Games that People Play' [1995] *EIPR* 259.

Brown P and Raysman R, 'Property Rights in Cyberspace Games and Other Novel Legal Issues in Virtual Property' *Indian Journal of Law & Information Technology* (2006) Vol 2: 87, 103.

Brownsword R, 'Neither East nor West, Is Mid-West Best?' (2006) 3:1 *SCRIPT-ed* 1.

Brownsword R, 'The Shaping of Our Online Worlds: Getting the Regulatory Environment Right' (2012) *Int'l J L & Info Tech* Vol 20 (4) 249.

Burkett D, 'Copyright culture – the history and cultural specificity of the Western model of copyright.' (2001) *IPQ* 2, 146.

Burk D L, 'Authorization and governance in virtual worlds' *First Monday* (2010) Vol. 15(5).

Cabasso A, 'Piercing Pennoyer with the Sword of a Thousand Truths: Jurisdictional Issues in the Virtual World' (2011-2012) 22 *Fordham Intell Prop Media & Ent LJ* 383.

Cameron J, 'Approaches to the problems of multimedia' (1996) *EIPR* 18(3) 115.

- Caramore M B, 'Help! My Intellectual Property is Trapped: Second Life, Conflicting Ownership Claims and the Problem of Access' (2008) Rich J L & Tech 3.
- Carrier M A and Lastowka G, 'Against Cyberproperty' (2007) Berkeley Tech L J Vol 22, 1483.
- Castronova E, 'On Virtual Economies' (July 2002) <[http://ssrn.com/abstract\\_id=338500](http://ssrn.com/abstract_id=338500)> retrieved 18 March 2010.
- Castronova E, 'Theory of the Avatar' (February 2003) <<http://ssrn.com/abstract=385103>> retrieved 18 March 2010.
- Castronova E, 'The Right to Play' (2004) N Y L Sch L Rev 49(1) 187.
- Clay A, 'Nova Productions Ltd v Mazooma Games Ltd – Game Over for Nova – Case Comment' [2007] Ent L R 187.
- Chalton S, 'Implementation of the Software Directive in the United Kingdom: The Effects of the Copyright (Computer Programs) Regulations 1992' [1993] EIPR 138.
- Chein A, 'A Practical Look At Virtual Property' (2006) St John's L Rev 80, 1059.
- Cheng T S L, 'A Brave New World for Intellectual Property Rights' (2006) 17 Journal of Law, Information and Science 10.
- Chen-Wishart M, 'Transparency and Fairness in Bank Charges' (2010) LQR 126 (Apr) 157.
- Chin B, 'Regulating Your Second Life: Defamation in Virtual Worlds' (2006-2007) 72 Brook L Rev 1304.
- Christie A, 'Designing Appropriate Protection for Computer Programs' [1994] EIPR 486.
- Christie A, 'Reconceptualising Copyright in the Digital Age' [1995] EIPR 522.
- Cifuentes C and Fitzgerald A, 'Copyright Protection for Digital Media Works' [1999] Ent L R 23.
- Clapperton D and Conones S, 'Unfair Terms in Clickwrap and Other Electronic Contracts' (2007) Aus Business L Rev 152.
- Condon W J, 'Electronic Assent to Online Contracts: Do Courts Consistently Enforce Click-Wrap Agreements?' (2003-2004) 16 Regent U L Rev 433.
- Crowne E A and Kaploun M, 'From Blackacre & Whiteacre to Greyacre: Three Models for Ascribing Virtual Property Rights in Cyberspace' [2010] Baltimore Intellectual Property Law Journal 19(1) 19.
- Cusack N, 'Is the Digital Economy Act 2010 the most effective and proportionate way to reduce online piracy?' (2011) EIPR 33(9), 559.
- Cwik B, 'Labor as the Basis for Intellectual Property Rights' Ethic Theory Moral Prac (2014) 17: 681.

Dauer E A, 'Contracts of Adhesion in Light of the Bargain Hypothesis: An Introduction' (1972) 5 Akron L Rev 1.

Davies P S, 'Bank charges in the Supreme Court' (2010) CLJ 69(1), 21.

Davies S, 'Computer Program Claims: The Final Frontier for Software' [1998] EIPR 429.

Day J P, 'Locke on Property' The Philosophical Quarterly (1966) 16 (64), 207.

Deenihan K E, 'Leave Those Orcs Alone: Property Rights in Virtual Worlds' (26 March 2008) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1113402](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1113402)> retrieved 11 May 2010.

Derclaye E, 'Software Copyright Protection: Can Europe Learn from American Case Law? Part 1' [2000] EIPR 7.

Derclaye E, 'Software Copyright Protection: Can Europe Learn from American Case Law? Part 2' [2000] EIPR 56.

Deveci H A, 'Databases: is sui generis a stronger bet than copyright?' (2004) Int J Law Info Tech, 12(2), 178.

Dougherty C, 'Bragg v Linden Lab: Virtual Property Rights Litigation' (July 2007) E-Commerce Law & Policy 9(7) <<http://ssrn.com/abstract=1092284>> retrieved 18 March 2010.

Driver L, 'Would the current ambiguities within the legal protection of software be solved by the creation of a *sui generis* right for computer programs?' (2008) JIPL & P Vol.3 (2) 125.

Dusollier S, 'Electrifying the Fence: The Legal Protection of Technological Measures for Protecting Copyright' [1999] EIPR 285.

Dusollier S, 'Technology as an Imperative for Regulating Copyright: From the Public Exploitation to Private Use of the Work' [2005] EIPR 201.

Dworkin G, 'The Moral Right of the Author: Moral Rights and the Common Law Countries' (1994-1995) 19 Colum.-VLA J L & Arts 229.

Easterbrook F H, 'Cyberspace and the Law of the Horse' (1996) U Chi Legal F 207.

Edwards L and Harbinja E, "What Happens to my Facebook profile when I die?" Legal Issues Around Transmission of Digital Assets on Death' CREATE Working Paper No. 5 (2013) available online: <<http://www.create.ac.uk/publications/what-happens-to-my-facebook-profile-when-I-die-legal-issues-around-transmission-of-digital-assets-on-death/>> retrieved 18 August 2014.

Egitto L, 'Certifying Uncertainty: Assessing the Proposed Directive on the Patentability of Computer Implemented Inventions' [2004] JILT 3 <[http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2004\\_3/egitto](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2004_3/egitto)> retrieved 27 January 2010.

- Elkin-Koren N, 'Public / Private and Copyright Reform in Cyberspace' (September 1996) *Journal of Computer-Mediated Communication* 2(2)  
<<http://jcmc.indiana.edu/vol2/issue2/index.html>> retrieved 17 January 2010.
- Elliott J, 'Help – Somebody Robbed My Second Life Avatar!' *JVW Research* 1(1) 2008.
- Fairfield J, 'Anti-Social Contracts: The Contractual Governance of Virtual Worlds' (2008) 53 *McGill LJ* 427.
- Fairfield J, 'Nexus Crystals: Crystallizing Limits on Contractual Control of Virtual Worlds' [2011] *William Mitchell Law Review* Vol 38(1) 43.
- Fairfield J A T, 'The God Paradox' (2009) 89 *B U L Rev* 1017.
- Fairfield J, 'The Magic Circle' (2009) 11 *Vand J Ent & Tech L* 823.
- Fairfield J A T, 'Virtual Property' (2005) 85 *Boston U L Rev* 1047.
- Femminella J, 'Online Terms & Conditions Agreements: Bound by the Web' (2003) 17 *St John's J Legal Comm* 57.
- Fitzgerald B, 'Copyright 2010: The Future of Copyright' [2008] *EIPR* 43.
- Fitzgerald B, 'Intellectual Property Rights in Digital Architecture (including software): The Question of Digital Diversity' [2001] *EIPR* 121.
- Fitzgerald B, 'Software as Discourse? The Challenge for Information Law' [2000] *EIPR* 47.
- Frissen P, 'The Virtual State: Postmodernisation, informatisation and public administration' in Loader B (ed), *The Governance of Cyberspace: Politics, Technology and Global Restructuring* (Routledge 1997) 125.
- Froomkin A M and C Bradley, 'Virtual Worlds, Real Rules' (2004) 49 *N Y L. Sch L Rev* 103.
- Fujita A K, 'The Great Internet Panic – How Digitisation is Deforming Copyright' (1996) 2 *J Tech L & Pol'y* 1 <<http://grove.ufl.edu/~techlaw/vol2/fujita>> retrieved 17 January 2010.
- Galambos A J, *Thrust for Freedom: An Introduction to Volitional Science* (Universal Scientific Publications Company, 1999).
- Gallegos J, 'New Role for Tortious Interference in the Digital Age: A Model to Enforce End User License Agreements' (2010-2011) 38 *Fla St U L Rev* 411.
- Garlick M, 'Player, Pirate or Conducer? A Consideration of the Rights of Online Gamers' (2004-2005) *Yale Jou of Law & Tech* 424.
- Garstka K, 'The Amended Digital Economy Act 2010 as an Unsuccessful Attempt to Solve the Stand-Alone Complex of Piracy' (2012) *IIC* 43(2), 158.

Geach N, 'The Future of Copyright in the Age of Convergence: Is A New Approach Needed for the New Media World?' [2009] *International Review of Law, Computers and Technology* 23:1, 131.

Geiger C, 'The Answer to the Machine Should Not Be the Machine: Safeguarding the Private Copy Exception in the Digital Environment' [2008] *EIPR* 121.

Geiger C, 'The future of copyright in Europe: striking a fair balance between protection and access to information.' [2010] *IPQ* 1, 1.

Gervassis N, 'In Search of the Value of Online Electronic Personnae: Commercial MMORPGs and the Terms of Participation in Virtual Communities' [2004] 2 *JILT* 26  
<[http://www2.warwick.ac.uk/fac/soc/law2/elj/jilt/2004\\_3/gervassis/](http://www2.warwick.ac.uk/fac/soc/law2/elj/jilt/2004_3/gervassis/)> retrieved 6 May 2010.

Gilbert B J, 'Getting to Conscionable: Negotiating Virtual Worlds' End User License Agreements without Getting Externally Regulated' (2009) available at:  
<[http://works.bepress.com/brendan\\_gilbert/1](http://works.bepress.com/brendan_gilbert/1)> retrieved 16 February 2013.

Gillen M, 'Lawyers and Cyberspace: Seeing the Elephant?' (2012) 9:2 *SCRIPTed* 131.

Gillies L E, 'Addressing the "Cyberspace Fallacy:" Targetting the Jurisdiction of an Electronic Consumer Contract' (2008) *Int'l J L & Info Tech* Vol 16(3) 242.

Ginsburg J C, 'Four Reasons and a Paradox: The Manifest Superiority of Copyright over Sui Generis Protection of Computer Software' (Dec 1994) *Columbia Law Review* 94(8) 2559.

Ginsburg J, 'Moral rights in Common Law systems' [1990] *Ent L R* 121.

Glushko B, 'Tales of the (Virtual) City: Governing Property Disputes in Virtual Worlds' [2007] *Berkeley Tech L J* Vol 22, 251.

Goldsmith J, 'Against Cyberanarchy' (1998) 65 *U Chi L Rev* 119.

Gomulkiewicz A, Robert W and Williamson M L, 'Brief Defense of Mass Market Software License Agreements' (1996) 22 *Rutgers Computer & Tech L J* 335.

Gong J, 'Note: Defining and Addressing Virtual Property in International Treaties' (2011) 17 *B U J Sci & Tech L* 101.

Goodman B, 'Honey, I Shrink- Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract' (1999-2000) 21 *Cardozo L Rev* 319.

Gordon S E, 'The very idea! Why copyright law is in an appropriate way to protect computer programs' [1998] *EIPR* 10.

Gordon W J, 'A Property Right in Self-Expression: Equality and Individualism in the Natural law of Intellectual Property' *Yale L J* (1993) 102, 1533.

- Gould M, 'Rules in the Virtual Society' (Oct 1996) *Int Rev of Law, Computers and Technology* 10(2) 199.
- Gray K, 'Property in Thin Air' (1991) 50 *Cambridge LJ* 252.
- Grewal M, 'Copyright Protection of Computer Software' [1996] *EIPR* 454.
- Griffin J, 'Making a new copyright economy: a new system parallel to the notion of proprietary exploitation in copyright.' (2013) *IPQ* 1, 69.
- Griffin J G H, 'The Changing Nature of Authorship: Why Copyright Law Must Focus on the Increased Role of Technology' [2005] *IPQ* 135.
- Griffin J, 'The Interface Between Copyright and Contract: Suggestions for the Future' (2011) *EJLT* Vol 2(1).
- Grimes S M, 'Online Multiplayer Games: A Virtual Space for Intellectual Property Debates' (2006) *New Media Society* 8, 969.
- Grimmelmann J, 'Regulation by Software' [2005] *Yale LJ* Vol 114, 1719.
- Grimmelmann J, 'Virtual Borders: The Interdependence of Real and Virtual Worlds' 2008/2009 *NYLS Legal Studies* No 9 <<http://ssrn.com/abstract=868824>> retrieved 12 December 2010.
- Gringras C, 'The Validity of Shrink-Wrap Licenses' (1996) *Int'l J L & Info Tech* 14(2) 77.
- Haggart G, 'Copyright of Artistic Works Online' (2001) 3 *EBL* 6, 2.
- Hardy T, 'Property and Copyright in Cyberspace' [1996] *University of Chicago Legal Forum* 217.
- Hardy T, 'Six Copyright Theories for protection of Computer Object Programs' (1984) 26 *Ariz L Rev* 895.
- Hemnes M, 'Substantial Similarity Between Video Games – An Old Copyright Problem in a New Medium' (1982-1983) 131 *U Pa L Rev* 171.
- Henderson H W, 'Through the looking glass: Copyright Protection in the Virtual Reality of Second Life' (2008-2009) 16 *J Intell Prop* 165.
- Heritage M and Jones P, 'The End of 'look and feel' and the Invasion of Little Green Men? UK Copyright and Patent Protection for Software After 2005' [2006] *CTLR* 67.
- Hetcher S, 'Climbing the Walls of Your Electronic Cage' (2000) 98 *Mich L Rev* 1916.
- Hettinger E C, 'Jusitfying IP' (Winter 1989) *Philosophy and Public Affairs*, 18(1) 31.

- van den Heuvel E, 'Online dispute resolution as a solution to cross-border e-disputes: an introduction to ODR' (August 2000) available online: <  
<http://www.oecd.org/internet/consumer/1878940.pdf>> retrieved 8 August 2012.
- Hickman T and Hickman K, 'The Myth of the Magic Circle' (2012) UC Irvine Law Review Vol 2, 537.
- Hillman R A and Rachlinski J, 'Standard Form Contracting in the Electronic Age' [2002] N Y U L Sch L Rev Vol 77, 429.
- van Hoorebeek M, 'Open Source Software: Can Innovation thrive without traditional Intellectual Property?' (2009) Student Law Review 58, 47.
- Horowitz S J, 'Bragg v Linden's Second Life: A Primer in Virtual World Justice' (2008) 34 Ohio N U L Rev 223.
- Horowitz S J, 'Competing Lockean Claims to Virtual Property' (2006-2007) 20(2) Harvard J L & Tech 443.
- Horowitz S J, 'Rethinking Lockean Copyright and Fair Use' 10 Deakin L Rev 209 (2005).
- Houweling M and Shaffer M, 'Touching and Concerning Copyright: Real Property Reasoning in MDY Industries, Inc. v. Blizzard Entertainment, Inc.' (2011) Santa Clara L Rev 51, 1063.
- Hughes J, 'Philosophy of Intellectual Property' (1985) Georgetown L J 77, 287.
- Hull G, 'Clearing the Rubbish: Locke, The Waste Proviso and the Moral Justification of Intellectual Property' Public Affairs Quarterly, (2009) Vol 23(1) 67.
- Humphreys S, 'Discursive constructions of MMOGs and some implications for policy and regulation.' (2009) Media International Australia 130: 53, 62.
- Humphreys S, 'Productive users, intellectual property and governance: The challenges of computer games' (2005) Media Arts Law Review Vol 10(4) 299.
- Humphreys S, 'Norraht: New Forms, Old Institutions' (2009) Games Studies: The International Journal of Computer Game Research 9(1).
- Humphreys S, 'Ruling the Virtual World. Governance in massively multiplayer online games' (2008) European Journal of Cultural Studies 11(2): 147.
- Humphreys S and Banks J, 'The labour of user co-creation. Emerging social network markets?' (2008) Convergences 14(4) 401.
- Humphreys S and Others, 'Fan based production for computer games: User led innovation, the 'drift of value' and the negotiation of intellectual property rights' Media International Australia incorporating Culture and Society (2005) February, Issue 114.

Humphreys S and de Zwart M, 'Griefing, Massacres, Discrimination and Art: the Limits of Overlapping Rule Sets in Online Games.' (2012) University of California Irvine Law Review 2(2) 507.

Hunter D, 'Cyberspace as Place and the Tragedy of the Digital Anticommons' [2003] 91 Calif L Rev 439.

Hunt K, 'This Land Is Not Your Land: Second Life, CopyBot, and the Looming Question of Virtual Property Rights' (2007-2008) 9 Tex L Rev Ent & Sports L 141.

Idris K, *Intellectual Property: A Power Tool for Economic Growth* (WIPO 2003).

Irvine W C H, 'The unfair terms in consumer contracts regulations in the courts?' (2004) SLT 21, 127.

Jankowich A, 'EULaw: The Complex Web of Corporate Rule-Making in Virtual Worlds' (2006) 8 Tul J Tech & Intell. Prop 2.

Jeffrey S and Gesh D L, 'Structuring the Multimedia Deal Legal Issues: Part 1 – Licensing In the Multimedia Arena' [1992] Ent L R 3(6) 196.

Jeffrey S and Gesh D L, 'Structuring the Multimedia Deal Legal Issues – Licensing In the Multimedia Arena. Part 2' [1993] Ent L R 4(1) 14.

Jin J, 'When Pretend Money Has Real Value; A Study of Virtual Property in Online Gaming' (September 2007) The Illinois Business Law Journal  
<[http://iblsjournal.typepad.com/illinois\\_business\\_law\\_soc/2007/09/the-increasing-.html](http://iblsjournal.typepad.com/illinois_business_law_soc/2007/09/the-increasing-.html)> retrieved 27 January 2010.

Johnson D R, 'How Online Games May Change the Law and Legally Significant Institutions' (2004) 49 N Y L Sch L Rev 51.

Johnson D R and Post D G, 'Law and Borders – The Rise of Law in Cyberspace' (1996) 48 Stan L Rev 1367.

Kane S F, 'Virtual Judgment: Legal Implications of Online Gaming' (May / June 2009) IEEE Computer and Reliability Societies 7(3) 23  
<<http://www.computer.org/portal/web/csdl/doi/10.1109/MSP.2009.81>> retrieved 16 March 2010.

Karjala D S, 'Copyright, Computer Software and the New Protectionism' (1987-1988) 28 Jurimetrics J 33.

Karniel Y, 'Copyright in *Second Life*,' [2010] 20 Alb L J Sci & Tech. 433.

Katsh E, 'Bringing Online Dispute Resolution to Virtual Worlds: Creating Processes through Code' (2004-2005) 49 N Y L Sch L Rev 271.

Katz L, 'Exclusion and Exclusivity in Property Law' (2008) 58 Uni Toronto Law Jou 275.



- Kayser J, 'The New New-World: Virtual Property and the EULA' (2006-2007) *Loy L A Ent L Rev* 60.
- Kennedy R, 'Virtual Rights? Property in Online Game objects and Characters' (June 2008) *Information & Communication Technology Law* Vol 17(2), 95.
- Kerr O S, 'Criminal Law in Virtual Worlds.' University of Chicago Legal Forum, GWU Law School Public Law Research Paper No. 391 [2008] <<http://ssrn.com/abstract=1097392>> retrieved 12 December 2010.
- Kessler F, 'Contracts of Adhesion-Some Thoughts About Freedom of Contract' (1943) 43 *Column L Rev* 629.
- Kim C L, 'South Korea: Copyrights: Linking to images does not infringe: protection of game character upheld' (2010) *WCRR* 5(4) 14.
- Kim N S, 'Bargaining Power and Background Law' (2009) 12 *Vand J Ent & Tech L* 93.
- Kim N S, 'Clicking and Cringing' [2007] 88 *Oregon L Rev* Vol 86, 797.
- Kim N S, 'The Software Licensing Dilemma' [2008] *B Y U L Rev* 1103.
- Koch A, 'Nowhere and Now Here: Hybrid Nature of Communities and Spaces' *NETCOM* 18(3) 2004, 171.
- van Kokswijk J, 'Social Control in Online Society' *International Conference on Cyberworlds* (2010) <[http://www.kokswijk.nl/agenda/files/CW2010-JvK\\_v1.pdf](http://www.kokswijk.nl/agenda/files/CW2010-JvK_v1.pdf)> retrieved 15 February 2013.
- Koo D M and Others, 'Experimental Motives for Playing Online Games' *Journal of Convergence Information Technology* (2007) 2(2) 37, 40.
- Kornhauser L A, 'Unconscionability in Standard Forms' (1976) 64 *Cal L Rev* 1151.
- Kotelnikov A, 'Trademarks and Visual Replicas of Branded Merchandise in Virtual Worlds' [2008] *IPQ* 110.
- Kretschmer M, 'Digital Copyright – The End of an Era' [2003] *EIPR* 333.
- Kunze J T, 'Regulating Virtual Worlds Optimally: The Model EULA' (2008-2009) *N W J Tech & Intell Prop* 102.
- Laddie J, 'Copyright: Over-Strength, Over-Regulated, Over-Rated?' [1996] *EIPR* 253.
- Lai S, 'Digital Copyright and Watermarking' [1999] *EIPR* 171.
- Lambert P B, 'Copyleft, Copyright and Software IPRs: Is contract still king?' [2001] *EIPR* 165.
- Lambrick J, 'And Now to Regulate Internet Gaming – A Gamble in Itself' [1999] *DTLJ* 17.
- Lastowka G, 'Decoding Cyberproperty' [2007] 40 *Indiana L Rev* 23.

- Lastowka G, 'Foreword: Paving the Path of Cyberlaw' (2011) *William Mitchell Law Review*, Vol 38(1) 6.
- Lastowka G, 'User-Generated Content and Virtual Worlds' (2007-2008) 10 *Vand J Ent & Tech L* 893.
- Lastowka G and Dougherty C, 'Copyright Issues in Virtual Economies' [2007] *E-Commerce & Policy* 9(5).
- Lastowka F G and Hunter D, 'The Laws of Virtual Worlds' [2004] 92 *Cal L Rev* 1.
- Laun M W, 'Improving the International Framework for the Protection of Computer Software' (1986-1987) 48 *U Pitt L Rev* 1151.
- Lawrence D E, 'It Really Is Just A Game: The Impracticability of Common Law Property Rights in Virtual Property' (2007-2008) 47 *Washburn LJ* 505.
- Lee M, 'Online Role Play Games – The Legal Response' (Winter 2006) *Herts Law Journal* 4(2) 72 <<http://www.herts.ac.uk/courses/schools-of-study/law/hertfordshire-law-journal/volume-4-issue-2-winter-2006.cfm>> retrieved 27 January 2010.
- Lee Y H, 'Play again? Revisiting the case for copyright protection of gameplay in videogames' [2012] *EIPR* 34(12).
- LeBlanc J W, 'The Pursuit of Virtual Life, Liberty, and Happiness and Its Economic and Legal Recognition in the Real World' (2007-2008) 9 *Fla Coastal L Rev* 255.
- Ledgerwood G, 'Virtually Liable' (2009) 66 *Wash & Lee L Rev* 811.
- Lessig L, 'The Law of the Horse: What Cyberlaw Might Teach' (1999) 113 *Harv L Rev* 501.
- Lessig L, "The Zones of Cyberspace" (1996) 48 *Stanford Law Review* 1403.
- Lim Y F, 'Is It Really Just A Game? Copyright and Online Role-Playing Games' [2006] *J IPL & P* 1(7) 481
- Lim H Y F, 'Who Monitors the Monitor? Virtual World Governance and the Failure of Contract Law Remedies in Virtual Worlds' (2008-2009) 11 *Vand J Ent & Tech L* 1053.
- Liu J and Fang F, 'The Idea / Expression Dichotomy in Cyberspace: A Comparative Study of Web Page Copyrights in the United States and in China' [2003] *EIPR* 504.
- Lodder A R, 'Conflict Resolution in Virtual Worlds: General Characteristics and the 2009 Dutch Convictions on Virtual Theft' in K Cornelius and D Hermann, eds *Virtual Worlds and Criminality*, available online: <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1590144](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1590144)> retrieved 12 December 2010.
- Loos M B M and Others, 'Digital Content Contracts for Consumers' (CESCL Working Paper Series No 2012-05) <<http://ssrn.com/abstract=2081918>> retrieved 1 July 2013.

- Louie A W M, 'Designing Avatars in Virtual Worlds: How Free Are We to Play Superman?' (2007) *Journal of Internet Law* 3.
- Lucchetti S and Lo S, 'Virtual Items in a Legal Vacuum: Perspectives on Virtual Property from China' (2009) 54 *IPBA Journal*, 9.
- Luck M, 'The gamer's dilemma: An analysis of the arguments for the moral distinction between virtual murder and virtual paedophilia' (2009) *Ethics and Information Technology* 11:31.
- Macaulay S, 'Non-contractual Relations in Business: A Preliminary Study' (1963) 28 *Am Soc Rev* 55.
- MacCulloch A, 'Game-Over – The Region Lock in Video Games' [2005] *EIPR* 176.
- Macdonald E, 'Unifying Unfair Terms Legislation' (2004) 67 *MLR* 69.
- MacEwan N, 'The Computer Misuse Act 1990: lessons from its past and predictions for its future' (2008) *Crim L R* 955.
- MacKinnon R, 'Virtual Rape' (1997) *Journal of Computer Mediated Communication* Vol 2(4) <<http://jcmc.indiana.edu/vol2/issue4/mackinnon.html#References>> retrieved 20 January 2013.
- MacMillan C, 'A Birthday Present for Lord Denning: The Contracts (Rights of Third Parties) Act 1999' (2000) *MLR* 63(5) 721.
- Mac Sithigh D, 'The regulation of video games: past, present and future.' (2010) *Ent L R* 298.
- Maltz T, 'Customary Law and Power in Internet Communities' (1996) *Journal of Computer Mediated Communication* Vol 2(1) <http://jcmc.indiana.edu/vol2/issue1/custom.html>> retrieved 16 February 2013.
- Marcus T D, 'Fostering Creativity in Virtual Worlds: Easing the Restrictiveness of Copyright for User-Created Content' (2007-2008) 52 *N Y L Sch L Rev* 67.
- Markey H T, 'Science and Law – Toward A Happier Marriage' (1977) 59 *J Pat Off Soc'y* 343.
- Marsoof A, 'A case for *sui generis* treatment of software under the WTO regime' (2012) *Int J Law Info Tech* 20 (4) 291.
- Masiyakurima P, 'The futility of the idea / expression dichotomy in UK Copyright law' (2007) *IIC* 38(5), 548.
- Massey R, 'Whose licence is it anyway? A study of end-user licence agreements for computer software - National Consumer Council unfair contract terms survey and findings' (2008) *CTLR* 14(5), 117.
- Mayer-Schonberger V, 'The Authority of Law in Times of Cyberspace' *Journal of Law, Technology & Policy*, No 1 (2001) 11.

Mayer-Schonberger V, 'The International Lawyer In Times of Cyberspace' (2000) 2 Eur J L Reform 557.

Mayer-Schonberger V, 'The Shape of Governance: Analyzing the World of Internet Regulation' (2003) Va J Int'l L 43, 605.

Mayer- Schönberger V, 'Virtual Heisenberg: The Limits of VW Regulability' (2009) 66 Wash & Lee L Rev 1245.

Mayer-Schönberger V and Crowley J, 'Napster's Second Life? The Regulatory Challenges of Virtual Worlds' (2006) N W U L R 100 (4) 1775.

de Mauny C, 'Court of Appeal clarifies patenting of computer programs' [2009] EIPR 147.

McIntyre T J, 'Copyright in Custom Code: Who Owns Commissioned Software?' (2007) JIPL&P 2(7) 473.

Meehan M, 'Virtual Property: Protecting Bits In Context' (2006) 13 Rich J L & Tech 7.

Mendis D, 'Streaming, Second Life, "summer" and tennis from SW19: A Legal Perspective on Streaming and Second Life on sporting events' [2008] EIPR 1.

Menell P S, 'The Challenges of Reforming Intellectual Property Protection for Computer Software' (Dec 1994) Columbia Law Review, 94(8) 2644.

Menell P S, 'Tailoring Legal Protection for Computer Software' 1986-1987 39 Stan L Rev 1329.

Miles S and Stoker E, 'Nova Productions Ltd v Mazooma Games Ltd – Case Comment' [2006] Ent L R 181.

Merges R P, 'The End of Friction? Property Rights and Contract in the "Newtonian" World of On-line Commerce' 12 Berkeley Tech L J 115 (1997) 115.

Merill T W and H E Smith, 'What Happened to Property in Law and Economics' Yale L J (2001) 357.

Miller D C, 'Determining Ownership in Virtual Worlds: Copyright and License Agreements' [2003] 22 Rev Litig 435.

Mnookin J L, 'Virtual(ly) Law: The Emergence of Law in LambdaMOO' (June 1996) Journal of Computer-Mediated Communication 2(1)  
<<http://jcmc.indiana.edu/vol2/issue1/index.html>> retrieved 17 January 2010.

Moens A, 'Streamlining the Software Development Process Through Reuse and Patents' [2000] EIPR 418.

Moon K, 'The Nature of Computer Programs: Tangible? Goods? Personal Property? Intellectual Property?' [2009] EIPR 396.

Moore A D, 'Intellectual Property and Copyright' (Working Papers Series, Dec 2012). Available at SSRN: <<http://ssrn.com/abstract=2194729>>.

Moore C, 'Commonising the Enclosure: Online Games and Reforming Intellectual Property Regimes' [2005] Australian Journal of Emerging Technologies and Society 3(2) 100.

Moringiello J M, 'Towards A System of Estates in Virtual Property' Widener University School of Law Research Paper Series: 08-22. <<http://ssrn.com/abstract=1070184>> retrieved 18 March 2010.

Mossoff A, 'Saving Locke from Marx: The Labour Theory of Value in Intellectual Property Theory' Social Philosophy and Policy (2012) Vol. 29(2), 283.

Murray A and Scott C, 'Controlling the new media. Hybrid approaches to new forms of power' (2002) 65(4) MLR 491.

Nelson J W, 'The Virtual Property Problem: What Property Rights in Virtual Rights Might Look Like, How They Might Work, And Why They Are A Bad Idea' (2009-2010) 41 McGeorge L Rev 282.

Nichols W J, 'Painting Through Pixels: The Case for Copyright in Videogame Play' (2006-2007) 30 Colum J L & Arts 101.

Nocella L, 'Copyright and moral rights versus author's right and droit moral: a convergence or divergence?' [2008] Ent L R 151.

Oberding J M and Morderhaug T, 'A Separate Jurisdiction for Cyberspace?' (June 1996) Journal of Computer-Mediated Communication 2(1)  
<<http://jcmc.indiana.edu/vol2/issue1/index.html>> retrieved 17 January 2010.

Ondrejka C, 'A Piece of Place: Modelling the Digital on the Real in Second Life' (7 June 2004) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=555883](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=555883)> retrieved 21 March 2010.

Ondrejka C, 'Aviators, Moguls, Fashionistas and Barons: Economics and Ownership in Second Life' <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_is=614663](http://papers.ssrn.com/sol3/papers.cfm?abstract_is=614663)> retrieved 18 March 2010.

Ondrejka C, 'Changing Realities' (The Themis Group, 2005)  
<<http://www.themisgroup.com/uploads/Changing%20Realities.pdf>> retrieved 18 May 2010.

Onishi H, 'Personal Avatar Identity Theft in Japan: The Role of Japanese Copyright' (2011) Ent L R 17.

Padgett L, 'Computer Programs and Copyright: An Australian Perspective' [2003] DTLJ 2.

Passman M H, 'Transactions of Virtual Items in Virtual Worlds' [2008] 18 Alb LT Sci & Tech 259.

Peritt J, 'Protecting Technology over Copyright: A Step too Far?' [2003] Ent L R 1.

Perry J R, *A Dialogue on Personal Identity and Immortality* (Hackett Publishing Company 1978).

- Perry M and Margoni T, 'Ownership in complex authorship: a comparative study of joint works' (2012) EIPR 34(1) 22.
- Pila J, 'Copyright and its Categories of Original Works' (2010) OJLS 30(2): 229.
- Posner R, 'Antitrust in the New Economy 3' Uni Chi L Sch, J M Olin Law and Economics Working Paper No 106 (2000).
- Post D G, 'Governing Cyberspace: Law' (2007-2008) 24 Santa Clara Computer & High Tech L J 883.
- Radin M J, 'Humans, Computers and Binding Commitment' (2000) 75 Ind L J 1125.
- Radin M J, 'Property and Personhood' (1982) 34 Stan L Rev 957 960.
- Rahmatian A, 'Originality in UK law: the old "skill and labour" doctrine under pressure' (2013) IIC 44(1), 4.
- Rajan M T S, 'Moral Rights in Information Technology: A New Kind of Personal Right?' (2004) Int'l J L & Info Tech 12(1) 32.
- Reichmann J H, 'Legal Hybrids between the Patent and Copyright Paradigms' (Dec 1994) Columbia Law Review 94(8) 2432.
- Rector S D and Others 'Second Life – Brand Promotion and Unauthorized Trademark Use in Virtual Worlds' (December 2007) WIPO Magazine 11.
- Reed C, 'How to Make Bad Law: Lessons from Cyberspace' [2010] The Modern Law Review, Vol. 73(6) 903.
- Reed C, 'Online and Offline Equivalence: Aspiration and Achievement' (2010) Int'l J L & Info Tech Vol 18(3), 248.
- Reidenberg J, Technology and Internet Jurisdiction; (2005) 153 U Pa L Rev 1951.
- Reuveni E, 'Authorship in the Age of the Conducer' (2007) Journal of Copyright Society of the USA Vol 54 (218) 1801 <<http://ssrn.com/abstract=1113491>> retrieved 12 December 2010.
- Reuveni E, 'On Virtual Worlds: Copyright and Contract Law At the Dawn of the Virtual Age' [2007] 82 Indiana L J 261.
- Risch M, 'Virtual Rule of Law' [2009] 112 West Virginia Law Review 1, 37.
- Risch M, 'Virtual Third Parties' [2009] 25 Santa Clara Computer & High Tech L J 415.
- Rogers K M, 'Protecting 'rights' in the Digital Environment' [2009] International Review of Law, Computers and Technology 23:3, 167.
- Roe T, 'Contractual Intention Under Section 1(1)(b) and 1(2) of the Contracts (Rights of Third Parties) Act 1999 (2000) MLR 63(6) 887.

- O'Rourke, K 'Integrity on the web' (2012) EIPR 34(12), 815.
- O'Rourke, M 'Drawing the Boundary Between Copyright and Contract: Copyright Pre-Emption of Software License Terms' (1995) Duke L J 45(3), 479.
- Rowland D, 'Cyberspace – A Contemporary Utopia?' 1998 (3) The Journal of Information, Law and Technology (JILT) available online: <<http://www.law.warwick.ac.uk/jilt/98-3/rowland.html>> retrieved 20 December 2010.
- Rowland D and Campbell A, 'Supply of Software: Copyright and Contract Issues' (2002) Int'l J L & Info Tech 10, 23.
- Rustad M and Others, 'Copyrights in Cyberspace: A Roundup of Recent Cases' (2011) 12 J High Tech L 106, 158.
- Samuelson P, 'Does Copyright Law need to be reformed?' (Oct 2007) 50 Comm ACM 19.
- Samuelson P and Others, 'Does Copyright Protection under the EU Software Directive Extend to Computer Program Behaviour, Languages and Interfaces?' (December 2011) <<http://ssrn.com/abstract=1974890>> retrieved 20 June 2013.
- Samuelson P, 'Intellectual Property for an Information Age' (Feb 2001) 44 Comm ACM 2.
- Samuelson P, 'Preliminary Thoughts on Copyright Reform Project' (2007) 3 Utah L Rev 551.
- Samuelson P, 'Towards A New Deal for Copyright in an Information Age' (2002) 100 Michigan Law Review 1488.
- Samuelson P, 'Why Copyright Law Excludes Systems and Processes from the Scope of its Protection' (2006-2007) 85 Texas L Rev 1921.
- Samuelson P and Others, 'A Manifesto Concerning the Legal Protection of Computer Programs' (Dec 1994) Columbia Law Review 94(8) 2308.
- Schifreen R, 'The Internet: Where Did IT All Go Wrong?' (Aug 2008) SCRIPTed 5(2) <<http://www.law.ed.ac.uk/ahrc/script-ed/issue5-2.asp>> retrieved 27 January 2010.
- Schillig M, 'Inequality of Bargaining Power Versus Market for Lemons: Legal Paradigm Change and the Court of Justice's Jurisprudence on Directive 93/13 on Unfair Contract Terms' (2008) E L Rev 33(3) 336.
- Schlachter E, 'The Intellectual Property Renaissance in Cyberspace: Why Copyright Law Could Be Unimportant on the Internet' (1997) 12 Berkeley Tech L J 15.
- Schulz T, 'Carving Up the Internet: Legal Orders and the Public / Private International Law Interface' (2008) EJIL Vol. 19(4) 799.
- Schwarz M, 'Copyright Protection is 'not on the menu'' [1995] EIPR 337.

Scott B R, 'The Political economy of Capitalism' HBS Working Paper No 07-037 (2006) available online: <<http://www.hbs.edu/faculty/Publication%20Files/07-037.pdf>> retrieved 20 August 2013.

Scott Boone M, 'Virtual Property and Personhood' [2008] Santa Clara Computer & High Tech LJ 24 716.

Self L C and Dixon A N, 'Copyright Protection for the Information Superhighway' [1994] EIPR 465.

Sheldon D P, 'Claiming Ownership But Getting Owned: Contractual Limitations on Asserting Property Interests in Virtual Goods' (2006-2007) 54 UCLA L Rev 751.

Smith S A, 'In Defence of Substantive Fairness' (1996) LQR 112 (Jan) 138.

Solum L B & Chung M, 'The Layers Principle: Internet Architecture and the Law' 79 Notre Dame L Rev 815 (2004).

Stephens M, 'Sale of In-Game Assets: An Illustration of the Continuing Failure of Intellectual Property Law to Protect Digital Content Creators' [2001-2002] 80 Tex L Rev 1513.

Stern R H, 'The Game Genie Case: Copyright in Derivative Works Versus Users' Rights' (1992) Ent L R 3(3), 104.

Stokes S, 'The Development of UK Software Copyright Law: From John Richardson Computers to Navitaire' [2005] CTLR 129.

Stoup P, 'The Development and Failure of Social Norms in Second Life' (2008-2009) 58 Duke L J 311.

Strikwerda L, 'Theft of virtual items in online multiplayer computer games: an ontological and moral analysis' (2012) Ethics and Information Technology 14:89.

Suzor N P, 'On the (partially) inalienable rights of participants in virtual communities' (2009) Media International Australia 90.

Suzor N, 'Order Supported By Law: The Enforcement of Rules in Virtual Communities' [2012] Mercer Law Review 63(2) 523.

Suzor N, 'The Role of the Rule of Law in Virtual Communities' (2010) *Berkeley Technology Law Journal* 25(4) 1817.

Svantesson D, 'A legal method for solving issues of Internet regulation' (2011) Int'l J L & Info Tech Vol. 19(3) 2.

Talbott J L and Scott M D, 'Interactive Multimedia: What Is It, Why Is It Important and What Does One Need to Know About It?' [1995] EIPR 284.



Thomas C, 'What Role Should Substantive Fairness Have in the English Law of Contract? An overview of the Law.' (2010) CSLR 6(1) 177.

Townsend A M, 'Second Life and Other Virtual Worlds: A Roadmap for Research' <<http://ssrn.com/abstract=1021441>> retrieved 18 March 2010.

Trakman L E, 'The Boundaries of Contract Law in Cyberspace' (2009) IBLJ (2) 159.

Tseng Y S, 'Governing Virtual Worlds: Interration 2.0' (2011) 35 Wash U J L & Pol'y 547.

Turner M, 'Do Old Legal Categories fit new Multimedia Products? A Multimedia CD-ROM as a film.' (1995) EIPR 17(3), 107.

Uribe-Jongbloed E and Others, 'Authorship and Copyright in Virtual Worlds – From the Death of the Author and the Disempowerment of User to the Revival of Rights?' J V W R (forthcoming, 2013).

Valoso M G, 'Virtual Property Rights: A Modified Usufruct of Intangibles' (2010) Phillipine Law Journal Vol 82, 37.

Vaughn K I, 'John Locke and the Labour Theory of Value' Journal of Libertarian Studies (1978) 2(4) 311.

Vaver D, 'Moral Rights, Yesterday, Today and Tomorrow' [1999] 7(3) IJL & IT 270.

Verter M, 'The Production and Consumption of Self and Property in Locke, Hegel and Levinas' (MRP for Social and Political Thought) available online: <[http://www.waste.org/~roadrunner/writing/Levinas/SelfAndProperty\\_FinalEssay\\_WEB.htm](http://www.waste.org/~roadrunner/writing/Levinas/SelfAndProperty_FinalEssay_WEB.htm)> retrieved 14 August 2014.

Vinje T C, 'A Brave New World of Technical Protection Systems: Will There Still Be Room for Copyright?' [1996] EIPR 18(8) 431.

Vinje T C, 'Copyright Imperilled' [1999] EIPR 192.

Waldron J, 'Enough and as Good Left for Others' The Philosophical Quarterly (1979) 29 (117) 319.

Waldron J, 'From Authors to Copiers: Individual Rights and Social Values in Intellectual Property' (1993) Chicago-Kent L Rev 68, 841.

Warner R, 'Turned On Its Head? Norms, Freedom, and Acceptable Terms in Internet Contracting' (2008) 11 Tul J Tech & Intell Prop 1.

Weise H, 'The Justification of the Copyright System in the Digital Age' [2002] EIPR 387.

Westbrook T, 'Owned: Finding A Place for Virtual World Property Rights' [2006] Mich St L Rev 779.

Westkamp G, 'Multimedia Works and Categorization in UK Copyright Law' (2006) JIPL & P 1(5).

White E, 'MMO Fraud: Why the Introduction of Real World Law in a Virtual Context is Good for Everyone' (2008) North Western Journal of Tech and IP Vol 6(2) 228.

White R, 'Second Life: Brave New World' (2007) L S Gaz, 17 May, 24.

WIPO 'IP and Business: Second Life – Brand Promotion and Unauthorized Trademark Use in Virtual Worlds' (November 2007) WIPO Magazine Vol 6  
<[http://www.wipo.int/wipo\\_magazine/en/2007/06/article\\_0004.html](http://www.wipo.int/wipo_magazine/en/2007/06/article_0004.html)> retrieved 26 November 2009.

George Wright R, 'Fundamental Property Rights' 21 Val U L Rev 75 (2011) 75.

Yen A C, 'Restoring the Natural Law: Copyright as Labour and Possession' Ohio State Law J (1990) 51: 517.

Yoon U, 'A Quest for the Legal Identity of MMORPGs - From a Computer Game, Back to a Play Association' (Fall 2005) Journal of Game Industry & Culture Vol 10.

Yoon U, 'Real Money Trading in MMORPG Items From a Legal and Policy Perspective' (2008) Journal of Korean Judicature Vol 1, 418.

Zemer L, 'On the value of copyright theory.' (2006) IPQ 1, 35.

de Zwart M, 'Contractual Communities: Effective Governance of Virtual Worlds' (2010) 33 U N S Wales L J 605.

## **UK Case Law:**

*Apple Computer Inc v Computer Edge Pty Ltd* [1984] FSR 481.

*Bamgboye v Reed* [2004] EMLR (5) 61.

*Beckingham v Hodgins* [2003] EMLR 18 (CA).

*British Telecommunications Plc & Anor, R (on the application of) v The Secretary of State for Business, Innovation and Skills* [2011] EWHC 1021 (Admin).

*Buckingham CC v Moran* [1990] Ch 623.

*Cala Homes (South) v Alfred McAlpine Homes East* [1995] FSR 818.

*C & P Haulage v Middleton* [1983] 3 All ER 94.

*Clarke v Earl of Dunraven* [1897] AC 59.

*Cummins v Bond* [1927] 1 Ch 167.

*Designers Guild Ltd v Russell Williams Textiles Ltd* [2000] 1 WLR 2416.

*Director General of Fair Trading v First National Bank* [2002] 1 AC 481.

*Dramatico Entertainment Limited et al. v British Sky Broadcasting et al.* [2012] EWHC 268 (Ch).

*Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd* [1915] AC 847.

*Duport Steel v Sirs* [1980] 1 All ER 529.

*Electronic Techniques (Anglia) Ltd v Critchley Components Ltd* [1997] FSR 401.

*Fisher v Bell* [1961] 1 QB 394.

*Fisher v Brooker and Onward Music Ltd* [2007] FSR (12) 255.

*Fylde Microsystems v Key Radio Systems* [1998] FSR 449.

*Gates v Swift* [1982] RPC 339.

*Gilham v R* [2009] EWCA Crim 2293.

*Godfrey v Lees* [1995] EMLR 307.

*Hollinrake v Truswell* (1894) 3 Ch 420.

*Ibcos v Barclays Mercantile Finance* [1994] FSR 275.

*Interfoto Picture Library Ltd v Stilleto Visual Programmes Ltd* [1989] QB 433.  
*Interlego AG v Tyco Industries* [1989] AC 217.

*John Richardson Computers v Flanders* [1993] FSR 497.

*Kabushiki Kaisha Sony Computer Entertainment Inc and Others v Ball and Others* [2004] All ER (D) 334 (Jul).

*L'Estrange v F Graucob Ltd* [1934] 2 KB 394.

*Macmillan v Cooper* (1924) 40 TLR 186.

*Muckenbeck & Marshall v Harold* [2005] All ER (D) 227 (April).

*Navitaire Inc v Easyjet Airline Co and Another* [2004] EWHC 1725 (Ch).

*Nova Productions Ltd v Mazooma Games Ltd & Ors* Rev 1 [2006] EWHC 24 (Ch).

*Office of Fair Trading v Abbey National plc* [2010] 1 AC 696.

*Office of Fair Trading v Ashbourne Management Services Ltd* [2011] All ER (D) 276 (May).

*Office of Fair Trading v Foxtons* [2009] EWHC 1681.

*Pamela Dallas Brighton & Dubbeljoint Co. Ltd v Marie Jones* [2005] FSR 16.

*Parker v South Eastern Railway* [1877] 2 CPD 416.

*Peabody Trust Governors v Reeve* [2008] EWHC 1432 (Ch).

*Printing and Numerical Registering Co v Sampson* (1875) LR 19 EQ.

*R v Higgs* [2008] EWCA Crim 1324.

*R v Mitchell* (2011) (unreported).

*Redwood Music v Chappell* [1982] RPC 109.

*RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG (UK Production)* [2010] UKSC 14.

*Salomon v A Salomon & Co Ltd* [1897] AC 22.

*SAS Institute Inc v World Programming Ltd* [2013] EWHC 69 (Ch).

*Sayre v Moore* (1785) 102 ER 139.

*Schroeder Music Publishing Co Ltd v Macaulay* (1975) 1 All ER 237.

*Sega Enterprises v Richards* [1983] FSR 73.

*Thrustcode v WW Computing* [1983] FSR 502.

*Tweddle v Atkinson* (1861) 121 All ER 762.

*University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601.

*Walter v Lane* [1900] AC 53.

*Warwick Films v Eisinger* [1969] 1 Ch 508.

*Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273.

### **Chinese Case Law:**

Second Medium Level People's Court on the case *Li Hongchen v Beijing Artic Ice Technology Development Co* (Case No. (2004) er-zhong-min-zong-zi No. 02877) available at: <<http://www.4oa.com/office/750/964/1734/1737/200511/79842.html>> retrieved 18 August 2014.

*Zhao v Shanda Networking*, cited in Sarah Xuan, 'Virtual Property in Greater China' MMLC Group – MMLC Murphy Wang <<http://www.hg.org/article.asp?id=5538>> accessed 14 August 2014.

### **European Case Law:**

Court of Amsterdam 2 April 2009, *IJN* no. BH9789, BH9790 BH9791.

*Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Hofstetter* (Case C-237/02) [2004] CMLR 13.

*Océano Grupo Editorial SA v Roció Murciano Quintero* (C-240/98) and *Salvat Editores SA v José M. Sánchez Alcón Prades* (C-241/98).

## US Case Law:

*Amaretto Ranch Breedables v Ozimals*, 3:10-cv-05696-CRB (N.D. Cal.) [2010].

*American Libraries Ass'n v Pataki*, 969 F. Supp. 160, 170 (S.D.N.Y. 1997).

*Association for Molecular Pathology v Myriad Genetics*, 569 U.S. 12-398 (2013).

*BlackSnow Interactive v Mythic Entertainment Inc*, No 02-00112 (C.D. Calif.) [2002].

*Blizzard Entertainment Inc v In Game Dollar LLC* (US Disc. Ct. Central District of California, Case No: 8:07-cv-00589-JVS-AN [2007].

*Bragg v Linden Research Inc.* (487 F.Supp 2d 593 E.D. Penn) [2007].

*Comb v Paypal* 218 F. Supp. 2d 1165 (N.D. Cal. 2002)

*Electronic Arts Inc v Zynga Inc*, U.S. District Court, Northern District of California, No. 12-04099 [2012].

*Eros, LLC, v John Doe*, US Dist. Ct. Middle District of Florida, Case No: 8:07-cv-1158-T-24TGW [2007].

*Eros, LLC, et al. v Thomas Simon*, US Dist. Ct. Southern District of New York, Case No: 1:07-cv-4777 [2007].

*Evans v Linden Research, Inc.* (E.D. Pa. Feb. 3, 2011).

*Evans et al v Linden Research Inc. et al* No. C 11-01078 DM, United States District Court, N.D. California (November 20 2012).

*Feist Publications v Rural Telephone Service Inc* 499 US 340 (1991).

*Groff v America Online, Inc.*, 1998 WL 307001 (1998).

*Hernandez v Internet Gaming Entertainment*, U.S. Dist. Ct. Southern District of Florida, Case No:07-CIV-21403-COHN/SELTZER [2007].

*Lewis Galoob Toys Inc v Nintendo of America Inc* (1991) 780 F. Supp. 1283.

*Lotus Development Corporation v Borland International, Inc.*, 516 U.S. 233 (1996).

*MDY Indus., LLC v Blizzard Entertainment, Inc.*, 2010 WL 5141269, 97 U.S.P.Q.2d (BNA) 1001 (9th Cir. Dec. 14, 2010).

*ProCD, Inc. v Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

## **Legislative Instruments:**

### **UK Legislation:**

Cable and Broadcasting Act 1984.

Computer Misuse Act 1990.

Contracts (Rights of Third Parties) Act 1999.

Copyright Act 1911.

Copyright Act 1956.

Copyright (Computer Software) Amendment Act 1985.

Copyright, Designs and Patents Act 1988.

Criminal Justice and Public Order Act 1994.

Data Protection Act 1998.

Digital Economy Act 2010.

Draft Consumer Rights Bill (BIS/13/925) 2013.

Enterprise and Regulatory Reform Act 2013.

International Copyright Act 1886.

Licensing Act 1662.

Offences Against the Person Act 1861.

Patents Act 1977.

Statute of Anne 1709.

Statute of Monopolies 1624.

Theft Act 1968.

Trademarks Act 1994.

Unfair Contract Terms Act 1977.

SI 1999/2083 Unfair Terms in Consumer Contracts Regulations 1999.

Video Recordings Act 1984.

Video Recordings (Review of Determinations) Order 1995.

### **European Legislation:**

Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts (1993 OJ L95/29).

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. (Brussels Regulation).

Directive 2009/24/EC on the Legal Protection of Computer Programs (23 April 2009).

Directive 2001/29/EC on Copyright in the Information Society (22 May 2001), OJ 2001 L167/10.

Directive (EC) 91/250 on the Legal Protection of Computer Programs [1992] OJ L122/9.  
Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

Directive 2011/77/EU of The European Parliament and of The Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights.

Regulation (EC) no 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I Regulation).

### **International Legislative Instruments:**

Australian Copyright Amendment Act 1984.

The Berne Convention for the Protection of Literary and Artistic Works, 1886.

Establishing Convention of the World Intellectual Property Organization 1967.

Paris Convention for the Protection of Industrial Property 1883.

Trade Related Aspects of Intellectual Property Agreement 1994.

UNESCO Universal Copyright Convention 1952.

USA Copyright Act 1976.

WIPO Model Provisions on the Protection of Computer Software 1978.



**European Commission Documents:**

‘Agreement on a Unified Patent Court,’ Official Journal of the European Union, 56: 2013/C175 (20 June 2013).

Commission, ‘Creative Content Online in the Single Market’ COM (2007) 836 (final).

Commission, ‘Final Report on the Content Online Platform’ (May 2009)  
<[http://ec.europa.eu/avpolicy/docs/other\\_actions/col\\_platform\\_report.pdf](http://ec.europa.eu/avpolicy/docs/other_actions/col_platform_report.pdf)> retrieved 17 October 2009.

Commission, ‘Green Paper on Copyright and Related Rights in the Information Society July 1995 COM (1995) 382 (final). [Not published in the Official Journal].

Commission, ‘Green Paper on Copyright and Challenge of Technology – Copyright Issues Requiring Immediate Action’ COM (1988) 172 (final).

Commission, ‘Green Paper on Copyright in the Knowledge Economy’ COM (2008) 466.

## **Command Papers and Official Publications:**

Gowers A, 'The Gowers Review of Intellectual Property: Independent Review' (December 2006) <[http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06\\_gowers\\_report\\_755.pdf](http://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf)> retrieved 17 October 2009.

Department for Business, Innovation and Skills (BIS) and the Department for Culture, Media and Sport (DCMS), 'Digital Britain Report' (June 2009) <<http://www.culture.gov.uk/images/publications/digitalbritain-finalreport-jun09.pdf>> retrieved 17 October 2009.

Department for Business, Innovation and Skills, 'Draft Consumer Rights Bill: Government Response to Consultations on Consumer Rights (BIS/13/916)' (June 2013) available online: <<https://www.gov.uk/government/publications/draft-consumer-rights-bill>> retrieved 1 July 2013.

Department for Business, Innovation and Skills, 'Enhancing Consumer Confidence by Clarifying Consumer Law: Consultation on the supply of goods, services and digital content' (July 2012) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31864/12-937-enhancing-consumer-consultation-supply-of-goods-services-digital.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31864/12-937-enhancing-consumer-consultation-supply-of-goods-services-digital.pdf)> retrieved 1 October 2012.

Department for Culture, Media and Sport (DCMS), 'Creative Industries Economic Estimates – Headline Findings' (9 December 2010) <[http://www.culture.gov.uk/images/research/CIEE\\_Headline-Findings\\_Dec2010.pdf](http://www.culture.gov.uk/images/research/CIEE_Headline-Findings_Dec2010.pdf)> retrieved 1 August 2011.

Department for Culture, Media and Sport, 'Skills Review of Video Game and Visual Effects Industries' (DCMS News) 1 February 2011 <[http://www.culture.gov.uk/news/news\\_stories/7754.aspx](http://www.culture.gov.uk/news/news_stories/7754.aspx)> retrieved 20 November 2012.

European Network and Information Security Agency (ENISA) Position Paper, 'Virtual Worlds, Real Money – Security and Privacy in Massively Multiplayer Online Games and Social and Corporate Virtual Worlds' (November 2008) <<http://www.enisa.europa.eu>> retrieved 1 August 2011.

Government White Paper, 'Intellectual Property and Innovation' (Cmnd 9117, 1986).

Hargreaves I, 'Digital Opportunity: A review of Intellectual Property and Growth' (2011) <<http://www.ipo.gov.uk/ipreview.htm>> retrieved 14 December 2012.

HC Deb 21 July 2014, col 854W.

HC Deb 24 July 1984, vol 64, cols 851-852.

HL Deb 10 May 1985, vol 463, cols 865.

The Intellectual Property Office, 'Hargreaves Implementation: Copyright'  
<<http://www.ipo.gov.uk/types/hargreaves/hargreaves-copyright.htm>> retrieved 12 July 2013.

HM Government, 'Modernising Copyright: Government Response to consultation on copyright exceptions and clarifying copyright law.' (IPO, December 2012)  
<<http://www.ipo.gov.uk/response-2011-copyright-final.pdf>> retrieved 20 January 2013.  
HM Government, 'The Government Response to the Hargreaves Review of Intellectual Property and Growth' (August 2011 <<http://www.ipo.gov.uk/ipresponse-full.pdf>> retrieved 1 October 2012.

The Intellectual Property Office, 'Copyright in Europe: Call for Views' (July 2013)  
<<http://www.ipo.gov.uk/consult-2013-copyright-europe.pdf>> retrieved 20 July 2013.

Intellectual Property Office, 'New Exception for Parody; New Exception for Private Copying; New Exception for Quotation' 7 June 2013  
<<http://www.ipo.gov.uk/types/hargreaves/hargreaves-copyright/hargreaves-copyright-techreview.htm>> retrieved 7 June 2013.

Livingstone I and Hope A (*NESTA*), 'Next Gen: Transforming the UK into the world's leading talent hub for the video games and creative effects industries' February 2011  
<[http://www.nesta.org.uk/home1/assets/features/next\\_gen](http://www.nesta.org.uk/home1/assets/features/next_gen)> retrieved 20 November 2012' (February 2011) retrieved 20 November 2012.

National Institute on Economic and Social Research (NIESR), 'Digital Economy 40% bigger than official statistics suggest' 22 July 2013 <<http://niesr.ac.uk/press/digital-economy-40-cent-bigger-official-statistics-suggest-11498#.UfEGiqNjum4>> retrieved 23 July 2013.

Whitford Committee, 'Copyright and Designs Law' HC (1977).

## Reports:

Bartle R A, 'Pitfalls of Virtual Property' (April 2004) <<http://www.themis-group.com/uploads/Pitfalls%20of%20Virtual%20Property.pdf>> retrieved 18 March 2010.

Belgrove C, 'Whose licence is it anyway? A study of end-user licence agreements for computer software - National Consumer Council unfair contract terms survey and findings' (National Consumer Council 2008).

Bradgate R, 'Consumer Rights in Digital Products' (September 2010) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31837/10-1125-consumer-rights-in-digital-products.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31837/10-1125-consumer-rights-in-digital-products.pdf)> retrieved 12 June 2011.

Byron T, 'Safer Children in a Digital World' (2008) available online: <<http://webarchive.nationalarchives.gov.uk/20100202100434/http://publications.dcsf.gov.uk/eorderingdownload/dcsf-00334-2008.pdf>> retrieved 8 August 2014.

Camerani R and Others, 'Private Copying' IPO (2013) <<http://www.ipo.gov.uk/ipresearch-private-150313.pdf>> retrieved 30 March 2013.

Davies W and Withers K, 'Public Innovation: Intellectual Property in A Digital Age' (IPPR Study 2006) <<http://www.ippr.org.uk/publicationsandreports/publication.asp?id=495>> retrieved 19 December 2009.

End Software Patents, 'The Current State of Software and Business Method Patents' (28 February 2008) <<http://endsoftpatents.org/2008-state-of-softpatents>> retrieved 27 January 2010.

Hargreaves I and Hugenholtz P, 'Copyright Reform for Jobs and Growth: Modernising the European Copyright Framework' The Lisbon Council, May 2013 <<http://www.lisboncouncil.net/publication/publication/95-copyright-reform-for-growth-and-jobs-modernising-the-european-copyright-framework.html>> retrieved 1 June 2013.

Heeks R, 'Current Analysis and Future Research Agenda on 'Gold Farming:' *Real World Production in Developing Countries for the Virtual Economies of Online Games*' Paper 32 (2008) <[http://www.sed.manchester.ac.uk/idpm/research/publications/wp/di/documents/di\\_wp32.pdf](http://www.sed.manchester.ac.uk/idpm/research/publications/wp/di/documents/di_wp32.pdf)> retrieved 16 February 2013.

Hooper R and Lynch R, 'Copyright works – Streamlining copyright licensing for the digital age' IPO (July 2012) <<http://www.ipo.gov.uk/dce-report-phase2.pdf>> retrieved 12 August 2012.

ICANN and the Uniform Domain Name Dispute Resolution Policy <<http://www.icann.org/en/help/dndr/udrp>> retrieved 18 February 2013.

Kisielowska-Lipman M, 'Ups and down(load)s: Consumer Experiences of Buying Digital Goods and Services Online' Consumer Focus, December 2010.

Mintel, 'Massively Multiplayer Online Games (MMOG) and Mobile Video Games' (Leisure Intelligence, Mintel International Group Limited November 2005).

Mintel, 'Online Gaming and Casinos' (Leisure Intelligence, Mintel International Group Limited, 2006).

Mintel, 'Video, Computer and Internet Games' (Leisure Intelligence, Mintel International Group Limited September 2004).

Institute of Information Law, University of Amsterdam, 'The Recasting of Copyright and Related Rights for the Knowledge Economy' (November 2006)  
<[http://ec.europa.eu/internal\\_market/copyright/docs/studies/etd2005imd195recent\\_report\\_2006.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recent_report_2006.pdf)> retrieved 19 December 2009.

Ofcom 'Consumers spend almost half of their waking hours using media and communications' (2010) <<http://media.ofcom.org.uk/2010/08/19/consumers-spend-almost-half-of-their-waking-hours-using-media-and-communications/>> retrieved 17 February 2013.

Office of Fair Trading, 'Unfair Terms in Consumer Contracts'  
<<http://www.oft.gov.uk/about-the-oft/legal-powers/legal/unfair-terms/#.UcXCkDSW-So>> retrieved 22 November 2012.

Renaud C and Kane S F, 'Virtual World Industry Outlook 2008-2009' (Technology Intelligence Group, 25 August 2008)  
<[http://blog.techintelgroup.com/files/virtual\\_world\\_outlook\\_20082009.pdf](http://blog.techintelgroup.com/files/virtual_world_outlook_20082009.pdf)> retrieved 20 April 2010.

SABIP, 'The Relationship between Copyright and Contract Law' (July 2010)  
<<http://www.sabip.org.uk>> retrieved 12 September 2010.

UKIE, 'UKIE comments on Hargreaves Review into Intellectual Property' (18 May 2011) available online: <<http://ukie.org.uk/content/ukie-comments-hargreaves-review-intellectual-property>> retrieved 8 August 2014.

Report of the Working Group on Internet Governance (WGIG), (Chateau de Bossey, June 2005) [10] <<http://www.wgig.org/docs/WGIGREPORT.pdf>> retrieved 12 June 2013.

WIPO, 'Rights, Camera, Action! IP Rights and the Film-Making Process' (Creative Industries Booklet No. 2)  
<[http://www.wipo.int/export/sites/www/freepublications/en/copyright/869/wipo\\_pub\\_869.pdf](http://www.wipo.int/export/sites/www/freepublications/en/copyright/869/wipo_pub_869.pdf)> retrieved 12 June 2013.

## Internet Articles and Blogs:

ACID Lobby, 'Submission to the Hargreaves Review March 2011' (March 2011) available online: <<http://www.ipo.gov.uk/ipreview-c4e-sub-acid.pdf>> retrieved 8 August 2014.

Amazon, 'Introducing Amazon Coins: A New Virtual Currency for Kindle Fire' (5 February 2013) <<http://www.amazonappstoredev.com/2013/02/introducing-amazon-coins.html>> retrieved 16 February 2013.

An W J, 'The *Second Life* of Judge Richard A Posner' (*New World Notes*, 11 December 2006) <[http://nwn.blogs.com/nwn/2006/12/the\\_second\\_life.html](http://nwn.blogs.com/nwn/2006/12/the_second_life.html)> retrieved 29 November 2010.

Anderson S, '“Instagram Act” could see social media users lose control of their photos' *The Telegraph* (London 30 April 2013) <<http://www.telegraph.co.uk/technology/social-media/10028168/Instagram-Act-could-see-social-media-users-lose-ownership-of-their-own-photos.html>> retrieved 1 June 2013.

Anshe Chung Studios, 'Anshe Chung Becomes First Virtual World Millionaire' (*ACS Press Release*, 26 November 2006), available online at: <[http://www.anshechung.com/include/press/press\\_release251106.html](http://www.anshechung.com/include/press/press_release251106.html)> retrieved 29 August 2011.

Barracough E, 'Virtual Worlds – the New Frontier in IP Protection' (*Managing Intellectual Property*, 18 May 2009) <<http://www.managingip.com/Article.aspx?ArticleID=2205066>> retrieved 26 November 2009.

Barlow J P, 'Declaration of the Independence of Cyberspace' EFF (8 February 1996) available online: <<https://projects.eff.org/~barlow/Declaration-Final.html>> retrieved 17 February 2013.

Bartle R and M Davies, 'Gamers don't want any more grief' *The Guardian* (London, 15 June 2006) <<http://www.guardian.co.uk/technology/2006/jun/15/games.guardianweeklytechnologysession2>> retrieved 15 February 2013.

BBC News, 'Chinese Gamer Sentenced to Life' (8 June 2005) <<http://news.bbc.co.uk/1/hi/4072704.stm>> retrieved 19 November 2009.

BBC News, 'Eve players stage giant online space battle' 29 July 2013 <<http://www.bbc.co.uk/news/technology-23489293>> retrieved 29 July 2013.

BBC News, '“Game theft” led to fatal attack' (31 March 2005) <<http://news.bbc.co.uk/1/hi/technology/4397159.stm>> retrieved 8 August 2011.

BBC News, 'Leveson: Internet needs new privacy laws' (7 December 2012) <<http://www.bbc.co.uk/news/uk-20636697>> retrieved 17 February 2013.

BBC News, 'Twitter tightens security after recent hacking spate' (23 May 2013)  
 <<http://www.bbc.co.uk/news/technology-22634176>> retrieved 12 June 2013.

Bloomfield R, 'Property Rights in Virtual Worlds' (TerraNova, 15 June 2007) available online:  
 <[http://terranova.blogs.com/terra\\_nova/2007/06/property\\_rights.html](http://terranova.blogs.com/terra_nova/2007/06/property_rights.html)> retrieved 20 August 2013.

Blizzard Entertainment, 'World of Warcraft subscriber base reaches 12 million worldwide' (Blizzard Entertainment Press Release, 7 October 2010) <<http://us.blizzard.com/en-us/company/press/pressreleases.html?101007>> retrieved 9 March 2011.

Booth Simpson Z, 'The In-Game Economics of *Ultima Online*' (1999) <<http://www.mine-control.com/zack/uocon/uocon.html>> retrieved 15 February 2013.

Bradbury D, 'Are Virtual Reality Games the New Wild West, and if so, Who Will Police Them?' (*Backbone Magazine*)  
 <[http://www.backbonemag.com/Magazine/E\\_Law\\_10270601.asp](http://www.backbonemag.com/Magazine/E_Law_10270601.asp)> retrieved 11 May 2010.

Bramwell T, 'World of Warcraft Players Banned for Selling Gold' (14 March 2005)  
 <<http://www.gamesindustry.biz/articles/world-of-warcraft-players-banned-for-selling-gold>> retrieved 19 November 2009.

Brewster T, 'ITPro, 'British Hacker jailed for two years' (21 March 2011)  
 <<http://www.itpro.co.uk/632056/british-zynga-hacker-jailed-for-two-years>> retrieved 26 May 2011.

Burbridge R, 'Protecting Creativity: new small claims track for IP cases' *The Guardian* (London, 2 October 2012 <<http://www.guardian.co.uk/law/2012/oct/02/intellectual-property-patent-claims-court>> retrieved 23 June 2013.

Challis B, 'No UK "Three Strikes" until 2017, perhaps never?' (*1709 Blog*, 1 June 2013)  
 <<http://the1709blog.blogspot.co.uk/2013/06/no-uk-three-strikes-until-2017-perhaps.html>> retrieved 2 June 2013.

China View, 'Online Game Company Taken Back to Court for Virtual Theft' (11 February 2004)  
 <[http://news.xinhuanet.com/english/2004-02/11/content\\_1310083.htm](http://news.xinhuanet.com/english/2004-02/11/content_1310083.htm)> retrieved 4 January 2010.

Craig K, 'Second Life Land Deal Goes Sour' (*Wired News*, 18 May 2006)  
 <<http://www.wired.com/gaming/virtualworlds/news/2006/05/70909>> retrieved 19 November 2009.

Conlon T, 'Game kidnapped at gunpoint for password' (*Switched*, 24 July 2007)  
 <<http://www.switched.com/2007/07/24/gamer-kidnapped-at-gunpoint-for-password/>> retrieved 15 February 2013.

Cringley R X, 'Get a Life (Which One?): A Real Battle is Brewing in the World of EverQuest' (14 November 2002)  
 <[http://www.pbs.org/cringley/pulpit/2002/pulpit\\_20021114\\_000752.html](http://www.pbs.org/cringley/pulpit/2002/pulpit_20021114_000752.html)> retrieved 20 November 2009.

Dannenberg R, 'New Case: Eros v Linden Research' (16 September 2009)  
 <<http://www.patentarcade.com/2009/09/new-case-eros-v-linden-research.html>> retrieved 11 May 2010.

Davis R, 'Welcome to the new gold mines' *The Guardian* (London, 5 March 2009)  
 <<http://www.guardian.co.uk/technology/2009/mar/05/virtual-world-china>> retrieved 16 February 2013.

Davis W, 'Courtroom Sketch Artist Sues Getty Images for Copyright Violations' (*MediaPost*, 21 June 2013)  
 <<http://www.mediapost.com/publications/article/203059/gettycopyright.html#axzz2ZOMK0Gkb>> retrieved 22 June 2013.

Dibbell J, 'Serfing the Web: Blacksnow Interactive and the World's First Virtual Sweatshop' (*Wired Magazine*, January 2003) <<http://www.juliandibbell.com/texts/blacksnow.html>> retrieved 29 July 2010

Dibbell J, 'The Unreal Estate Boom' (*Wired News*, January 2003)  
 <<http://www.wired.com/wired/archive/11.01/gaming/html>> retrieved 6 May 2010

Duranske B, 'Hernandez v IGE Settles' (*Virtually Blind*, 27 August 2008)  
 <<http://virtuallyblind.com/category/active-lawsuits/hernandez-v-ige/>> retrieved 16 February 2013.

Duranske B, 'Second Life Hairstyle Raises Copyright Question' (*Virtually Blind*, 15 February 2007) <<http://virtuallyblind.com/2007/02/15/second-life-hairstyle-copyright-question/>> retrieved 11 May 2010.

Duranske B, 'Six Major Second Life Content Creators Sue Alleged Copyright Infringer in New York Federal District Court' (*Virtually Blind*, 27 October 2007)  
 <<http://virtuallyblind.com/2007/10/27/content-creators-sue-rase-kenzo/>> retrieved 16 March 2010.

Duranske B, 'The 3D Internet Will Change How We Live' (17 July 2008)  
 <[http://www.telepresenceoptions.com/2008/07/the\\_3d\\_internet\\_will\\_change\\_ho/](http://www.telepresenceoptions.com/2008/07/the_3d_internet_will_change_ho/)> retrieved 9 March 2010.

Duranske B T, "'Virtual Rape' Claims Bring Belgian Police to Second Life' (*Virtually Blind*, 24 April 2007) <<http://virtuallyblind.com/2007/04/24/open-roundtable-allegations-of-virtual-rape-bring-belgian-police-to-second-life/>> retrieved 20 July 2012.

DWT, 'MMORPG worm a threat to virtual swag bag' (*Privacy & Security Law Blog*, 24 August 2005) <<http://www.privsecblog.com/archives/identity-theft-60-mmorpg-worm-a-threat-to-virtual-swag.html>> retrieved 16 February 2013.

The Economist, 'Getting Serious: Virtual Worlds are Being Put to Serious Real-World Uses – and Are Starting to Encounter Some Real-World Problems' (*The Economist*, 6 December 2007)  
 <[http://www.economist.com/science-technology/technology-quarterly/displaystory.cfm?story\\_id=10202591&sa\\_campaign=blog\\_referral/guardian/virtual/standage&source=login\\_payBarrier](http://www.economist.com/science-technology/technology-quarterly/displaystory.cfm?story_id=10202591&sa_campaign=blog_referral/guardian/virtual/standage&source=login_payBarrier)> retrieved 18 March 2010.



The Economist, 'Living A Second Life' (*The Economist*, 28 September 2006)  
 <[http://www.economist.com/business-finance/displaystory.cfm?story\\_id=E1\\_SJGPVPR](http://www.economist.com/business-finance/displaystory.cfm?story_id=E1_SJGPVPR)>  
 retrieved 18 March 2010.

The Economist, 'Online Gaming's NetScape Moment' (*The Economist*, 7 June 2007)  
 <[http://www.economist.com/printedition/displayStory.cfm?story\\_id=9249157](http://www.economist.com/printedition/displayStory.cfm?story_id=9249157)> retrieved  
 18 March 2010.

The Economist, 'The End Is Virtually Nigh' (*The Economist*, 8 December 2005)  
 <[http://www.economist.com/search/displaystory.cfm?story\\_id=E1\\_VNQQTNJ](http://www.economist.com/search/displaystory.cfm?story_id=E1_VNQQTNJ)>  
 retrieved 18 March 2010.

The Economist, 'Why video games are so expensive to develop' (*The Economist*, 24 September  
 2014) available online: <<http://www.economist.com/blogs/economist-explains/2014/09/economist-explains-15>> retrieved 24 September 2014.

Edwards R, 'Woman divorces husband for having 'virtual affair' on Second Life' *The Telegraph*  
 (14 November 2008) <<http://www.telegraph.co.uk/technology/3453273/Woman-divorces-husband-for-having-a-virtual-affair-on-Second-Life.html>> retrieved 12 December 2010.

Eisen A, 'Feminist Frequency Kickstarter Successful Despite Internet Ashaats' (12 June 2012)  
 <<http://www.gamepolitics.com/2012/06/12/feminist-frequency-kickstarter-successful-despite-Internet-asshats>> retrieved 20 June 2012.

EPO News, 'Plea For A Truly Global Patent System' (2 March 2010)  
 <<http://www.epo.org/topics/news/2010/20100302a.html>> retrieved 2 March 2010.

ERA, 'The Sting in the Tail of the Hargreaves Review' (19 May 2011) available online:  
 <<http://www.eraltd.org/news/era-blog/blog/2011/may/the-sting-in-the-tail-of-the-hargreaves-review.aspx>> retrieved 8 August 2014.

Fairfield J, 'Third Party Beneficiaries and Other Fantastical Beasts in Virtual Worlds'  
 (*TerraNova*, 14 April 2009) retrieved 16 February 2013.

Fitch C, 'Cyberspace in the 21<sup>st</sup> Century: Part One, Mapping the Future of Multiplayer Games'  
 (*GamaSutra* 20 January 2000)  
 <[http://www.gamasutra.com/view/feature/3421/cyberspace\\_in\\_the\\_21st\\_century\\_.php](http://www.gamasutra.com/view/feature/3421/cyberspace_in_the_21st_century_.php)>  
 retrieved 11 June 2012.

GameGirlAdvance, 'Stripping the "Dark" from "Dark Elf" in EQ' (21 October 2002)  
 <[http://www.gamegirladvance.com/mmog/archives/2002/10/21/stripping\\_the\\_dark\\_from\\_dark\\_elf\\_in\\_eq.html](http://www.gamegirladvance.com/mmog/archives/2002/10/21/stripping_the_dark_from_dark_elf_in_eq.html)> retrieved 4 January 2010.

Gerhard M, 'Anti-Gold farming measures' *RuneScape News* available online:  
 <<http://services.runescape.com/m=news/anti-gold-farming-measures>> retrieved 18  
 February 2013.

Gerhard M, 'Bot-busting Update: Legal Proceedings' *RuneScape News* available online:  
 <<http://services.runescape.com/m=news/bot-busting-update-legal-proceedings>> retrieved  
 17 February 2013.

- Granick J, 'Second Life Will Save Copyright' (*Wired Magazine*, 20 November 2006)  
<<http://wired.com/gaming/virtualworlds/commentary/circuitcourt/2006/11/72143>>  
retrieved 26 November 2009.
- Goss P, 'Xbox One pre-orders will come bundled with FIFA 14' (TechRadar 20 August 2013)  
available online: <<http://www.techradar.com/news/gaming/consoles/xbox-one-pre-orders-will-come-bundled-with-fifa-14-1174288>> retrieved 21 August 2013.
- Gudamuz A, 'Avatars Behaving Badly' (*TechnoLlama Blog*, 3 June 2009)  
<<http://www.technollama.co.uk/avatars-behaving-badly>> retrieved 5 July 2010.
- Gudamuz A, 'Blurring the Real and Virtual Boundaries' (*TechnoLlama Blog*, 26 March 2009)  
<<http://www.technollama.co.uk/blurring-the-real-and-virtual-boundaries>> retrieved 6 July 2010.
- Gudamuz A, 'State of Play VI' (*TechnoLlama Blog*, 23 June 2009)  
<<http://www.technollama.co.uk/state-of-play-vi>> retrieved 5 July 2010.
- Gudamuz A, 'User Generated Gaming' (TechnoLlama Blog, 21 April 2010)  
<<http://www.technollama.co.uk/user-generated-gaming>> retrieved 5 July 2010.
- Hickman L, 'Bruce Willis v Apple: who actually 'owns' the music on an iPod?' (The Guardian, 3 September 2012) available online: <<http://www.theguardian.com/technology/shortcuts/2012/spe/03/bruce-willis-v-apple-owns-music-ipod>>  
retrieved 4 September 2012.
- Hauben J, 'Further thoughts about netizens' (1 June 2010)  
<[http://http://www.columbia.edu/~hauben/CMC/netizen\\_thoughts.html](http://http://www.columbia.edu/~hauben/CMC/netizen_thoughts.html)> retrieved 25 June 2012.
- O'Hear S, 'Second Life IP Rights; here today, gone tomorrow' (3 February 2007)  
<<http://blogs.zdnet.com/social/?p=83>> retrieved 26 November 2009.
- Hof R, 'Second Life's First Millionaire' (*Bloomberg Business Week*, 26 November 2006)  
<[http://www.businessweek.com/the\\_thread/techbeat/archives/2006/11/second\\_lifes\\_fi.html](http://www.businessweek.com/the_thread/techbeat/archives/2006/11/second_lifes_fi.html)> retrieved 16 March 2010.
- Hoffman E, 'We The Gamers' (The Escapist, 7 October 2008) available online:  
<<http://blog.practicaethics.ox.ac.uk/2008/10/protectionist-deities-vs-the-economy-of-fun-ownership-of-virtual-possession/>> retrieved 20 August 2013.
- Huffpost Tech, 'Amazon Autorip UK Launch: Free Digital Copies of Every CD Bought since 1999' (Huffington Post, 26 June 2013)  
<[http://www.huffingtonpost.co.uk/2013/06/27/amazon-autorip-uk-launch\\_n\\_3508044.html](http://www.huffingtonpost.co.uk/2013/06/27/amazon-autorip-uk-launch_n_3508044.html)> retrieved 1 July 2013.
- Indvik L, 'The Fascinating History of Online Role Playing Games' (*Mashable*, 14 November 2012) <<http://mashable.com/2012/11/14/mmorpgs-history/>> retrieved 12 December 2012.

Intellectual Property Office, 'The Enterprise and Regulatory Reform Act 2013 – Your Photos and You' (May 2013) <<http://www.ipo.gov.uk/hargreaves-orphanmyth.pdf>> retrieved 10 June 2013.

Intellectual Property Office, 'The History of Copyright' <<http://www.ipo.gov.uk/types/copy/c-about/c-history.htm>> retrieved 23 June 2013.

Internet & Jurisdiction, *Synthesis II* (December 2012)  
<<http://www.Internetjurisdiction.net/wp-content/uploads/2012/12/Internet-Jurisdiction-Synthesis-II-December-2012.pdf>> retrieved 21 January 2013.

The Internet Society, 'A Brief History of the Internet' available online:  
<<http://www.internetsociety.org/internet/what-internet/history-internet/brief-history-internet-related-networks>> retrieved 23 June 2013.

Irvine D, 'Virtual Worlds, Real Money' (*CNN*, 12 March 2007)  
<<http://Internetgames.about.com/cs/gamingnews/a/gameassets.htm>> retrieved 17 February 2013.

Jimenez C, 'The High Cost of Playing Warcraft' (*BBC News*, 24 September 2007)  
<<http://news.bbc.co.uk/1/hi/technology/7007026.stm>> retrieved 11 May 2010.

Johnson B, 'Virtual Theft on the Rise' *The Guardian*, (London, 20 November 2008)  
<<http://www.guardian.co.uk/technology/2008/nov/20/theft-in-virtual-worlds>> retrieved 31 September 2011.

Johnson S, 'Brave New World' (*Discover Magazine*, 2 April 2006)  
<<http://www.discovermagazine.com/2006/apr/well-intro>> retrieved 24 June 2010.

Kaelin M, 'Playing a MMORPG is not all fun and games, you better have the right vocabulary' (*TechRepublic*, 3 May 2006) <<http://www.techrepublic.com/article/playing-a-mmorpg-is-not-all-fun-and-games-you-better-have-the-right-vocabulary/>> retrieved 12 June 2012.

Kirby C, 'Avatars, Attorneys In New World of Virtual Law' (27 April 2009)  
<[http://articles.sfgate.com/2009-04-27/business/17194388\\_1\\_second-life-virtual-worlds-san-francisco-s-linden-lab](http://articles.sfgate.com/2009-04-27/business/17194388_1_second-life-virtual-worlds-san-francisco-s-linden-lab)> retrieved 7 March 2010.

Kirby T and Forster J, 'Video link to Bulger murder disputed' (*The Independent*, 26 November 1993) available online: <<http://www.independent.co.uk/news/video-link-to-bulger-murder-disputed-1506766.html>> retrieved 8 August 2014.

Knight W, 'Computer Characters Mugged in Virtual Crime Spree' (*New Scientist*, 18 August 2005) <<http://www.newscientist.com/article/dn7865>> retrieved 11 July 2010.

Knowledge Wharton, 'In Norrath, Tattoine and Rubi-ka, Just What are Your Legal Rights?' (24 September 2003) <<http://knowledge.wharton.upenn.edu/article.cfm?articleid=856>> retrieved 11 May 2010.

Knowledge Wharton, 'The New Economy: Earning Real Money in the Virtual World' (2 November 2005) <<http://knowledge.wharton.upenn.edu/article.cfm?articleid=1302>> retrieved 11 May 2010.

Kolz A, 'Virtual IP Rights Rock Online Gaming World' (*The American Lawyer*, 12 June 2004)  
<<http://www.law.com/jsp/article.jsp?id=1101738506769>> retrieved 27 November 2009.

Koster R, Declaration of the Rights of Avatars' (27 August 2000)  
<<http://www.raphkoster.com/gaming/playerrights.shtml>> retrieved 13 May 2010.

Krotoski A, '\$26 500 paid for property that doesn't exist' (*Guardian Unlimited Games Blog*) 15 December 2004, available online:  
<[http://blogs.guardian.co.uk/games/archives/virtual\\_worlds/2004/12/26500\\_paid\\_for\\_property\\_that\\_doesnt\\_exist.html](http://blogs.guardian.co.uk/games/archives/virtual_worlds/2004/12/26500_paid_for_property_that_doesnt_exist.html)> retrieved 19 November 2009.

Krotoski A, 'Chinese gamer gets suspended death sentence for stabbing a player who stole his virtual sword' *The Guardian* (London, 9 June 2005) available online:  
<<http://www.guardian.co.uk/technology/gamesblog/2005/jun/09/chinesegamers>> retrieved 19 November 2009.

Krotoski A, 'Real Profits from Play Money' *The Guardian* (London, 15 April 2004)  
<<http://www.guardian.co.uk/technology/2004/apr/15/media.newmedia>> retrieved 4 January 2010.

Lastowka G, 'MDY v Blizzard Opinion' (*TerraNova*, 29 December 2010)  
<[http://terranova.blogs.com/terra\\_nova/2010/12/legal-commentators-in-the-blogsphere-eg-nic-suzor-technollama-rebecca-tushnet-venkat-eric-have-already-offered-some.html](http://terranova.blogs.com/terra_nova/2010/12/legal-commentators-in-the-blogsphere-eg-nic-suzor-technollama-rebecca-tushnet-venkat-eric-have-already-offered-some.html)> retrieved 16 February 2013.

Leahy R, 'The Magical Illusion of Property Ownership' (Dodd Scientifics, 13 August 2014) available online: <<http://www.doddscientifics.com/?page=story&id=41>> retrieved 14 August 2014.

Lewis H, 'This is what online harassment looks like' (*The New Statesman*, 6 July 2012) available online: <<http://www.newstatesman.com/blogs/internet/2012/07/what-online-harassment-looks>> retrieved 6 July 2012.

Loftus T, 'Virtual Worlds Wind Up in Real World's Courts' (*MSNBC News*, 7 February 2005)  
<[http://www.msnbc.msn.com/id/6870901/ns/technology\\_and\\_science\\_games/](http://www.msnbc.msn.com/id/6870901/ns/technology_and_science_games/)> retrieved 18 March 2010.

Lovell N, 'What is a social game?' (*GamesBrief*, 11 January 2011)  
<<http://www.gamesbrief.com/2011/01/what-is-a-social-game/>> retrieved 11 June 2012.

Lyman J, 'Gamer Wins Lawsuit in Chinese Court Over Stolen Virtual Winnings' (*TechNewsWorld*, 12 September 2003) <<http://www.technewsworld.com/story/32441.html>> retrieved 4 January 2010.

Lichtarowicz A, 'Virtual Kingdom Richer than Bulgaria' (*BBC Science*, 29 March 2002)  
<<http://news.bbc.co.uk/1/hi/sci/tech/1899420.stm>> retrieved 4 January 2010.

Light J, 'Play money is real money says High Court' (*CNN Money*, 22 January 2010) <<http://moremoney.blogs.money.cnn.com/2010/01/22/play-money-is-real-money-says-high-court/>> retrieved 16 February 2013.

MacKenzie J, 'Control and Exploitation of Copyright Material Online' (August 2008) <<http://www.out-law.com/page-334>> retrieved 4 January 2010.

Mack C, 'IRS Getting Closer to a Virtual Goods tax' (*Inside Social Games*, 20 January 2009) <<http://www.insidesocialgames.com/2009/01/20/irs-getting-closer-to-a-virtual-goods-tax/>> retrieved 16 February 2013.

Masnick M, 'Craigslist griever ordered to pay up over both copyright and privacy violations' (*Techdirt*, 20 April 2009) <<http://www.techdirt.com/articles/20090418/1728344551.shtml>> retrieved 15 February 2013.

Masnick M, 'Second Life dragged into legal dispute over copyright of virtual horses and virtual bunnies' (*Techdirt News*, 6 January 2011) <<http://www.techdirt.com/articles/20110103/12254512499/second-life-dragged-into-legal-dispute-over-copyright-virtual-horses-virtual-bunnies.shtml>> retrieved 23 June 2013.

Mayner J, 'What does UK IP Reform mean for the games industry?' 31 December 2011, available online: <<http://www.gamerlaw.co.uk/2011/12/what-does-uk-ip-reform-mean-for-games.html>> retrieved 11 January 2012.

McCullagh D, 'Instagram says it now has the right to sell your photos' (*CNETNews*, 18 December 2012) <[http://news.cnet.com/8301-13578\\_3-57559710-38/instagram-says-it-now-has-the-right-to-sell-your-photos/](http://news.cnet.com/8301-13578_3-57559710-38/instagram-says-it-now-has-the-right-to-sell-your-photos/)> retrieved 22 June 2013.

Miller N, 'Virtual world: tax man cometh' (*The Age*, 31 October 2006) <<http://www.theage.com.au/news/biztech/virtual-world-tax-man-cometh/2006/10/30/1162056925483.html>> retrieved 16 February 2013.

Morris S, 'British hacker jailed over £7m virtual gaming chips scam' *The Guardian* (London, 18 March 2011) <<http://www.guardian.co.uk/technology/2011/mar/18/hacker-jailed-gaming-chips-scam>> retrieved 20 March 2011.

Musgrove M, 'Virtual Games Create a Real World Market' *Washington Post* (Washington, 17 September 2005) <<http://www.washingtonpost.com/wp-dyn/content/article/2005/09/16/AR2005091602083.html>> retrieved 11 May 2010.

Newitz A, 'Dangerous Terms: A User's Guide to EULAs' (EFF, February 2005) <<http://www.eff.org/wp/dangerous-terms-users-guide-eulas>> retrieved 11 July 2010.

Nintendo, 'Modchips' <<http://www.nintendo.co.uk/Legal/Nintendo-s-Anti-Piracy-Programme/Hardware-Piracy/Mod-Chips/Mod-Chips-732253.html>> retrieved 10 July 2013.

Nino T, 'Evans et al vs Linden Lab: The new lawsuit on the block' *Massively by Joystiq* (21 April 2010) available online: <<http://massively.joystiq.com/2010/04/21/evans-et-al-vs-linden-lab-the-new-lawsuit-on-the-block/>> retrieved 1 May 2010.

OUT-LAW News, 'European Commission Asks for New IP Protection Layer' (25 October 2007) <<http://www.out-law.com/page-8578>> retrieved 4 December 2009.

OUT-LAW News, 'EU finally ratifies copyright treaty as new IP enforcement unit meets' (14 December 2009) <<http://www.out-law.com/page-10598>> retrieved 15 January 2010.

OUT-LAW News, 'EU Must Break Down National Copyright Barriers says Commissioner' (6 May 2010) <<http://www.out-law.com/page-10996>> retrieved 6 May 2010.

OUT-LAW News, 'Lisbon Treaty Could Strengthen EU Powers in IP and Data Protection' (1 December 2009) <<http://www.out-law.com/page-10567>> retrieved 4 December 2009.

OUT-LAW News, 'Nobody Reads Terms and Conditions: Its Official' (19 April 2010) <<http://www.out-law.com/page-10929>> retrieved 20 April 2010.

OUT-LAW News, '*Second Life* gets its first copyright lawsuit' (17 July 2007) <<http://www.out-law.com/page-8297>> retrieved 25 June 2012.

OUT-LAW News, 'YouTube Threatened by Changes to the Digital Economy Bill' (4 March 2010) <<http://www.out-law.com/page-10810>> retrieved 4 March 2010.

Oxford Dictionaries, 'Definition of Netizen in English' <<http://oxforddictionaries.com/definition/english/netizen>> retrieved 14 May 2013.

Oxford Dictionaries, 'Definition of Social Media in English' <<http://oxforddictionaries.com/definition/english/social-media>> retrieved 14 May 2013.

Phillips J, 'Moral rights: no grey areas' (The IPKat, 23 March 2010) available online: <<http://ipkitten.blogspot.co.uk/2010/03/moral-rights-no-grey-areas.html>> retrieved 17 February 2013.

Paul R, 'Korea Considers Gold Farming Regulation' (*Ars Technica*, 27 December 2006) <<http://arstechnica.com/business/news/2006/12/8503.ars>> retrieved 11 July 2010.

Purewal J, 'Blizzard, Valve and the future of virtual goods,' 14 August 2011, available online at: <<http://www.gamerlaw.co.uk/2011/08/blizzard-valve-and-future-of-virtual.html>> retrieved 15 August 2011.

Purewal J, 'Should virtual theft be treated like real world theft? A UK MP says yes.' (Gamer Law, 24 July 2014) available online: <[http://www.gamerlaw.co.uk/2014/should-virtual-theft-be-treated-like-real-world-theft-a-uk-mp-says-yes/?utm\\_source=Gamer%2FLaw+Newsletter&utm\\_medium=email&utm\\_campaign=f32322ec74-G%2FL+RSS+email+updates&utm\\_term=0\\_b6f5e3944e-f32322ec74-410247293](http://www.gamerlaw.co.uk/2014/should-virtual-theft-be-treated-like-real-world-theft-a-uk-mp-says-yes/?utm_source=Gamer%2FLaw+Newsletter&utm_medium=email&utm_campaign=f32322ec74-G%2FL+RSS+email+updates&utm_term=0_b6f5e3944e-f32322ec74-410247293)> retrieved 29 July 2014.

Purewal J, 'The second virtual goods crime: is Runescape theft, theft?' (Gamer Law, 4 July 2011) Available online: <<http://www.gamerlaw.co.uk/2011/the-second-virtual-goods-crime-is-runescape-theft-theft/>> retrieved 10 July 2011.

Purewal J, 'Virtual Goods, Real Rights' 19 August 2011, available online at:  
 <<http://www.gamerlaw.co.uk/2011/08/virtual-goods-real-rights>> retrieved 21 August 2011.

Reynolds R, 'Hands off my Avatar! Issues with claims of property and identity'  
 <<http://www.ren-reynolds.com/downloads/HandsOffMYavatar.htm>> retrieved 14 October 2010.

Reynolds R, 'Intellectual Property Rights in Community Based Video Games'  
 <[http://www.renreynolds.co/downloads/RReynolds\\_MMORPG\\_IPR.htm](http://www.renreynolds.co/downloads/RReynolds_MMORPG_IPR.htm)> retrieved 18 March 2010.

Reynolds R, 'The Four Worlds Theory' (August 2005)  
 <[http://terranovalogs.com/terra\\_nova/2005/08/the\\_four\\_worlds.html](http://terranovalogs.com/terra_nova/2005/08/the_four_worlds.html)> retrieved 1 August 2011.

Reynolds R, 'The State of Second Life' (*TerraNova*, 4 June 2007)  
 <[http://terranovalogs.com/terra\\_nova/2007/06/the\\_state\\_of\\_se.html](http://terranovalogs.com/terra_nova/2007/06/the_state_of_se.html)> retrieved 17 February 2013.

Reuters A, 'Linden Lab Settles Bragg Lawsuit' (4 October 2007)  
 <<http://secondlife.reuters.com/stories/2007/10/04/linden-lab-settles-bragg-lawsuit/>> retrieved 18 March 2010.

Reuters E, 'Pirated Content Deleted from Second Life' (17 June 2008)  
 <<http://secondlife.reuters.com/stories/2008/06/17/pirated-content-deleted-from-second-life/index.html>> retrieved 11 May 2010.

Reuters E, 'Second Life business sues for copyright infringement' (3 July 2007)  
 <<http://secondlife.reuters.com/stories/2007/07/03/SL-business-sues-for-copyright-infringement/>> retrieved 18 March 2010.

Richards J, 'Second Life sex bed spawns virtual copyright action' *The Times* (London, 4 July 2007) <[http://technology.timesonline.co.uk/tol/news/tech\\_and\\_web/article2025713.ece](http://technology.timesonline.co.uk/tol/news/tech_and_web/article2025713.ece)> retrieved 22 October 2009.

The Register, 'EverQuest Class Action Threat Over Auction Spat' (25 January 2001)  
 <[http://www.theregister.co.uk/2001/01/25/everquest\\_class\\_auction\\_threat\\_over/](http://www.theregister.co.uk/2001/01/25/everquest_class_auction_threat_over/)> retrieved 18 March 2010.

Rosenberg D, "'Gold Farming' Good for Multiplayer Games?' (*CNET News*, 2 October 2008)  
 <[http://news.cnet.com/8301-13846\\_3-10056262-62.html](http://news.cnet.com/8301-13846_3-10056262-62.html)> retrieved 29 July 2010.

Rosenblatt B, 'Moral Rights Primer' (1998) available online:  
 <<http://cyber.law.harvard.edu/property/library/moralprimer.html>> retrieved 18 August 2014.

Ryan N, 'Gold trading exposed: the sellers' (*EuroGamer*, 25 March 2009)  
 <<http://www.eurogamer.net/articles/gold-trading-exposed-the-sellers-article>> retrieved 16 February 2013.

Sandberg A, 'Protectionist Deities v Economy of Fun: Ownership of Virtual Possessions' (Oxford University Practical Ethics Blog, 14 October 2008) available online: <<http://blog.practicaethics.ox.ac.uk/2008/10/protectionist-deities-vs-the-economy-of-fun-ownership-of-virtual-possession/>> retrieved 20 August 2013.

Sandoval G, 'eBay, Yahoo Crack Down on Fantasy Sales' (*CNET News*, 26 January 2001) <<http://cnet.news.com/2100-1017-251654.html>> retrieved 20 November 2009.

Sandoval G, 'Sony to Ban Sale of Online Characters from its Popular Gaming Sites' (*CNET News*, 10 April 2000) <[http://cnet.news.com/Sony-to-ban-sale-of-online-characters-from-its-popular-gaming-sites/2100-1017\\_3-239052.html](http://cnet.news.com/Sony-to-ban-sale-of-online-characters-from-its-popular-gaming-sites/2100-1017_3-239052.html)> retrieved 20 November 2009.

SCL, 'NCC Refers Software Companies to OFT' 21 February 2008 <<http://www.scl.org/site.aspx?i=ne9235>> retrieved 22 June 2013.

Segal A, Council on Foreign Relations Policy Innovation Memorandum No 2, 'Cybergovernance: The Next Step' (11 November 2011, New York) <<http://www.cfr.org/cybersecurity/cyberspace-governance-next-step/p24397>> retrieved 20 January 2013.

Seifert R, 'Striptease and cyber sex: My stay at Habbo Hotel' *Channel 4 News*, 12 June, 2012 <<http://www.channel4.com/news/striptease-and-cyber-sex-my-stay-at-habbo-hotel>> retrieved 20 June 2012.

Selyukh A, 'Obama executive order seeks better defense against cyberattacks' (*Reuters*, 12 February 2013) <<http://www.reuters.com/article/2013/02/13/us-obama-speech-cyber-idUSBRE91C03G20130213>> retrieved 17 February 2013.

Si-soo P, 'Ruling to Boost Sale of Cyber Money' (*The Korea Times*, 10 January 2010) <[http://www.koreatimes.co.kr/www/news/nation/2010/01/116\\_58775.html](http://www.koreatimes.co.kr/www/news/nation/2010/01/116_58775.html)> retrieved 16 February 2013.

Sipress A, 'Where Real Money Meets Virtual Reality – The Jury is Still Out' *The Washington Post* (Washington, 26 December 2006) <<http://www.washingtonpost.com/wp-dyn/content/article/2006/12/25/AR2006122500635.html>> retrieved 11 May 2010

Slattery B, 'Woman jailed for murdering avatar' *Washington Post* (Washington, 27 October 2008) <[http://articles.washingtonpost.com/2008-10-27/news/36838980\\_1\\_maple-story-electronic-data-avatar](http://articles.washingtonpost.com/2008-10-27/news/36838980_1_maple-story-electronic-data-avatar)> retrieved 18 February 2013.

Spohn D, 'Gaming for Money: Trading Game Assets' <<http://Internetgames.about.com/cs/gamingnews/a/gameassets.htm>> retrieved 17 February 2013.

Steadman I, 'Copyright holders target their takedown notices with takedown notices' (*Wired News*, 5 April 2013) <<http://www.wired.co.uk/news/archive/2013-04/5/takedown-notices-takedown-notices>> retrieved 23 June 2013.



- Stephens N, 'EverQuest 2: Guides and Game Masters' (*Examiner.com*, 28 June 2010)  
<<http://www.examiner.com/article/EverQuest-2-guides-and-game-masters>> retrieved 16 February 2013.
- Talk Talk News, 'Cyber Sabre Provokes Real Death' (1 April 2005)  
<<http://www.talktalk.co.uk/news/odd/reuters2005/04/01/cyber-sabreprovokesrealdeath.html>> retrieved 16 March 2010.
- Talk Talk News, 'Online Gamer Gets Life for Cyber-Sabre Stabbing' (9 June 2005)  
<<http://www.talktalk.co.uk/news/odd/reuters/2005/06/09/onlinegamergetslifeforcyber-sabrestabbing.html>> retrieved 16 March 2010.
- TechSecurityChina.com Editor, 'Court Grants Online Chinese Gamer Virtual Property' (23 December 2006) <<http://www.techsecuritychina.com/2003/12/23/628-court-grants-online-chinese-gamer-virtual-property/>> retrieved 11 May 2010.
- Terdiman D, 'eBay Bans Auctions of Virtual Goods' (*CNET News*, 29 January 2007)  
<[http://news.cnet.com/2100-1043\\_3-6154372.html](http://news.cnet.com/2100-1043_3-6154372.html)> retrieved 12 May 2010.
- Terdiman D, 'IRS taxation of online game assets inevitable' (*CNET News*, 3 December 2006)  
<[http://news.cnet.com/IRS-taxation-of-online-game-virtual-assets-inevitable/2100-1043\\_3-6140298.html?tag=item](http://news.cnet.com/IRS-taxation-of-online-game-virtual-assets-inevitable/2100-1043_3-6140298.html?tag=item)> retrieved 16 February 2013.
- Terdiman D, 'Laying Down the Virtual Law' (*Wired News*, 13 November 2003)  
<<http://www.wired.com/gaming/gamingreviews/news/2003/11/61188>> retrieved 18 March 2010.
- Terdiman D, 'When Play Money Becomes Real' (*Wired News*, 4 July 2004),  
<<http://www.wired.com/gaming/gamingreview/news/2004/04/62929>> retrieved 19 November 2009.
- Thirer A, 'What is cyber-libertarianism? (The Debate over Lessig's Code at 10 Continues)' (*The Technology Liberation Front*, 14 May 2009) available online:  
<<http://techliberation.com/2009/05/14/what-is-cyber-libertarianism-the-debate-over-lessigs-code-at-10-continues/>> retrieved 17 February 2013.
- Thompson C, 'The Game Within the Game' (*Wired News*, 22 May 2006)  
<<http://www.wired.com/print/gaming/gamingreviews/commentary/games/2006/05/70945>> retrieved 29 July 2010.
- Thompson T, 'They Play Games For 10 Hours And Earn £2.80 In A 'Virtual Sweatshop'' *The Guardian* (London, 13 March 2005)  
<<http://www.guardian.co.uk/technology/2005/mar/13/games.theobserver>> retrieved 11 May 2010.
- Tingting Z and Moller D, 'Legislation Proposed to Protect Virtual Property' (*China Through A Lens*, 26 January 2004) available online: <<http://www.china.org.cn/english/2004/Jan/85502.htm>> retrieved 22 June 2012.

Vincent D, 'China Used Prisoners in Lucrative Internet Gaming Work' *The Guardian* (London, 25 May 2011) <<http://www.guardian.co.uk/world/2011/may/25/china-prisoners-internet-gaming-scam>> retrieved 8 August 2011.

Virtual Worlds News, 'Users Raising Class Action Against Linden Lab Over Virtual Property' (21 April 2010) <<http://www.virtualworldsnews.com/2010/04/users-raising-class-action-against-linden-lab-over-virtual-property.html>> retrieved 24 June 2010.

Virtual Worlds Review, 'What is a Virtual World?' <<http://www.virtualworldsreview.com/info/whatis.shtml>> retrieved 11 May 2010.

Wagner J A, 'Why A War on Virtual Gold Sellers Makes No Sense' (*Gigaom*, 1 October 2008) <<http://gigaom.com/2008/10/01/does-a-war-on-virtual-gold-sellers-make-sense/>> retrieved 29 July 2010.

Ward M, 'Buy Yourself a Hero' (*BBC News*, 19 May 2000), <<http://news.bbc.co.uk/1/hi/sci/tech/755614.stm>> retrieved 4 January 2010.

Ward M, 'Does Virtual Crime Need Real Justice?' (*BBC News*, 29 September 2003) <<http://news.bbc.co.uk/1/hi/technology/3138456.stm>> retrieved 4 January 2010.

Ward M, 'Making Money from Virtually Nothing' (*BBC News*, 11 August 2003) <<http://news.bbc.co.uk/1/hi/technology/3135247.stm>> retrieved 4 January 2010.

Ward M, 'The Dark Side of Digital Utopia' (*BBC News*, 22 December 2003) <<http://news.bbc.co.uk/1/hi/technology/3334923.stm>> retrieved 4 January 2010.

Ward M, 'Virtual Cash Exchange Goes Live' (*BBC News*, 7 January 2004) <<http://news.bbc.co.uk/1/hi/technology/3368633.stm>> retrieved 4 January 2010.

Ward M, 'Virtual Gaming Worlds Overtake Namibia' (*BBC News*, 19 August 2004) <<http://news.bbc.co.uk/1/hi/technology/3570224.stm>> retrieved 6 July 2010.

Watson A, 'Who Owns Your Virtual Life?' (11 July 2006) <[http://www.bit-tech.net/gaming/2006/07/11/Who\\_owns\\_your\\_virtual\\_life/1](http://www.bit-tech.net/gaming/2006/07/11/Who_owns_your_virtual_life/1)> retrieved 19 November 2009.

Whitehead T, 'Selling illegal DVDs not illegal because of blunder' (*The Telegraph*, 24 August 2009) available online: <<http://www.telegraph.co.uk/news/uknews/law-and-order/6083182/Selling-illegal-DVDs-not-illegal-because-of-blunder.html>> retrieved 8 August 2014.

Wright O, 'David Cameron to announce crackdown on violent Internet porn' *The Independent* (London, 22 July 2013) available online: <<http://www.independent.co.uk/news/uk/politics/david-cameron-to-announce-crackdown-on-violent-Internet-porn-8725011.html>> retrieved 23 July 2013.

Wyman W, 'Japanese Government looks into gold farming' (*GameSpotAU*, 18 July 2006) available online: <<http://au.gamespot.com/news/japanese-govt-looks-into-gold-farming-6154249?>> retrieved 16 February 2013.

Yans C, 'Play to Pay' <[http://www.cgonline.com/computer-games-magazine/article/play\\_to\\_pay](http://www.cgonline.com/computer-games-magazine/article/play_to_pay)> retrieved 16 March 2010.

'Zynga hacker faces jail for \$12 million theft' (*This Is Devon*) available online:  
<<http://www.thisissouthdevon.co.uk/news/HACKER-ADMITS-STEALING-12m-POKER-CHIPS/article-3170994-detail/article.html>> retrieved 20 February 2011.

## Other Sources:

Barker K, 'Are Users Usurpers?' Departmental Research Seminar Series, Department of Law & Criminology, Aberystwyth University, June 2011.

Barker K, 'Copyright 2010: A *Second Life* or Death?' Fourth International Conference on Information Law (ICIL), University of Macedonia, Thessaloniki, Greece, May 2011.

Boldrin M and Levine K D, 'Economic and Game Theory: Property Rights and Intellectual Monopoly' available online: <<http://www.dklevine.com/general/intellectual/coffee.htm>> retrieved 12 February 2012.

Boonk M and Lodder A, 'How to apply intellectual property to virtual worlds? On the blurring borders between real world (IRL) and virtual reality (in-game)' BILETA Conference Paper, 16-17 April 2007, available online: <<http://www.bileta.ac.uk/content/files/conference%20papers/2007/How%20to%20apply%20intellectual%20property%20law%20to%20Virtual%20worlds.pdf>> retrieved 29 November 2010.

Bornkamm J, 'Intervention: Time for A European Copyright Code?' (Management and Legitimate Use of IP Conference, Strasbourg July 9-11 2000) <[http://ec.europa.eu/internal\\_market/copyright/docs/conference/2000-07-strasbourg-proceedings\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/conference/2000-07-strasbourg-proceedings_en.pdf)> retrieved 6 May 2010.

Brimelow A, "Not Seeing the Woods for the Trees:" Is the Patent System Still Fit For Purpose?' (2<sup>nd</sup> Annual Francis Gurry Lecture, Melbourne 1 March 2010) <[http://documents.epo.org/projects/babylon/eponet.nsf/0/94DC50B78360225EC12576DB00301EC2/\\$File/francis\\_gurry\\_lecture\\_master\\_en.pdf](http://documents.epo.org/projects/babylon/eponet.nsf/0/94DC50B78360225EC12576DB00301EC2/$File/francis_gurry_lecture_master_en.pdf)> retrieved 21 March 2010.

Carli R, 'The Sword, The Thief and the EULA' (MIT: Thesis, 1 December 2007) <<http://groups.csail.mit.edu/mac/classes/6.805/student-papers/fall07-papers/games-property.pdf>> retrieved 24 June 2010.

Chen K T, Pao H K K and Chang H C, 'Game bot identification based on manifold learning.' In Proceedings of ACM NetGames, 2008, 91.

Computer History Museum, 'Inventing a New Medium' available online: <<http://www.computerhistory.org/revolution/computer-games/16/187>> retrieved 8 August 2014.

Costikyan C, 'I Have No Words & I Must Design: Toward a Critical Vocabulary for Games' CGDC Conference (2002), 33, available online: <<http://www.digra.org/dl/db/05164.51146.pdf>> retrieved 1 August 2011.

Deloitte, 'Turn on to digital: getting prepared for digital content creation and distribution in 2012' (2006) available online; <[http://www.deloitte.com/assets/Dcom-UnitedKingdom/Local%20Assets/Documents/uk\\_TMT\\_Digital\\_turn\\_on\\_.pdf](http://www.deloitte.com/assets/Dcom-UnitedKingdom/Local%20Assets/Documents/uk_TMT_Digital_turn_on_.pdf)> retrieved 18 February 2013.

EPO, 'Scenarios For the Future Compendium' (EPO 2007).

Eriksson A and Grill K, 'Who Owns My Avatar? Rights in Virtual Property' (Changing Views: Worlds in Play Conference, Vancouver June 16 – 20 2005).  
<[http://www.digra.org/dl/search\\_results?general\\_search\\_index=who+owns+my+avatar&SUBMIT=Search](http://www.digra.org/dl/search_results?general_search_index=who+owns+my+avatar&SUBMIT=Search)> retrieved 27 January 2010.

EverQuest II User Agreement and Software License 10-15-2010, Clause 7, available at:  
<[http://help.station.sony.com/cgi-bin/soe.cfg/php/enduser/std\\_adp.php?p\\_faqid=12248](http://help.station.sony.com/cgi-bin/soe.cfg/php/enduser/std_adp.php?p_faqid=12248)>  
retrieved 29 November 2010.

Foo C Y and Koivisto E M I, 'Defining Grief Play in MMORPGs: Player and Developer Perceptions' *Proceedings of the 2004 ACM SIGCHI International Conference on Advances in Computer Entertainment Technology* (ACM, New York, 2004) available online:  
<<http://doi.acm.org/10.1145/1067343.1067375>> retrieved 1 August 2011.

Gaudrat P, 'Legislation and Technology – Is the Need for Copyright Legislation Diminishing?' (Management and Legitimate Use of Intellectual Property Conference, Strasbourg 10 July 2000) <[http://ec.europa.eu/internal\\_market/copyright/docs/conference/2000-07-strasbourg-proceedings\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/conference/2000-07-strasbourg-proceedings_en.pdf)> retrieved 29 January 2010.

van Geel I, 'MMOData Charts v3.2' (MMOData.net) 25 December 2010, available online:  
<<http://mmodata.net>> retrieved 9 March 2011.

Hunter D and Lastowka F G, 'Virtual Property' (State of Play Conference, New York Law School, New York 13-14 November 2003).

Johnson N, 'Swords, Shields and Statutes: Common Law Property Rights and Limited Licenses – are Both Necessary to Protect Virtual Property' (Cyberlaw Seminar, University of Iowa College of Law, 31 March 2006)  
<<http://http://www.uiowa.edu/~cyberlaw/cls06/papers/dlfinfin.htm>> retrieved 22 June 2012.

Kujanpää T, Manninen T and Vallius L, 'What's My Game Character Worth – The Value of Components of MMOG Characters' (Situating Play DiGRA Conference, Tokyo 24-28 September 2007) <<http://www.digra.org/dl/db/07312.35346.pdf>> retrieved 27 January 2010.

MacInnes I, 'The Implications of Property Rights in Virtual Worlds' (Proceedings of the Tenth Americas Conference on Information Systems, New York, August 2004) <[http://virtual-economy.org/the\\_implications\\_of\\_property\\_r](http://virtual-economy.org/the_implications_of_property_r)> retrieved 3 January 2010.

MaGee M, 'Peers Review Digital Bill' OUT-LAW Radio (14 January 2010) retrieved 15 January 2010.

National Security Council, 'The Comprehensive National Cybersecurity Initiative' <<http://www.whitehouse.gov/cybersecurity/comprehensive-national-cybersecurity-initiative>> retrieved 17 February 2013.

Panel on Global Internet Cooperation and Governance Mechanisms, 'Towards a Collaborative, Decentralized, Internet Governance Ecosystem' (Internet Society, May 2014) available online:  
<<http://www.internetsociety.org/sites/default/files/Internet%20Governance%20Report%20iPDF.pdf>> retrieved 1 June 2014.

PWC, 'Digital lives: we value our digital assets at 25 billion.' (2013) available online:  
<<http://www.pwc.co.uk/cyber-security/insights/digital-lives-we-value-our-digital-assets-at-25-billion.jhtml>> retrieved 18 August 2014.

PWC, 'Game changer: a new kind of value chain for entertainment and media companies' (December 2013) available online:  
<[http://www.pwc.com/en\\_US/us/industry/entertainment-media/publications/assets/pwc-value-chain.pdf](http://www.pwc.com/en_US/us/industry/entertainment-media/publications/assets/pwc-value-chain.pdf)> retrieved 18 February 2013.

Samuelson P, 'Copyright, Commodification and Censorship: Past as Prologue – But to What Future?' (The Commodification of Information Conference 30-31 May 1999 Haifa, Israel).

Samuelson P and Davis R, 'The Digital Dilemma: A Perspective on Intellectual Property in the Information Age' (Telecommunications Policy Research Conference 2000).

Taylor T L, 'Whose Game Is This Anyway? Negotiating Corporate Ownership in A Virtual World' (Proceedings of Computer Games and Digital Cultures Conference, Tampere 2002).

Thawonmas R, Kashifuji Y and Chen K T, 'Detections of MMORPG bots based on behaviour analysis' Proceedings of the 2008 International Conference on Advances in Computer Entertainment Technology, ACM, New York, 2008, 91.

*The Social Network*, Sony Pictures Home Entertainment (2010).

*The Truman Show*, Paramount Pictures, (1998).

UK Houses of Parliament, 'Parliamentary Calendar'  
<<http://services.parliament.uk/calendar/>> retrieved 8 February 2010.

Vine J, BBC Panorama, 'Addicted to Games?' First broadcast 6 December 2010.

## Virtual World and Online Game Resources:

Colmthecrazy, 'Habbo Moderators' (8 June 2010) <<https://help.habbo.com/entries/189751-Habbo-Moderators>> retrieved 16 February 2013.

Daxxari, 'What does a Game Master really do?' *World of Warcraft* (22 January 2013) <[http://us.battle.net/wow/en/blog/8501406/What\\_Does\\_A\\_Game\\_Master\\_Really\\_Do-1\\_22\\_2013](http://us.battle.net/wow/en/blog/8501406/What_Does_A_Game_Master_Really_Do-1_22_2013)> retrieved 16 February 2013.

eBay, 'About VeRo' available online: <<http://pages.ebay.co.uk/vero/about.html>> retrieved 29 August 2011.

*Entropia Universe* EULA, (MindArk, 5 May 2011) <<http://legal.entropiauniverse.com/legal/eula.xml>> retrieved 29 August 2011.

EVELOPEDIA, 'Escalation to a senior Game Master' <[http://wiki.eveonline.com/en/wiki/Escalation\\_to\\_a\\_senior\\_Game\\_Master](http://wiki.eveonline.com/en/wiki/Escalation_to_a_senior_Game_Master)> retrieved 30 July 2010.

EVELOPEDIA, 'GameMaster' <<http://wiki.eveonline.com/en/wiki/Gamemaster>> retrieved 29 July 2010.

EVELOPEDIA, 'Kill Rights' <[http://wiki.eveonline.com/en/wiki/Kill\\_rights](http://wiki.eveonline.com/en/wiki/Kill_rights)> retrieved 23 July 2013.

*EverQuest II* Code of Conduct; 'Play Nice Policies – Activity within *EverQuest II*' <[https://help.station.sony.com/app/answers/detail/a\\_id/16213](https://help.station.sony.com/app/answers/detail/a_id/16213)> retrieved 29 August 2011.

*EverQuest*, 'Lore of Norrath' <<https://www.everquest.com/lore>> retrieved 20 July 2013.

*EverQuest II* Rules of Conduct, (SOE, 1 July 2011) <[https://help.station.sony.com/app/answers/detail/a\\_id/16213](https://help.station.sony.com/app/answers/detail/a_id/16213)> retrieved 8 August 2011.

*EverQuest II* User Agreement and Software License <[http://help.station.sony.com/cgi-bin/soe.cfg/php/enduser/std\\_adp.php?p\\_faqid=12248](http://help.station.sony.com/cgi-bin/soe.cfg/php/enduser/std_adp.php?p_faqid=12248)> retrieved 15 October 2010.

*Habbo Hotel* Terms and Conditions, (Sulake Limited, 1 October 2010). <<https://help.habbo.com/entries/278066-terms-and-conditions-uk-and-ireland>> retrieved 29 August 2011.

*Habbo Hotel*, 'The *Habbo* Way' <<http://www.habbo.com/groups/officialHabboway>> retrieved 29 August 2011.

Internet Gaming Exchange: see <[www.IGE.com](http://www.IGE.com)> retrieved 29 August 2011.

Linden Lab Press Release, 'Second Life Residents to Own Digital Creations' (14 November 2003) <[http://lindenlab.com/press/releases/03\\_11\\_14](http://lindenlab.com/press/releases/03_11_14)> retrieved 29 August 2011.

*Linden Lab*, 'Scripting Object Behaviour' (*Second Life* Knowledge Base, 24 February 2011) <<http://community.secondlife.com/t5/English-Knowledge-Base/Scripting-object-behavior/ta-p/700139>> retrieved 29 August 2011.

*Lineage II* EULA (April 2008) Clause 6(c) <<http://us.ncsoft.com/en/legal/user-agreement/Lineage-2-user-agreement.html>> retrieved 17 February 2011.

NC Interactive, '*Aion*,' <<http://www.aiononline.com/>> retrieved 27 May 2011.

NC Interactive, '*Lineage II – Chaotic Thrones*' <<http://www.lineage2.com/>> retrieved 27 May 2011.

NCSOFT, 'Lineage II Terms of Use' (21 November 2012) <<http://ncsoft.com/en/legal/terms-of-use.php>> retrieved 22 November 2012.

Preamble to the *World of Warcraft* Terms of Use Agreement (Blizzard Entertainment, 9 December 2010) <[http://eu.blizzard.com/en-gb/company/legal/wow\\_tou.html](http://eu.blizzard.com/en-gb/company/legal/wow_tou.html)> retrieved 29 August 2011.

Linden R, 'Transactions and disputes between Residents' *Second Life Community* <<http://community.secondlife.com/t5/English-Knowledge-Base/Transactions-and-disputes-between-Residents/ta-p/799395>> retrieved 16 February 2013.

*Second Life* Community, 'Buying and Selling Linden Dollars' <<http://community.secondlife.com/t5/English-Knowledge-Base/Buying-and-selling-Linden-dollars/ta-p/700107>> retrieved 14 May 2010.

*Second Life* Community Incident Report <<http://secondlife.com/support/incidentreport.php>> retrieved 14 May 2010.

*Second Life*'s Community Standards <<http://secondlife.com/corporate/cs.php>> retrieved 29 August 2011.

*Second Life* Frequently Asked Questions (FAQs), 'Is Second Life A Game?' <<http://secondlife.com/whatis/faq.php>> retrieved 13 May 2010.

*Second Life* Intellectual Property Policy <[http://wiki.secondlife.com/wiki/Linden\\_Lab\\_Official:Intellectual\\_Property](http://wiki.secondlife.com/wiki/Linden_Lab_Official:Intellectual_Property)> retrieved 20 August 2011.

*Second Life*, 'LSL Portal' (18 March 2011) <[http://wiki.secondlife.com/wiki/LSL\\_Portal](http://wiki.secondlife.com/wiki/LSL_Portal)> retrieved 1 August 2011.

*Second Life*, 'Mesh/FAQs' (9 January 2011) <[http://wiki.secondlife.com/wiki/Mesh/FAQs#How\\_can\\_I\\_protect\\_my\\_intellectual\\_property\\_in\\_my\\_meshes.3F](http://wiki.secondlife.com/wiki/Mesh/FAQs#How_can_I_protect_my_intellectual_property_in_my_meshes.3F)> retrieved 13 March 2011.

*Second Life*, 'Owning Land' <<http://secondlife.com/land/>> retrieved 18 February 2013.



*Second Life*, 'What is *Second Life*?' <<http://secondlife.com/whatis/?lang=en-US>> retrieved 22 July 2013.

*Second Life*, 'What Is *Second Life*? – Scripting' <<http://secondlife.com/whatis/scripting.php>> retrieved 25 May 2010.

*Second Life* Terms of Service Agreement (*Linden Lab*, 15 December 2010) available online at: <<http://secondlife.com/corporate/tos.php>> retrieved 29 August 2011.

*Second Life* Terms of Service, 'Releases, Disclaimers of Warranty, Limitation of Liability and Indemnification' (29 April 2010)  
<[http://wiki.secondlife.com/wiki/Linden\\_Lab\\_Official:Terms\\_of\\_Service\\_Archive/Through\\_29\\_April\\_2010](http://wiki.secondlife.com/wiki/Linden_Lab_Official:Terms_of_Service_Archive/Through_29_April_2010)> retrieved 30 July 2010.

*Second Life* Viewer, available online at: <<http://secondlife.com/support/downloads/>> retrieved 29 August 2011.

SOE Stratics, 'An Extensive Guide Into Tradeskills' *EverQuest II Wiki*  
<[http://eq2.stratics.com/content/guides/padasher\\_crafting\\_1.php](http://eq2.stratics.com/content/guides/padasher_crafting_1.php)> accessed 25 June 2012.

*Sony Entertainment's* Station Exchange  
<<http://stationexchange.station.sony.com/livegamer.vm>> retrieved 20 August 2011.

Techpedia, 'Bot' <<http://www.techopedia.com/definition/10459/bot-gaming>> retrieved 25 June 2012.

*Ultima Online* Terms of Service, Clause 7 'Limitation of Liability'  
<[http://support.ea.com/app/answers/detail/a\\_id/2688](http://support.ea.com/app/answers/detail/a_id/2688)> retrieved 29 November 2010.

Urban Dictionary, 'Toading' (4 November 2007)  
<<http://www.urbandictionary.com/define.php?term=toading>> retrieved 30 July 2010.

WordIQ, 'Game Master – Definition' (2010)  
<[http://www.wordiq.com/definition/Game\\_Master](http://www.wordiq.com/definition/Game_Master)> retrieved 30 July 2010.

*World of Warcraft* Battle Net Terms of Use (Blizzard Entertainment, 26 May 2010)  
<<http://us.blizzard.com/en-us/company/about/termsfuse.html>> retrieved 29 August 2011.

*World of Warcraft* EULA, (Blizzard Entertainment, 9 December 2010)  
<[http://us.blizzard.com/en-us/company/legal/WoW\\_tou.html](http://us.blizzard.com/en-us/company/legal/WoW_tou.html)> retrieved 29 August 2011.

*World of Warcraft* Terms of Use Agreement (Blizzard Entertainment, 9 December 2010)  
available online at <[http://us.blizzard.com/en-us/company/legal/WoW\\_tou.html](http://us.blizzard.com/en-us/company/legal/WoW_tou.html)> retrieved 29 August 2011.

WoWWiki, 'Kill Steal' (World of Warcraft Wiki) <[http://www.wowwiki.com/Kill\\_steal](http://www.wowwiki.com/Kill_steal)> retrieved 25 May 2011.

**Other Websites:**

Blacks Law Dictionary, 'What is Property?' available online:  
<<http://thelawdictionary.org/property/>> retrieved 18 August 2014.

British Board of Film Classification, 'Video Recordings Act' available online:  
<<http://www.bbfc.co.uk/education-resources/student-guide/legislation/video-recordings-act>> retrieved 8 August 2014.

Courts and Tribunals Judiciary, 'Structure of the Courts System' (2014) available online:  
<<http://www.judiciary.gov.uk/about-the-judiciary/the-justice-system/court-structure/>>  
retrieved 20 August 2014.

Crayola: <<http://www.crayola.co.uk/>> retrieved 18 August 2014.

Creative Commons, 'What is CC?' <<http://creativecommons.org/about/what-is-cc>>  
retrieved 28 February 2010.

GNU, 'What is Copyleft?' <<http://www.gnu.org/copyleft/>> retrieved 18 February 2013.

Microsoft Office: <<http://office.microsoft.com/en-GB/>> retrieved 18 August 2014.

Oxford Dictionaries, 'Virtual'  
<<http://www.oxforddictionaries.com/definition/english/virtual>> accessed 8 August 2014.