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Mending the Gap: *The Use of Common Law to Supplement Virtual Mass Contracts*

By Floyd Morris

The interplay between the virtual world and the real world has slowly evolved to the point where what is real and what is virtual depends on how avid a gamer they are. As more real world money is invested in the virtual worlds, the lines are blurred even further. Today, ostensibly virtual communities have real world currency backing, and as a result issues within the game have a much more real feel to them. The ability of virtual worlds to successfully develop safeguards against abuses is a sure fire way to maintain their viability, and ensure their growth. In the same way Facebook took off by being able to protect privacy much better than MySpace ever could, virtual worlds that can protect person and property properly will become a huge hit given the worldwide interest in virtual gaming. However, to this point no virtual world has, or really attempted, to apply laws which successfully protect all of their users' interests. That is partially a result of the sheer number of people involved in virtual gaming. However, in my opinion a more important influence is the game developers' concern about avoiding onerous legal and administrative obligations, which has in most cases led to a hands off approach even for situations well within their control in order to ensure that they maintain deniability.

The adrenaline rush that accompanies the purchase of the next "it" video game is similar to a child's excitement on Christmas morning. In the same way that wrapping paper goes flying and tape is massacred, gamers seek to rip through any and all obstacles between themselves and the virtual experience, almost assuredly forgetting that there is a most important writing attached to the prize. In "meat space" the hand written cards telling you who the presents were from, get thrown out the window while attempting to get to the game. In the virtual world this card is replaced by a series of contracts, click thru agreements, Terms of Service, and End User License

Agreements, which contain enough information to make your head spin, but are so easily bypassed that to find someone who has read 10 words from any of them is to find the honest man that eluded Diogenes.

Both the card and the agreements will almost certainly become a source of contention. When writing the thank you note, you have no idea who sent what, and must scramble or make up the facts in order to save face. In virtual worlds the results can be even more damaging, because the contracts that have been ignored are enforceable, and can result in monetary loss. Because the virtual contracts are made for many as opposed to real life contracts that are generally between two parties, there is no actual bargaining between the parties. Instead, there is simply an offer by the virtual world developer, followed by blind acceptance from the user, and just that quickly the user is bound to a collection of terms and code of conduct that he/she has never been aware of (although they could have been if they just read.)

This paper is premised on the notion that, though these contracts are legally enforceable according to real world legal principles, they by their very nature cannot meet the changing needs of virtual world communities. Much like our Constitution, these contracts need to be living documents to accommodate all the nuances, cultural shifts, and the evolution of behavioral norms that arise over the years of playing a game. Because it is unlikely that any company is willing to invest in continuously updating their user agreements, most virtual reality providers, like Second Life, seek to completely avoid any liability in player-to-player interaction. For this reason these communities need swift and effective “meat space” regulation, in the form of basic public laws written and geared towards virtual worlds and regularly updated, to foster confidence in all users that remedies exist when wrongs are done. However, given that the overall lack of any prompt response by real world courts, a more attainable short term remedy may consist of

modifying the language of existing agreements between users and virtual worlds until the courts catch up to the technology. In Part X of this paper I provide examples showing that, while the virtual community has boomed, the contracts do not fully protect their users, and propose how, by either adapting existing law or modifying the language of existing agreements, virtual worlds could resolve issues in ways that are economically and socially acceptable.

Virtual Landscape: How Big Is It? In 2006 two journalists summed it up in one sentence:

“Virtual worlds are the next generation of both social-networking sites and the internet”.¹ A common misconception among non-gamers is that the only money spent on gaming is to purchase the gaming console, the game itself, and the subscription fees. While this was the case in early gaming, technology has advanced to the point where these cost are almost incidental compared to the almost limitless stock of items and services you can purchase within the game itself. For example, when Zynga introduced FarmVille on Facebook, it followed the Second Life use of currency [Linden] by introducing Farm Bucks.² As the new game caught on, a significant number of players were going into Facebook with their credit card and PayPal accounts, using real life money to purchase Farm Bucks to buy a new expansion or a white picket fence. The amount of money spent in virtual worlds like Second Life is an even bigger business. In 2006 it was estimated that 20 million users spent roughly \$200 million a year in virtual worlds.³ Last year these numbers were even higher, with United States citizens alone

¹ Matt Richtel and Brad Stone, “Doll Web Sites Drive Girls to Stay Home and Play” *The New York Times* (6 June 2007), online: The New York Times <<http://www.nytimes.com/2007/06/06/technology/06doll.html>>.

² Available at <http://farmaddicts.com/farmville/index.php> (last visited March 15, 2010)

³ Mike Musgrove, *Virtual Games Create a Real World Market*, WASH. POST, Sept. 17, 2005, at A01, available at <http://www.washingtonpost.com/wpdyn/content/article/2005/09/16/AR2005091602083.html>. These numbers are surely higher today.

spending close to \$621 million in virtual worlds, according to financial analyst Piper Jaffray.⁴ If that number seems staggering, consider that the estimate for Asian markets in virtual world spending was nearly \$5 **BILLION**.⁵

Second Life has thus far been at the forefront of this virtual boom, as the game escalated from a place to just hang out and escape to a viable business option for accruing profits that measure up to real world standards. Businesses have begun to embrace the opportunity; through proper branding and marketing, to reach a target audience in a medium that is relatively low cost and generates at least as many views as traditional television advertising. Nic Fleming of New Scientist cogently summed up the phenomena of Second Life selling:

*Over in Second Life, trade remains robust. The value of transactions between residents in the second quarter of this year was \$144 million, a year-on-year increase of 94 per cent. With its users swapping virtual goods and services worth around \$600 million per year, Second Life has the largest economy of any virtual world - which exceeds the GDP of 19 countries, including Samoa.*⁶

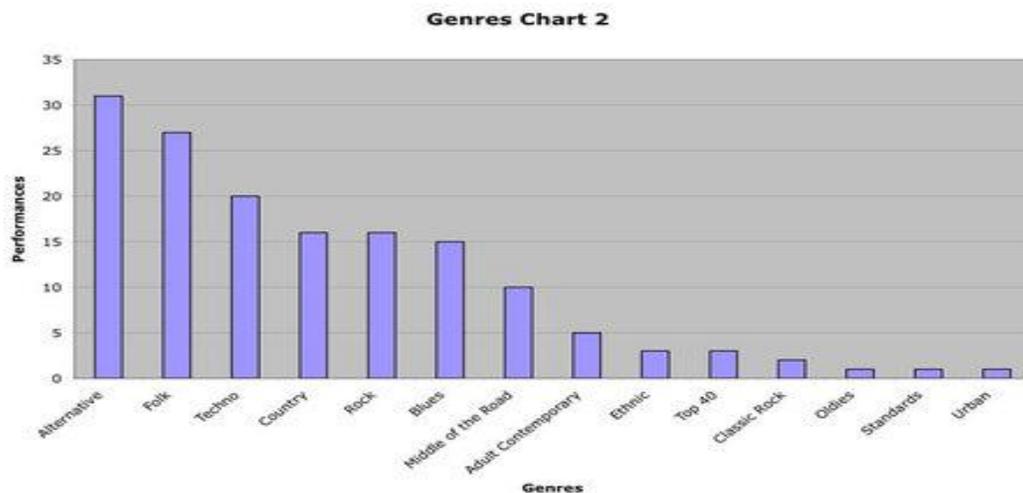
As the Second Life economy continues to grow, the traditional ventures of selling land, clothing and furniture have continued to dominate the landscape. However, the more interactive markets, such as service based jobs, are starting to increase in number. Such service providers as virtual weddings planners, home designers and even language translators, have emerged within the game as people begin to adapt more of the “meat space” jobs to virtual worlds. In another significant area, performers have begun to boom within Second Life, either through concert or by Second Life Karaoke. The ability for people to embrace music from their home, or perform in

⁴ Available at <http://www.emarketer.com/Article.aspx?R=1007226> (last visited March 15, 2010)

⁵ Available at <http://www.plus8star.com/2009/04/08/virtual-goods-in-asia-its-even-more-than-you-think-25-times-usa/> (last visited March 15, 2010)

⁶ Available at <http://www.newscientist.com/article/mg20427285.900-virtual-world-disputes-heading-for-meat-space-courtooms.html> (last visited March 17, 2010)

the guise of an avatar, has allowed music to become a popular driving force in user interaction on Second Life. Between June and September of 2009, an estimated 203 music shows were performed within Second Life, across a variety of genres:

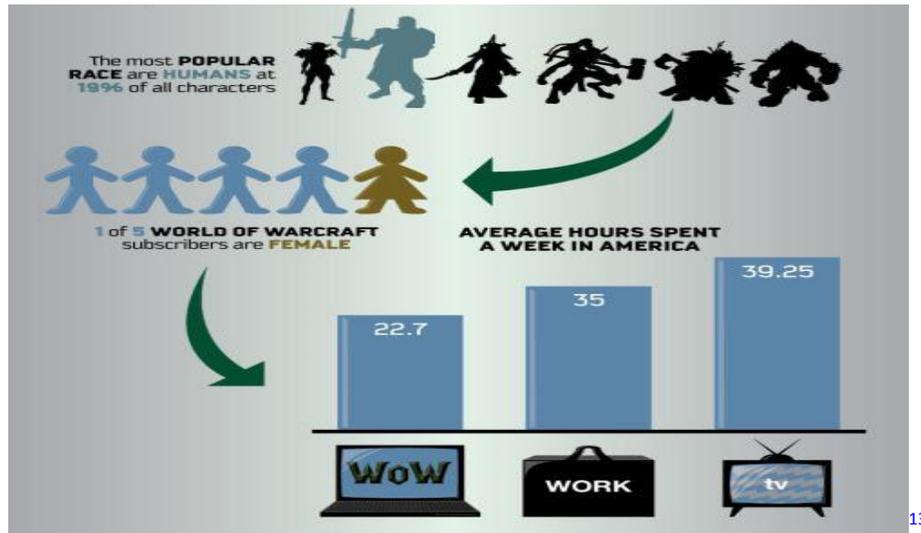


The BBC music entity Radio 1 noticed the potential of this musical landscape as early as 2006, when it purchased an island within Second Life and put on a virtual concert to coincide with its traditional big event in Dundee. The island held a virtual event the same weekend as the show and included bands such as Muse, Razorlight and Gnarls Barkley.⁷ It was estimated that almost 400 people were able to see the event by choice of Radio 1 which limited the number of people watching in order to ensure a good stream. And this wasn't just about the concert itself, as the event was given the look and feel of a real life concert. "They were able to take part in a dance-off in the DJ tent, take a hot air balloon ride or have an authentic festival experience on a virtual mud-slide."⁸

⁷ Available at <http://news.bbc.co.uk/2/hi/technology/4766755.stm> (last visited February 8, 2010)

⁸ Available at <http://news.bbc.co.uk/2/hi/technology/4766755.stm> (last visited March 22, 2010)

Music within Second Life is just one example of how the cross between the real world and virtual world has led to significant investment of both time and money. Another is World of Warcraft, which has been one of the biggest virtual world hits of all time. Throughout its growth it has sparked mainstream appeal.⁹ In addition, the revenue the game generates is astronomical.¹⁰ World of Warcraft has 12 million paying subscribers.¹¹ Reports in 2008 estimated that nearly 90,000 users were spending roughly 20,000 minutes, per day, on WoW.¹² Broken down further in the picture below you can see the comparison between the amount of time spent on WoW versus other aspects of everyday life, namely work and watching television.



⁹ In addition to widespread news coverage, an episode of the popular television show *South Park* focused on the virtual world World of Warcraft (episode 147, 4 October 2006).

¹⁰ FirstAdopter reports that World of Warcraft \$ (WoW) will reach over \$200M in revenues from subscribers fees in addition of \$50M of games sales. Up to 250000 players are online simultaneously. That's quite an achievement.

¹¹ Available at <http://deals.venturebeat.com/2009/04/16/blizzard-switches-world-of-warcraft-partner-in-critical-chinese-market/> (last visited March 22, 2010)

¹² Available at <http://www.aeropause.com/2008/06/some-world-of-warcraft-statistics/> (last visited March 22, 2010)

¹³ Available at <http://www.walyou.com/blog/2010/03/17/world-of-warcraft-statistics/> (last visited March 23, 2010)

With a constant stream of expansion packs and new virtual worlds the growth prospectus for World of Warcraft is quite positive. The success of platforms like Sony Playstation Home and The Sims further demonstrate that virtual worlds are going to continue to emerge in a wide variety of formats and be viable gaming, as well as business, options. Playstation Home, which is free and exclusively for Playstation 3, already boasts over 12 million users.¹⁴ It is clear that the future trend for virtual worlds is continued expansion for years to come, with significant and growing real dollar investments by both individual and business users. It is accordingly necessary that proper policing mechanisms be in place to handle disputes and violations of an individual's liberties in the virtual world, just as they exist in the real world.

Don't Shoot the Messenger Linden Labs, developer of the virtual world Second Life, has since its inception tried to establish that, while it is in control of a majority of the gaming platform, it does not have the inclination, resources or ability to control the interaction between users. The Linden Terms of Service, including the "No Control Provision", is its attempt to establish a safe haven insulating it from the responsibility to police or mediate interaction between users.¹⁵ If this system operated in the real world, existing firmly established laws would apply in similar situations. Why should virtual worlds be different? To quote Mark Stephens, a partner of the London-based Law Firm Finers Stephens Innocent, "The law in this area is pretty good and should be protecting people who've got [intellectual property] or who are writing unique code,

¹⁴ Available at <http://www.secondlifeupdate.com/uncategorized/top-9-online-virtual-3d-worlds/> (last visited March 23, 2010)

¹⁵ Second Life Terms of Service § 1.2, <http://secondlife.com/corporate/tos.php> (last visited March 16, 2010) ("1.2 Linden Lab is a service provider, which means, among other things, that Linden Lab does not control various aspects of the Service. You acknowledge that Linden Lab is a service provider that may allow people to interact online regarding topics and content chosen by users of the service, and that users can alter the service environment on a real-time basis. Linden Lab generally does not regulate the content of communications between users or users' interactions with the Service. As a result, Linden Lab has very limited control, if any, over the quality, safety, morality, legality, truthfulness or accuracy of various aspects of the Service.").

but the problem is policing it. So increasingly people are trying to pin liability on the gatekeepers."¹⁶

Like Linden Labs, Blizzard Entertainment, host of World of Warcraft tries to limit the liability that it has in the interaction of its users. For example, the private property that everyone seeks to acquire within the game is not protected by Blizzard. Instead, the WoW Terms of Use disclaim any recognition of private property owned by Users: "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 the Account or stored on the Service."¹⁷ The sponsor of Dark Ages, Electronic Arts, also refuses to recognize any user's interest in the value that has been acquired in the game, even though it encourages the spending of money to advance your character.¹⁸

This approach by the virtual world providers may be seen as disingenuous, because the agreements that must be signed in order to get access to the game protect the the providers from liability or indeed from any obligation to protect the people who make them rich. Furthermore, it doesn't protect the very people who invest so much time and energy in these games. Players

¹⁶ Available at <http://www.newscientist.com/article/mg20427285.900-virtual-world-disputes-heading-for-meat-space-courtooms.html> (last visited March 27, 2010)

¹⁷ The *World of Warcraft Terms of Use* state that Blizzard [the company that produces World of Warcraft] does not recognize the transfer of WoW Accounts or Blizzard Accounts. 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. ... 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 the Account or stored on the Service. 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 (*supra* note 8, s. 11).

¹⁸ (*Dark Age of Camelot End User Access and License Agreement*, online: Dark Age of Camelot Support <http://support.darkageofcamelot.com/kb/article.php?id=072>)

have reportedly spent as much as 55 consecutive hours playing or logged in to virtual worlds.¹⁹ Given that level of commitment and monetary contribution virtual worlds should be more inclined to protect their users to the fullest extent that is practical. While feasibility and cost of such an endeavor should not be entirely discounted, it costs twice as much money to get a new customer as it does to keep an existing one. **←CITE?** By creating the most comfortable and secure environment possible virtual worlds like Second Life and World of Warcraft are only going to increase the amount of time spent gaming, which will increase the amount of money spent on the game. Suddenly what looked like a costly function is now a further driver of revenue.

If appealing to the wallets of virtual world creators does not lead to improved virtual world protection, the only alternative users have is to “vote with their feet” and move to platforms that better protect them from these dangers. For someone who invests the significant time and money in virtual worlds articulated earlier, the ease of mind that the money will not disappear, and the avatar will not be harmed without recourse, is a selling point that can make the difference when choosing between competing virtual worlds or other platforms.

A Net with Big Holes The only feasible way to govern and monitor the basic rules for users living in mass online communities like Second Life and World of Warcraft is through blanket guidelines laid out at the beginning for each player. The contractual obligations, in the form of Terms of Service, Codes of Conduct, and End User License Agreements, try, unsuccessfully, to artificially solve the natural property, tort, contract, trademark and copyright law that arise as readily in virtual worlds as they do in the real world. These End User License Agreements, or

¹⁹ Yee Fen Lim, *Is It Really Just a Game? Copyright and Online Role-Playing Games* 1 J. INTELL. PROP. L. & PRAC. 481, 482 (2006).

EULA's, are created by a mechanism requiring prospective players people to click thru "I Agree" options in order to play a game.²⁰ Yet this clicking is often done at such a rapid pace that there is little to no reading, and certainly no understanding, of what the actual agreement is. Initially these agreements were attacked as unenforceable as a matter of law, because EULA's and Terms of Service, even using click thru technology, must meet the three basic tenets of contract law: offer, acceptance, and consideration. In *Step-Saver Data Systems, Inc. v. Wyse Technology*²¹ the Third Circuit declined to recognize additional terms included in a software "box top" license. However, most courts have adopted the approach of *ProCD v. Zeidenberg*²² in which the Seventh Circuit concluded that UCC 2-204 allows for the offeror to specify what constitutes acceptance, and that by purchasing software in a package that included a "shrink wrap" license, the offeree has indeed accepted the terms as provided, regardless of whether or not they took the time to fully understand what they were accepting.²³ This approach was applied to an online "click wrap" agreement in *Caspi v. Microsoft*, 732 A.2d 528 (N.J. A.D. 1999)

The EULA terms may have serious consequences for players who suffer significant losses. For example, the United States treats crimes in the virtual world as private law contract claims.²⁴ Because a real world remedy is not readily available, the reliance on these contracts is even more important to the people that are wronged in virtual worlds. Similarly, rather than

²⁰ See Gerri L. Dreiling, "U.S. Court of Appeals Eighth Circuit Rules Online Gaming Runs Afoul of Click-Wrap Contract" (26 September 2005) ("[i]n order to play the game, the user must click through 'I agree' boxes on both an End User License Agreement (EULA) and Terms of Use (TOU)").

²¹ 939 F.2d 91 (3d Cir. 1991)

²² 86 F.3d 1447 (7th Cir. 1996).

²³ *Id.*

²⁴ For example, theft of virtual property is a contract matter in the United States, not a crime (John Brewer, "When a Virtual Crook Struck This Gamer, He Called Real Cops" *St. Paul Pioneer Press* (1 February 2008) A1 (discussing the lack of police action when \$3800 worth of virtual property was stolen).

address property claims on an individual basis, the great majority of online game EULA's address property by simply eliminating private property all together, with the company controlling all virtual property rights.²⁵

The problem with governing virtual worlds through contractual obligations is, as in the real world, people don't follow the rules.²⁶ As articulated earlier, the appropriate remedy cannot be to treat all of these separate violations and crimes as just a violation of contract.²⁷ The law, as written, is ideally situated to address these problems symmetrically: tort for tort, property for property. Yet the typical virtual world EULA, more than specifying price and use restrictions, attempts to develop a template background on which users can interact with the game.

Background rules are necessary for virtual worlds, just like the real world, but they must correspond with one another. Contract law cannot, by its nature, adequately substitute for the law of property or torts. Contracts require mutual consent, which those laws do not. Similarly, the remedies available for breach of contract are different than those for a common law tort or violation of a property right. While online assault or battery may not be consistently redressed by real world jail time, treating online assault in a virtual world as a breach of contract seems outrageous, especially since the question of who the contract is between cannot be answered without confusion. The person assaulted can't sue based on the contract that the assaulter signed with the virtual world unless the court employs some arbitrary and difficult 3rd party beneficiary analysis, a result which appears at best unlikely. Players do not have direct contracts between

²⁵ See Brewer, *supra* note 2.

²⁶ Julian Dibbell, "A Rape in Cyberspace" *The Village Voice* (21 December 1993), online: Julian Dibbell.com http://www.juliandibbell.com/texts/bungle_vv.html

²⁷ See *Bragg v. Linden Research*, 487 F.Supp.2d 593 at 605-10 (E.D. Pa. 2007) [*Bragg*]. See also Will Knight, "Gamer Wins Back Virtual Booty in Court Battle" *New Scientist* (23 December 2003), online: New Scientist <<http://www.newscientist.com/article.ns?id=dn4510>> (discussing the case of Li Hongchen).

themselves, but rather each has a contract with the virtual world itself. There is no law, virtually, against assaulting another player that allows for the recoupment of virtual money or other remedy within the world itself. A code of conduct is a set of rules about how players should interact, but often the only remedy is the loss of playing privileges, not redress for the victim.

Effectively governing the mass person community through contract is a very ambitious task, and contractual solutions often do not properly address the problem. EULA's need to govern everyone, not only in their relationship between the seller and user, but also between the users in the virtual communities themselves. Unfortunately, because there is no "legal" backing that is incorporated into the EULA's, the appropriate enforcement is lacking. Similarly, Terms of Service agreements do not effectively address the conduct pitfalls that occur within a virtual world. In both instances, whether it is the Terms of Service or EULA, the result is a document that binds the user to a set of strict guidelines in order to use the platform, but fails to adequately respond to cries for help with a similarly rigid response plan for virtual crimes.

Making the Virtual "Real" Virtual worlds are continuing to grow, not only in size and popularity, but also in economics. We have seen that creators and service providers that make a living off of these worlds do so while trying to take as little responsibility for in game play as possible. The result of this approach is contractual agreements which do little to protect the user from the variety of harms that can come about when dealing with human interaction, albeit virtually. Rather than rejecting the virtual world as its own entity, devoid of the regulations and remedies associated with real life, courts should adapt and apply the laws already on the books to the virtual worlds, ensuring the protection of individuals both in and out of the computer. Given the fact that violations in virtual worlds ran the gamut the same way crimes in the real world do, addressing how courts can approach each type of law individually is important.

COPYRIGHT Looking at Copyright violations, which might be the most prevalent in virtual worlds, the marriage between copyright protection and virtual worlds seems flawless. The fundamental principle of copyright law is the protection of artistic expression. Copyright law exists to promote the creation of artistic works by providing authors exclusive rights to their creative expression for a limited period of time.²⁸ Given that expression in virtual worlds like Second Life is as real as the expression of a painting in the meat space, the notion that copyright protection shouldn't exist is absurd. One commentator has explained how easily, and realistically, courts could apply existing copyright protections to the virtual world:

“Courts can solve this problem by viewing virtual space creations in isolation, rather than as a creative whole. Courts could apply copyright’s originality and fixation standards to each individual act of creativity occurring within a virtual world to ascertain authorship and copyright over an individual work or contribution. This construction of copyright creates the inverse legal fiction of the Copyright Act’s collaborative works. Thus, existing copyright law would view each creative contribution to the virtual space independently and separately from the collective whole.”²⁹

However, copyright protection is nearly non-existent in the virtual landscape because service providers deem it too difficult to protect the creative interests of their users. In most cases copyright ownership itself is given up, either by way of grant or by joining the game, to the creator of the virtual world. This not only helps eliminate the need to police against infringers; it provides for the cultivating of other people’s original ideas, to be turned around as “part of the game” and used to further drive up profit. For example, the developers for Sony’s EverQuest

²⁸ U.S. CONST. art. I, § 8, cl. 8.

²⁹ Erez Reuveni *Indiana Law Journal*, Vol. 82, No 261, 2007

game make users forfeit their rights to the company as part of the EULA.³⁰ City of Heroes and World of Warcraft are two other virtual worlds who follow a similar approach of stripping the creative gene away from users.

TORT The combination of real world tort law and the virtual world setting on the surface appears to be a tenuous one because most commonly when we think of tort law we're envisioning a civil wrong done through physical contact. However tort law is far more expansive than that, including business torts and non-physical tort injuries, many of which can occur in virtual worlds. It is important to recognize that different types of virtual worlds may affect the types of tort legislation that are necessary. World of Warcraft is a virtual world that operates on the genre of hand to hand combat and fighting, and so basic torts for physical violence are irrelevant. By contrast, there is no need for such physical interaction in Second Life or Sony Playstation's Home, and for these platforms physical attacks can indeed give rise to legal liability.

One of the most famous tort claims involving virtual worlds is the Anshe Chung "griefing" incident. Chung, an avatar, is a very powerful but somewhat controversial figure within Second Life, and was conducting an interview in the game when a "griever" managed to hack into the system and "attack" her with animated penises. This continued after two reboots by the CNET moderators, who conducted the interview, until finally the griever managed to crash the server. This attack became so mainstream that it was broadcast on YouTube, set to music,

³⁰ First, sale of the game software and access to the virtual world is licensed and may be revoked for any violation of the EULA. EverQuest User Agreement and Software License. Second, Sony retains all rights, title, and interest to all property, including intellectual property, related to the virtual world. Players acknowledge that they have no rights to their virtual property or artistic creations, and even if they do, Sony retains all such rights.

and screenshots appeared all over the internet. Outraged, Chung's real life husband, Guntram Graef, filed a Digital Millenium Copyright Act complaint against YouTube, alleging that the use of Chung in these videos constituted direct copyright infringement. In a later interview Graef backed off of the DMCA complaint, contending that, "I would like to make it clear that I regret filing DMCA claims in this case, because the real issue at hand wasn't at all about copyright. I didn't realize that some people would misunderstand this as a censorship attempt, which it definitely was not."³¹ The true issue, according the Graef, was one of defamation and sexual assault.

Looking at the elements of defamation, one commentator has contended that the difference between virtual world defamation and real world defamation is mythical: the avatar is intellectual property of the user, and defaming that property is the same as defaming the person.³² Because the Second Life Terms of Service and Community Standards do not do anything to properly restore the reputation or financial loss an individual suffers at the hands of virtual world defamation, real world legal recourse is a necessary option. In looking at the defamation claim that would have arisen from the Chung incident, the only hurdle standing in the way of a real world claim was proving that the incident was "of and concerning" Chung and Graef. Considering just how intertwined the user/avatar relationship has become, it would appear this this hurdle is easily surpassed. People like Chung hold their avatars out not as a separate entity from their real life form, but rather a way of presenting themselves in a different medium. In the same way your Facebook page or Twitter account is merely an extension of you, your avatar can be another way of presenting yourself to the world, and thus actions taken

³¹ Available at http://news.cnet.com/Behind-the-Anshe-Chung-DMCA-complaint/2008-1023_3-6150457.html (last visited April 21, 2010)

³² Chin, 72 Brook. L. Review 1333 (2007).

against your avatar, when such a strong connection has been established, are essentially taken against you.

Yet another tort that lends itself to the need for real world litigation is intentional infliction of emotional distress, or IIED. For torts like this which require showing a psychological impact from virtual harm, the connection between a person and the avatar is even more important. People don't refer to virtual world activities as "my avatar was...": they almost always say "I was..." And in these increasingly realistic virtual worlds tortious actions taken against an avatar can indeed cause emotional trauma to the real world user. Mrs. Chung, upon seeing her avatar attacked by penis during the Second Life interview, easily could have had a visceral reaction that may have been extreme enough to warrant legal protection. This is not to say that an IIED lawsuit would have prevailed, but rather to suggest why, in instances where such a claim is valid, contractual remedies are not enough. Contracts do not restore reputations, nor do most contractual breaches from virtual world activity provide a monetary damage remedy that is suitable for the act itself.

Many believe that liability should arise from acts against a person's virtual identity, but should not rise to the level of the real world counterpart. In the case of torts I believe that this is the right approach, but that does not mean that tort law should be banned from virtual worlds. Having a legal remedy is not a golden ticket to legal success, any more than every real world complaint produces a favorable result for the plaintiff. As in the real world, virtual world users need to be able to address tort injuries through a legal mechanism, especially given the fact that virtual world developers, such as Second Life, explicitly remove themselves from any liability regarding user to user contact. If the developer won't remedy the problem, and the courts are not to intervene, then how is the harm redressed?

PROPERTY Saving the best for last, no single area has received more real world attention than the applying of property law to virtual worlds. This is a natural occurrence given that property in virtual worlds, whether it is real property, collected items, or intellectual property, all involve the spending of real money to acquire them, whether it is upgrading your game or, as in Second Life, purchasing the in game currency to then use to buy your game additions. Supporters of virtual property rights have invoked labor theory, utilitarian theory, and personality theory, all philosophical, as reasons for recognizing property rights in virtual worlds,³³ Concluding: “Since millions of people labor to create objects of value in virtual worlds, there are utilitarian grounds for granting property rights based on the value of the transactions to individual users.”³⁴ Furthermore, as technology expands the differences between real property and virtual property continue to diminish, perhaps to the vanishing point. Both are useful, transferable, and exclusive to the user. In games such as World of Warcraft actual money needs to be spent to repair goods, or else they become unusable.³⁵ Lastly, while virtual goods are not tangible, intangibility has not prevented the United States courts from recognizing property interests in patent or copyright.³⁶

If one can acquire a property interest in shoveling manure into piles in the street, certainly you can acquire a property interest in virtual worlds where you expend not only energy, but also money.³⁷ While there has been some initial progress, virtual property rights still remain far

³³ F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CAL. L. REV. 1, 4-5 (2004).

³⁴ *Id.* at 45.

³⁵ World of Warcraft, <http://worldofwarcraft.com/info/items/basics.html> (“When an item reaches zero durability, it no longer gives the player any benefit; it acts as though it does not exist until repaired.”)

³⁶ *See* Lastowka & Hunter, *supra* note 1, at 41-42 (stating property interests in intangible things are common and include copyrights and patents).

³⁷ *Haslem v. Lockwood*, 37 Conn. 500, 506 (1871) (judgment for plaintiff, who raked manure in the street into piles, intending to pick it up later, over defendant, who carted off the manure in the meantime; the court held that the plaintiff had acquired valid title by virtue of having expended money and labor on the acquisition of the manure).

behind real world property rights mostly due to the technology. For example, users in Second Life can keep someone from taking items out of their inventory, but cannot lease them to other users, that is, allow them to use it for a certain period of time before it reverts back into the inventory of the owner.³⁸

To understand the interplay between virtual property and real world property law it is vital to look at the decision of *Bragg v. Linden Research Inc.*, which not only showed that real world litigation would result from virtual world violations, but also that the property acquired in virtual worlds holds immense value to its users, and needs to be protected.³⁹ *Bragg* focused on the repercussions for Linden Lab when Linden, upon finding out Marc Bragg was acquiring land at lower than market price by “cheating”, terminated his account. According to Bragg’s complaint, this termination dissolved his assets and cost him between \$4,000 to \$6,000 USD.⁴⁰ If we picture this in a real world setting it would be the equivalent of someone coming to your home that you purchased, taking the home and everything inside, and then denying you access to it, based on an allegation that you got it by some unfair means. No one would stand for this, yet Linden thought that they would be able to get away with such an act in the virtual world; luckily, Bragg had other ideas. He argued, on a theory of reasonable reliance, that Linden had gone out of its way to tout itself as the leader in user legal rights within virtual worlds, as well as a leading protector of user intellectual property interests. Yet this was inconsistent with Linden’s EULA, which it wanted to enforce so that it still retained final control over all the dealings in the game. As noted by one commentator, “Platform owners, however, cannot have it both ways. They

³⁸ Available at http://terranova.blogs.com/terra_nova/2007/06/property_rights.html (last visited April 26, 2010)

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

⁴⁰ Tateru Nino, *Bragg vs. Linden Lab - The Story So Far*, Second Life Insider (Jan. 27, 2007).

cannot simultaneously encourage the purchase and sale of virtual items and then write the EULA so that all virtual items remain the property of the platform owner.”⁴¹ Yet this is exactly what the Linden EULA sets out to accomplish:

“Linden Lab has the right at any time for any reason or no reason to suspend or terminate your Account, terminate this Agreement, and/or refuse any and all current or future use of the Service without notice or liability to you. In the event that Linden Lab suspends or terminates your Account or this Agreement, you understand and agree that you shall receive no refund or exchange for any unused time on a subscription, any license or subscription fees, any content or data associated with your Account, or for anything else.”⁴²

Though the case ultimately settled before there was a decision from the court regarding whether Linden could take the property from Bragg, the decisions from the court in favor of Bragg on issues of both minimum contacts and contractual adhesion led many to believe that Bragg would have been successfully able to claim that Linden Labs deprived him of his property illegally, and this is likely what led Linden to quickly settle on terms favorable to Bragg.⁴³ Had the case been decided by the court, instead of just restoring the account Linden could have been assessed monetary damages, and more importantly the case could have well as set a precedent that would have severely hampered Linden from further heavy handed activity. As Linden stated after the settlement, “The parties agree that there were unfortunate disagreements and miscommunications regarding the conduct and behavior by both sides and are pleased to report

⁴¹ Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043 at 2043 n.1 (2004).

⁴² Second Life: Terms of Service, <http://secondlife.com/corporate/tos.php>

⁴³ See Jury Deliberation Transcript, http://cyber.law.harvard.edu/cyberone/wiki/Jury_deliberation_Transcript

that Mr. Bragg's "Marc Woebegone" account, privileges and responsibilities to the Second Life community have been restored."⁴⁴

Following *Bragg* there has been much debate about if, and how, property law should be applied to virtual worlds. It has been contended that the utility of legal rights to virtual property was one that benefitted both the users and the developers, as it would enable developers to fight off some of the back alley and out of game dealing that they sought to limit in order to generate revenue.⁴⁵ As Westbrook correctly argued, if virtual world developers weren't going to develop in game safeguards for individuals to protect their property interests, then users would have to resort to making deals outside the gaming platform, where they would be protected by the laws of the real world. Along the same line of reasoning, another commentator has argued that the growth and popularity of virtual worlds made the imposition of legal property rights no longer a question of if, but when and to what extent.⁴⁶

On the other side of this property debate are two voices: 1) virtual developers who want game autonomy, and 2) academics who think real world property law does not advance the gaming qualities that users care about. Virtual world developers think the application of real world laws to their virtual reality is untenable and unprofitable.⁴⁷ In their opinion, the whole point of creating End User License Agreements is for the users to understand that the "law" of the virtual world is dictated by the developer. Furthermore, this is law that is ever changing and

⁴⁴ Marty Linden, *Resolution of Lawsuit*, Second Life Blogs (Oct. 4, 2007).

⁴⁵ Theodore Westbrook, *Owned: Finding a Place for Virtual World Property Rights*, Note, 2006 Mich. St. L. Rev 779 at 796-97 (2006).

⁴⁶ Bettina Chin, *Regulating Your Second Life*, Note, 72 BKNLR 1303, 1349 (Summer 2007)

⁴⁷ See generally Symposium, *Rules & Borders -- Regulating Digital Environments*, 21 SANTA CLARA COMPUTER & HIGH TECH L.J. 807 (2005)

adapting, as freedom to evolve is a necessary element of maintaining a viable virtual world.

After all, if the developer needs to lower the value of an item in your inventory in order to make the gaming experience better for everyone, they should be allowed to do so without the threat of litigation for violating your property rights.⁴⁸

The other argument against property rights is that the real world legal system is not set up to adequately protect the interests that matter most to gamers. In this view, what matters to users of virtual worlds are status and fair play, not fixed prices and market systems. Online players are seen as using gaming platforms not for work, but for entertainment, and to escape from an unfulfilling reality.⁴⁹ Accordingly, it is argued, applying law to these platforms guarantees no positive change. Moreover, transaction and discovery costs from user vs. user lawsuits would severely damage the quality of the virtual worlds.⁵⁰ As evidenced by the year long battle in the *Bragg* lawsuit, there is no guarantee that issues would be resolved in a timely manner. Most importantly, the *Bragg* decision illustrated just why real law cannot be applied to virtual worlds: Linden Labs was well within its rights to terminate the account of an individual who found a way to manipulate the loophole in the company code to the detriment of other players.⁵¹ In short, virtual property antagonists content that, while virtual worlds have begun to move closer to

⁴⁸ Dr. Richard A. Bartle, *Virtual Worldliness: What the Imaginary Asks of the Real*, 49 N.Y.L. Sch. L. Rev. 19, 30-31 (2004).

⁴⁹ See Kevin Deenihan, *Status, Masturbation, Wasted Time, and WoW*, http://www.halfsigma.com/2006/10/status_masturba.html

⁵⁰ See *Complaint, Eros et. al. v. Simon*, available at http://www.virtuallyblind.com/files/07_10_24_eros_et_al_v_simon_complaint.pdf. ("Six major Second Life content creators have filed a lawsuit (.pdf) in the Eastern District of New York claiming copyright and trademark infringement against Second Life user Thomas Simon, who allegedly exploited a flaw in the Second Life software to duplicate thousands of copies of the creators' products. Simon allegedly sold these products to other Second Life users as Second Life avatar 'Rase Kenzo.'")

⁵¹ Bobby Glushko, *Tales of the (Virtual) City: Governing Property Disputes in Virtual Worlds*, Note, 22 BERKELEY TECH. L.J. 507, 524.

reality than fiction, they have not lost enough of the entertainment and gaming qualities as to make real world legal rights a necessary remedy.⁵²

While I agree with some of the fundamental principles invoked in support of this position, I think it vastly undervalues not only the significant market for money making in virtual worlds, but also the ramifications of not having real world legal protections, particularly in the property sphere. One look at the empire that Anshe Chung has built in Second Life makes it clear that for those users dedicated to creating substantial wealth within the game, anything is possible. To say that Anshe Chung is not in Second Life for work, but rather status and entertainment, is a fallacy and oversimplification, as evidenced by the lawsuit she filed when her avatar was grieved during an in-game interview.⁵³ It has also been pointed out that, conceding for the sake of argument these virtual worlds are just a game, that does not automatically preclude the laws of the real world from applying to the game.⁵⁴ Furthermore, for games like Second Life where the interface encourages in-game to real world transfers via link clicks, the line between what is purely a game and what is a virtual business is blurred. As an example, though eBay has banned the sale of virtual goods, the practice still continues to this day and underscores the notion that virtual assets have a tangible real world dollar amount that calls for some sort of real world legal mechanism to enforce laws in the event that these transactions are faulty.⁵⁵

⁵² Kevin Deenihan, *Leave Those Orcs Alone: Property Rights in Virtual Worlds*, VIRTUALLY BLIND, January 15, 2008.

⁵³ Available at http://news.com.com/Behind+the+Anshe+Chung+DMCA+complaint/2008-1023_3-6150457.html (last visited April 30, 2010)

⁵⁴ Joshua Fairfield, *Anti-Social Contracts: The Contractual Governance of Online Communities*, 53 MCGILL L.J. 427 (2008).

⁵⁵ Available at <http://www.cbc.ca/technology/story/2007/01/31/ebay-virtual.html> (last visited April 30, 2010)

Solutions in Writing While the application of real world law to virtual worlds is the most ideal situation, academic opponents and virtual world developers present a strong countervailing force against this revolution. I think virtual wrongs need to be addressed in a manner comparable to the real world, but also fully understand that virtual crimes and real world crimes cannot always be punished equally. The goal of applying real world law is to have prongs of law that apply specifically to the internet and virtual worlds, because as those mediums continue to grow, the line between virtual and real shrinks.

Though contract law is not adequate to address all of the issues that arise in virtual worlds, this does not mean that there is no value in the contract itself. Terms of Service are vital to governing, and protecting, both the producer and the end user. So, given that the Terms of Service is the framework within which we need to work, the task becomes developing language in the Terms of Service that makes people liable for their tort and property crimes in the real life as those crimes and not breach of contract. To do this provisions would need to be explicit and direct, enabling the user to fully comprehend that just because this is a virtual world doesn't mean that violating the rights of others will be met with a slap on the wrist.

There is precedent for this sort of strategic placement of provisions that give power to the drafter. For example, the choice of law provision at the end of a contract often heavily favors the drafter without being deemed unconscionable. In the same way, having language in the Terms of Service about which law will govern certain action is almost an identical form of "choice of law", but instead of the forum you are selected the applicable law. Users will feel much more comfortable understanding this at the outset and feeling protected. The counter argument is that this is very heavy handed and will drive people away, but 98% of the virtual community does not enter the game to break the laws, and so these provisions will be nothing more than safeguards

for their own interests. Facebook's ability to protect information and privacy allowed it to eclipse MySpace, and similarly virtual worlds with stringent protection policies for users, which are enforced, will become the next wave, assuming all of the technical and graphic features are on par with the industry.

After toying around with a few provisions I have written three modifications to the current Second Life Terms of Service which I feel better address and protect the users in Second Life. While not comprehensive of all the issues that may arise, it will help to avoid some of the recent litigation and make businesses and people feel more comfortable investing money into their avatar and the game.

- Addendum #1 - Looking at the Second Life Terms of Service, the first item that needs to be addressed is section 4.3 which contains the provisions regarding Linden's liability to users. Part of the provision says that, "You acknowledge that you will be exposed to various aspects of the Service involving the conduct, Content, and services of users, and that Linden Lab does not control and is not responsible or liable for the quality, safety, legality, truthfulness or accuracy of any such user conduct, User Content, or user services."⁵⁶ To better protect individuals a more appropriate provision needs to express some control by Linden. It is understandable that Linden cannot leave themselves open to all liability possible, but in situations where they truly should be held liable it is more than reasonable for there to be a policy in place that enables users to seek the right remedy. The proposed change to this particular sentence would look as follows:

⁵⁶ Second Life: Terms of Service, <http://secondlife.com/corporate/tos.php> (4.3).

“Given the size of our virtual world and the 24/7 nature of online gaming, Linden Lab cannot adequately monitor and prevent every user-to-user interaction in real time. To the extent that is reasonably foreseeable, Linden Lab will seek to maintain a safe and secure atmosphere for all users, and will work diligently to help rectify problems regarding user interaction at such time as they are brought to our attention.”

The reason that I like this provision better for both parties is that it strikes a more even balance between the capabilities, and limitations, of Linden’s control over users’ interaction with each other, while also providing the user with an understanding that Linden has some affirmative duty to address problems that arise. Furthermore, by putting language in the Terms of Service that makes it the responsibility of the user to make Linden aware of issues there is a fostering of a better relationship between the user and the interface itself. Much like a classroom full of rowdy students, Linden is in no position to see every little thing that goes on, and thus the user has to take some responsibility by at least alerting them of an issue. It is then that Linden would need to seek out the problem and fix it, but it is much easier to solve a single problem when you know the source.

- Addendum #2 - The heavy handed nature in which Linden Lab dealt with Marc Bragg made me think that the Terms of Service provision which it tried to enforce needed to have some, but not all, of the bite removed. As noted earlier, the provision essentially allows for Linden to take a users property with no reason, no notice, and no liability.⁵⁷ If users were told this upfront how many of them would have decided to join the virtual world? In the first addendum I sought to have Linden protect users from the actions of others. With this one I hope to protect users from the actions of Linden:

⁵⁷ *Id.*

“Because Linden Lab, as a virtual world developer, needs to maintain as much flexibility and control as possible to ensure the proper gaming experience for the entire community, you agree that though you are in charge of the actions of your avatar, ultimately Linden controls the accounts of its users. Linden Lab has the right to, at any time, suspend or terminate your account, provided that adequate notice has been given and you have been afforded an opportunity to rectify the issue or respond to the complaint. Only if your action following this notice continues to not comply with Linden’s orders will your account be terminated. You understand and agree that termination by Linden is a means of last resort, and if this occurs you are entitled to no refund, nor legal recourse, for anything lost in association with the discontinuance of your account.”

By keeping the ability to terminate an account without legal recourse I think this provision maintains some of the string threat Linden wanted when it wrote the original Terms of Service. However, by making notice and a chance to respond a mandatory action prior to termination I believe Linden better allows users to play the game in accordance with the Linden rules, while also feeling like they are not building up empires that can be taken from them at any whim. A result of this may be that those individuals who were reluctant to invest money in a virtual world may see this form of leeway from Linden as an invitation to work with the developers in maintaining a proper society, rather than a dictatorship. Had marc Bragg been allowed to speak with Linden prior to them terminating his account perhaps he could have explained how he was doing what he did, and why it wasn’t against any of the Linden policies as they were written. If developers really want to stay on the cutting edge of their virtual worlds understanding the tricks and schemes that result from flaws in the programming is much more important than simply cutting out the people that take advantage of a developer’s mistake.

- Addendum #3 - Having addressed Linden’s responsibility in regulating user interaction with the first addendum and limited Linden’s own interaction with its users with the

second, the last straw was addressing the responsibilities between users. While the goal of this paper is to show how Terms of Service and EULA's cannot address user interaction properly as written, these are ultimately the vehicles we are going to be stuck with for the foreseeable future. And if we must use these means as a way to protect ourselves then there must be something within the writing that calls for a legal remedy in situations that warrant such action. For Second Life, user interaction is cited in the Terms of Service with a reference to the Community Standards. In looking at the Community Standards the policing mechanisms, as expected, are limited to warning, suspension, and banishment from the game.⁵⁸ Yet, as discussed throughout the paper, these remedies are not enough to address the differing wrongs that occur within the game. This last addendum, to be added to the Community Standards, seeks to empower users that are victimized in Second Life the opportunity to defend themselves in the same manner as would be afforded them in the real world:

“Not all users of the Second Life platform fully understand the Community Standards at the outset, and Linden seeks to work with individuals, through warnings and continual reminders of policy, to ensure that they adhere to the rules of the game. However there are certain individuals whose action is of such an extreme nature as to force users themselves, as opposed to Linden, to seek legal recourse. Though Linden encourages users to seek alternate means of conflict resolution, we do not preclude any user from filing an out of world lawsuit against another user for the actions in the game. Users agree that, in the absence of circumstance in which Linden knew and ignored a violation of a user's rights, Linden will not be a party to any lawsuit and will comply with any discovery or transcript requests at no cost to Linden and within a

⁵⁸ Available at <http://secondlife.com/coporate/cs.php> (last visited April 30, 2010)

reasonable time frame. Users further agree that real world litigation is a serious recourse and will only be taken as the last resort to solve any dispute. In the event that a final verdict is rendered by a court, Linden will honor that verdict including, if necessary, the termination of a user's account, without having to refund any monies that may be lost due to Linden's accordance with the law."

Conclusion Virtual worlds, by their nature, are supposed to allow us to create an alternate reality for ourselves, free from the constraints and pressures of the real world. Though originally created solely as a gaming platform, the evolution of virtual worlds into business opportunities and marketplaces must be coupled with increasing protection by developers to ensure that all the rights of their users are protected. At inception the Terms of Service and End User License Agreements worked fine to govern mass communities because the risks were so minimal. As people invest more energy and money into the games however, remedies for wrongs cannot lag behind with these contractual agreements. Change can be effected in two ways; the adaptation and application of existing law to virtual worlds, or the modification of mass contracts which govern virtual worlds to allow users a real world legal remedy for virtual wrongs. Only through legal recourse will users be able to protect themselves in such a way that will make them feel comfortable enough to fully immerse themselves in the world. Though it requires more work for developers like Linden, the benefits of real world litigation as a remedy are both tangible and intangible. If a problem occurs, there is a remedy. But almost as important is the threat of litigation itself, which would be enough to curb some of the current issues, while at the same time encouraging further growth and development. For virtual reality to remain "real", developers must address the real nature of virtual wrongs with real world recourse.