

CLAIMING OWNERSHIP, BUT GETTING OWNED: CONTRACTUAL LIMITATIONS ON ASSERTING PROPERTY INTERESTS IN VIRTUAL GOODS

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Virtual worlds, and the subset known as massively multiplayer online games, have grown in popularity to encompass tens of millions of participants and billions of dollars in revenues per year. Participants make sizable investments of social, human, and economic capital in these virtual worlds, often with the questionable expectation that the items they have collected and creations they have developed are their property. This Comment builds on previous scholarship by looking past abstract theoretical possibilities of whether property can exist in a virtual world to perform a systematic analysis of how end user license agreements actually allocate the property rights of use, exclusion, and transfer among virtual-world providers and participants.

While there are some small differences from agreement to agreement in the commensurability of virtual goods and in the ability of participants to recognize profit from their virtual creations, the agreements consistently give providers the plenary ability to impose sanctions on participants and to change the terms of the agreements. This uncertainty severely curtails the ability of participants to enjoy the fruits of their investments. This Comment proceeds from this analysis to explore assertions of a reasonable right of access, contract claims, consumer protection claims, and possible legislative action that might help participants to protect these investments and encourage continued growth on this innovative frontier.

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“There are gods, and they are capricious, and have way more than ten commandments. Nobody knows how many because everyone clicked past them.”¹

INTRODUCTION

Individuals are increasingly required to submit to numerous contracts in order to participate meaningfully in society. Indeed, in order to participate in a wide range of voluntary activities, such as attending a concert, making a purchase online, or even parking a car in a private parking lot, an individual must agree to a contract that alters the intricate web of default rights that govern such relationships. Usually, individuals are ignorant of the terms of these contracts, and sometimes they are even ignorant of the fact that they have entered into a contract at all.

While these contracts are often necessary for businesses to protect themselves from unmanageable liability, they may take away rights that an individual's common sense tells him that he always possesses. If an individual follows his common sense instead of the contract, he may be shocked to find that the rights he relied upon no longer exist. Moreover, when the individual's

1. Posting of Raph Koster to Raph Koster's Website, *What Are the Lessons of MMORPGs Today?*, <http://www.raphkoster.com/2006/02/24/what-are-the-lessons-of-mmorpgs-today> (Feb. 24, 2006, 20:41 PST).

ignorance of the terms of the contract coincides with a drastic increase in his monetary or temporal commitment to the relationship, he may be even more surprised to learn that his options for redress through the legal system are severely limited.

This Comment will examine these issues with respect to a growing area of importance: the relationship between the providers of and participants in virtual worlds. Virtual worlds—three-dimensional online environments in which participants socialize with each other and interact with the environment—have recently exploded in popularity. Approximately 12.5 million customers² subscribe to one virtual world or another, and at a typical access fee of around \$15 per month,³ this nascent industry is already generating billions of dollars per year for the providers of virtual worlds.⁴

In addition to this source of income for providers, every popular commercial virtual world has given rise to an accompanying secondary market in real-world currency for virtual items.⁵ In fact, these markets are so robust that independent companies exist for no other purpose than to facilitate these sales.⁶ As the popularity of virtual worlds has grown, so has the size of these secondary markets. In 2001, Edward Castronova wrote an oft-cited article analyzing the secondary markets supported by the virtual world EverQuest and found that the per capita income of EverQuest participants rivaled that of citizens of many countries.⁷ Castronova calculated the nominal hourly wage of participants in this market as \$3.42 per hour,⁸ found the unit of currency to have an exchange rate higher than the Japanese Yen or Italian Lira,⁹ and computed the per

2. See MMOGCHART.com, <http://www.mmogchart.com> (follow “Total Active Subscribers” hyperlink) (last visited Jan. 26, 2007).

3. See World of Warcraft Community Site, Billing Support, <http://www.blizzard.com/support/wowbilling/?id=abl01025p> (last visited Jan. 26, 2007).

4. See Seth Schiesel, *An Online Game, Made in America, Seizes the Globe*, N.Y. TIMES, Sept. 5, 2006, at A1 (“World of Warcraft . . . is on pace to generate more than \$1 billion in revenue this year with almost seven million paying subscribers. . . . That makes it one of the most lucrative entertainment media properties of any kind.”).

5. See Tom Leupold, *Spot On: Virtual Economies Break Out of Cyberspace*, GAMESPOT, May 6, 2005, http://www.gamespot.com/news/2005/05/06/news_6123701.html (citing a study showing that the sale of World of Warcraft gold on eBay through the first four months of 2005 amounted to \$2 million, and estimating the size of the secondary market for virtual items at \$200 million); eBay Internet Games, http://video-games.listings.ebay.com/Internet-Games_W0QQsacatZ1654 (last visited Jan. 26, 2007) (listing games for which eBay hosts auctions of virtual items).

6. See Internet Game Exchange, <http://www.igxe.com/index.cfm> (last visited Jan. 26, 2007) (listing games for which Internet Game Exchange facilitates the sale of virtual items).

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

8. *Id.* at 30.

9. *Id.* at 3.

capita gross national product to be somewhere between those of Russia and Bulgaria.¹⁰ Individual items and user accounts are commonly worth thousands of dollars in these markets, so the impact of each sale on a particular participant can be considerable.¹¹

A growing body of scholarship¹² has outlined the prevalence of trading real-world money for virtual goods,¹³ analyzed the feasibility of asserting ownership over goods that have no physical manifestation,¹⁴ and questioned the possible effects of recognizing a firm property right in this area.¹⁵ This Comment owes a debt to this existing scholarship and begins by outlining the foundational matters developed in this preceding work. The Comment then builds on that foundation by taking the crucial next step of looking past abstract theoretical possibilities and performing a systematic analysis of the concrete contractual relationships between virtual-world providers and their end-user participants as actually embodied in the licensing agreements governing access to virtual worlds.¹⁶ This detailed analysis is timely, as the first lawsuits challenging the legitimacy of these agreements have been filed.¹⁷ Finding that the current contractual relationships provide participants with very little of what might be considered common-sense protection from capricious action by providers, this Comment suggests that participants may only be left with the feeling that they got “owned.”¹⁸ Nevertheless, this Comment

10. *Id.* at 1.

11. See Moira Muldoon, *They Got Game*, SALON.COM, July 13, 1999, http://archive.salon.com/tech/feature/1999/07/13/ultima_ebay.

12. See generally *State of Play: Institute for Information Law and Policy Symposium*, 49 N.Y.L. SCH. L. REV. 1 (2004) (collecting works from a symposium discussing issues in virtual worlds); Terra Nova, <http://terranova.blogs.com> (last visited Jan. 26, 2007) (discussing current legal and social issues in virtual worlds).

13. See, e.g., Castronova, *supra* note 7.

14. See, e.g., F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CAL. L. REV. 1, 29 (2004).

15. See, e.g., Jack M. Balkin, *Law and Liberty in Virtual Worlds*, 49 N.Y.L. SCH. L. REV. 63, 76–80 (2004).

16. Other writers have commented on license agreements governing property in virtual worlds. See, e.g., Joshua A. T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047, 1082–84 (2005) (discussing World of Warcraft’s prohibition on the transfer of items); Symposium, *Rules & Borders—Regulating Digital Environments: February 11, 2005: Panel 3—Ownership in Online Worlds*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 807 (2005) (presenting a transcript of a panel discussion concerning ownership issues in virtual worlds, and how they are affected by end user license agreements (EULAs)). This Comment goes a step further by analyzing in detail a wide range of license agreements and how they treat the bundle of rights that constitute property.

17. See Posting of Orin Kerr to OrinKerr.com, “Virtual Land Deal” Goes Sour and Leads to Lawsuit, <http://www.orinkerr.com/2006/05/08/virtual-land-deal-goes-sour-and-leads-to-lawsuit> (May 8, 2006, 15:12 EST).

18. See Wikipedia, *Owned*, <http://en.wikipedia.org/wiki/Owned> (last visited Jan. 26, 2007) (defining the term “owned” in gaming circles as “being defeated in a way that shows dominance”).

looks at several areas of law to determine possible ways participants might still be able to protect the considerable investments they make of time, money, and social capital.

Part I provides further background concerning what virtual worlds are and why the question of participant property rights is becoming increasingly important. Part II briefly addresses the threshold question, covered extensively by other authors, of whether property rights can exist over virtual goods at all. Part III discusses why game producers have chosen to apportion these rights through contract instead of existing intellectual property regimes and looks in extensive detail at the terms laid out in an illustrative sample of those contracts. Finally, Part IV discusses several ways by which participants could attempt to protect their virtual investments despite the providers' contractual control.

I. A TOUR OF THE VIRTUAL LANDSCAPE

From the start, when Nolan Bushnell and Atari cashed in on the willingness of people to spend quarter after quarter to play the arcade game Pong, the development of the entertainment software industry has revolved around generating revenue.¹⁹ Since these comparatively humble origins, the industry has grown massively. Entertainment software revenues are now comparable to other well-established forms of entertainment, such as feature films.²⁰

Along with this tremendous capacity for wealth generation, one of the exciting features of this industry is that every new computing and communication technology brings the possibility of radically transforming the way that consumers will interact with games—and with each other. Early virtual worlds consisted only of textual interactions between participants.²¹ While the sectioning of the world into different areas that participants could travel between as if they were physical locations infused early virtual interactions with a sense of “worldness,” the text-based nature of the interaction limited its appeal. The growing availability of affordable computer hardware with

19. See HAROLD L. VOGEL, *ENTERTAINMENT INDUSTRY ECONOMICS: A GUIDE FOR FINANCIAL ANALYSIS* 330–47 (6th ed. 2004).

20. See *id.* at 340 (comparing the yearly receipts for the video game industry to those of the Hollywood film industry).

21. See Wikipedia, MUD, <http://en.wikipedia.org/wiki/MUD> (last visited Jan. 26, 2007) (describing the experience of traveling from place to place in a text-based virtual world, or “MUD”). Despite the simple text-based nature of interactions in MUDs, they nevertheless gave rise to complex social constructs and relationships. See Jennifer L. Mnookin, *Virtual(ly) Law: The Emergence of Law in LambdaMOO*, 2 J. COMPUTER-MEDIATED COMM. (June 1996), <http://jcmc.indiana.edu/vol2/issue1/lambda.html> (describing the complex social interactions in an early text-based virtual world); Julian Dibbell, *A Rape in Cyberspace*, VILLAGE VOICE, Dec. 23, 1993, available at http://www.juliandibbell.com/texts/bungle_vv.html (further exploring social interactions in LambdaMOO).

powerful graphical capabilities has allowed virtual worlds to evolve into three-dimensional landscapes, where the participant interacts with the environment through an "avatar," a customizable three-dimensional character visible to other players in the world. Through this avatar, the participant explores the virtual landscape, socializes with others, and otherwise interacts with the virtual world.

This more easily accessible interface, along with the increasing availability of high-speed internet connections, have given rise to the exploding popularity and commercial success of virtual worlds known as massively multiplayer online games (MMOGs). Thousands of players may be interacting with these virtual worlds at the same time, hence the term "*massively* multiplayer," in contrast to previous multiuser environments that would allow only a few users to participate at the same time. Another innovative feature of these environments is that the virtual world continues to exist and develop even when a given player is not connected to it.

Before going further, it may be helpful to describe the general activities that take place in virtual worlds. While all virtual worlds have some social aspects and some aspects involving the acquisition of virtual goods, activities in virtual worlds are generally determined by the theme of the world. One major theme is the fostering of social interaction and creativity. Second Life, produced by Linden Labs, is a good example of such a world.²² Participants take part in Second Life largely to interact with each other and to explore the virtual world. Interaction in Second Life is often seen as either a substitute for or a complement to real-world interaction, allowing people to collaborate in new, interesting, and important ways. Celebrity appearances, book signings, parties, and political rallies have all been held in the virtual world of Second Life.²³ Along with social interaction, the other major activity in Second Life is creation. The interface allows participants to customize existing objects and combine objects to create brand new things in the world. Participants often spend large amounts of time customizing their avatars (or customizing

22. See Second Life, <http://secondlife.com> (last visited Jan. 26, 2007).

23. See, e.g., *Duran Duran to Give Virtual Gigs*, BBC NEWS, Aug. 8, 2006, <http://news.bbc.co.uk/1/hi/technology/5253782.stm> (describing the popular British band's plans to hold concerts in Second Life); Posting of Wagner James Au to New World Notes, *Someone Comes to Second Life*, <http://secondlife.blogs.com/nwn/2005/06/post.html> (June 13, 2005, 00:04 PST) (describing a virtual appearance and book signing by science fiction author Cory Doctorow taking place in Second Life); Posting of Wagner James Au to New World Notes, *Governor Mark Warner Comes to Second Life*, http://nwn.blogs.com/nwn/2006/08/governor_mark_w.html (Aug. 30, 2006, 20:47 PST) (describing a virtual political rally held by Virginia Governor Mark Warner).

avatars for others), and some combine other game objects together in ways that truly add depth and flavor to the virtual world.²⁴

The other major theme that defines virtual worlds is combat and collection. World of Warcraft, produced by Blizzard, is one of the most popular games of this genre, boasting seven million subscribers worldwide.²⁵ Much like traditional video games, the basic goal of World of Warcraft is to explore the world, killing monsters as you go. As a player kills monsters, his avatar becomes more powerful, capable of exploring more areas of the world and killing more powerful monsters. He will also receive rewards for killing monsters in the form of special items and virtual currency, colloquially known as "loot." Indeed, World of Warcraft has been described by some as an "online treasure hunt,"²⁶ with much of the gameplay revolving around killing monster after monster, hoping to collect particularly rare and valuable rewards for doing so.

What distinguishes these virtual environments from prior video games is the amount of interplayer interaction.²⁷ In social/creative environments, interaction is naturally central to the experience. In combat/collection environments, participants must work together in groups as large as forty people to accomplish particularly demanding tasks.

Most relevant to this Comment's inquiry is that in both the social/creative and combat/collection genres, certain items in the virtual world are highly sought after. Obtaining some items may require a significant investment of in-world time and effort,²⁸ and possession of these items is a way to identify participants who have made a considerable commitment to the virtual world. While many participants and commentators feel that the ability to purchase items for cash cheapens the experience,²⁹ one thing is clear: Goods earned or

24. See, e.g., Posting of Wagner James Au to New World Notes, Building a Better Doctorow, http://secondlife.blogs.com/nwn/2005/07/building_a_bett.html (July 22, 2005, 18:00 PST) (interviewing an artist who creates custom avatars for Second Life participants).

25. See Posting of Elizabeth Harper to Joystiq, World of Warcraft Hits 7 Million Subscribers, <http://www.joystiq.com/2006/09/07/world-of-warcraft-hits-7-million-subscribers> (Sept. 7, 2006, 11:15 CST).

26. Robert Holt, 'World of Warcraft: An Online Treasure Hunt', NPR.ORG, Mar. 16, 2005, <http://www.npr.org/templates/story/story.php?storyId=4537744>.

27. See Steven Levy, *Is World of Warcraft a Game?*, NEWSWEEK, Sept. 18, 2006, at 48 ("[P]layers of the game enjoy a form of comity rarely seen in the real world; higher-level players go out of their way to tutor newbies and accompany them on quests. Deep friendships are forged. Relationships begin that flower into marriage, with Tauren brides and Undead grooms tying the knot in some virtual tavern in Thunder Bluff.").

28. As an anecdotal example, the author spent more than 320 hours advancing a character in World of Warcraft to Level 60, the minimum level at which parties in the secondary market would be interested in acquiring it.

29. See Jon Wood, *Real Life Money Buys In-Game Products*, MMORPG.COM, Aug. 25, 2005, <http://www.mmorpg.com/showFeature.cfm?loadFeature=204&bhcp=1> (describing the debate among participants about the fairness of using cash to purchase virtual items in worlds where it is not a generally

created in virtual worlds are being sold for cash. Participants may begin to expect to be able to access the cash value of the virtual goods that they create or collect. The remainder of this Comment explores the reasonableness of the expectation of virtual property and what participants might be able to do to protect their expectation of value in virtual goods.

II. CAN PROPERTY EXIST IN A VIRTUAL WORLD?

In one sense, none of the avatars or items in a virtual world truly “exists.” That is, if a participant obtains a gold coin in a virtual world, there is no corporeal object to which the player now has a claim.³⁰ The question then arises, if none of these objects exists, does it even make sense to talk about whether a property interest in them could exist? This question can be answered on either logical or moral grounds. Logically, the existence of property is a social construct, so if people treat things or ideas as if certain parties have power over them, then they can be considered property regardless of whether they have a corporeal existence. Morally, it follows from the Lockean conception of the ability to enjoy the fruits of one’s labor that participants deserve some enforceable interest in virtual items that they have spent considerable time and effort creating or obtaining.

A. Traditional Forms of Noncorporeal Property

Early legal theorists felt that the term “property” was all that was needed to describe the relationship of a person to a thing.³¹ Since the beginning of

accepted part of game play). Further, the disdain felt for those who do participate in secondary markets can harm others who are innocent but are mistaken for secondary-market participants. See, e.g., Cartoon, *Tonight on: Gold Farmers of the Hinterlands*, PENNY ARCADE, Feb. 16, 2005, <http://www.penny-arcade.com/comic/2005/02/16/>; Posting of Ellie Gibson to Eurogamer.com, Chinese WOW Players Speak Out, http://www.eurogamer.net/article.php?article_id=62500 (Jan. 17, 2006, 11:26 GMT) (describing discrimination by World of Warcraft participants against other participants who are mistaken for gold farmers due to their limited English skills). Indeed, the social more of shunning achievements obtained through the expenditure of money as opposed to hard work, skill, and determination pervades popular culture. See, e.g., BACK TO SCHOOL (Paper Clip 1986) (depicting the tribulations of an undergraduate student who attempts to succeed academically by paying knowledgeable professionals to complete his assignments).

30. This might not be true in all cases. The game Magic: The Gathering exists as both a collectible card game and an online card game. If a player collects a certain number of digital cards in the online game, he may redeem them for physical copies of the cards. See Redemption: Terms and Conditions, <http://wizards.custhelp.com> (search text for “Redemption: Terms and Conditions”; then follow “Redemption: Terms and Conditions” hyperlink) (last visited Jan. 26, 2007) (describing the process of redeeming digital cards for physical cards).

31. See Justin Graham, *Preserving the Aftermarket in Copyrighted Works: Adapting the First Sale Doctrine to the Emerging Technological Landscape*, 2002 STAN. TECH. L. REV. 1, 17 (“Technological

the twentieth century, legal theorists have taken steps to sharpen this generic concept into something more descriptive.³² Wesley Hohfeld reconceptualized “rights” as claims and duties that lie between individuals in society, and argued that property is properly conceived as a bundle of these rights.³³ Unlike the former theory, which analyzed property in terms of a person’s relation to a thing, the bundle-of-rights approach conceives of property as the relation of people to each other with respect to a thing.³⁴ No particular “stick” in this bundle is necessarily essential to making a thing the property of a particular person, but instead the framework analyzes which of the possible rights and obligations a person has toward other people with respect to the thing.³⁵ To the extent that a person has those rights with respect to a particular thing, that thing is that person’s property. Chief among the rights that scholars generally consider part of this bundle are the right to exclude,³⁶ the right to use,³⁷ and the right to transfer interest to another.³⁸

The bundle-of-rights approach does not require the object over which a property claim is made to be a tangible thing.³⁹ For example, when an inventor successfully obtains a patent, she is considered to have a property right in her invention.⁴⁰ The property at issue is not the physical manifestation of her invention, or the official document that she obtains from the patent office—the property that she owns is the ability to practice the idea embodied in the document. The patent grants her the exclusive right to make, use, or sell the invention, and to

change has transformed nineteenth century conceptions of property as absolute dominion over a physical thing into property conceived as a limited bundle of rights in both material and non-material things.”).

32. See Adam Mossoff, *What Is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 372–73 (2003).

33. See *id.*

34. See *id.*

35. See *id.* at 373–74.

36. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982) (describing the right to exclude as “one of the most essential sticks in the bundle of rights that are commonly characterized as property” (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979))).

37. See William P. Barr et al., *The Gild That is Killing the Lily: How Confusion over Regulatory Takings Doctrine is Undermining the Core Protections of the Takings Clause*, 73 GEO. WASH. L. REV. 429, 479–80 (2005) (discussing the scope of the right to use property and the inherent limitations involved).

38. See Douglas L. Grant, *Western Water Rights and the Public Trust Doctrine: Some Realism About the Takings Issue*, 27 ARIZ. ST. L.J. 423 (1995) (discussing whether government limitations on the right to transfer should be considered takings).

39. See Wesley M. Oliver, *A Round Peg in a Square Hole: Federal Forfeiture of State Professional Licenses*, 28 AM. J. CRIM. L. 179, 192–93 (2001).

40. See Julian David Forman, Comment, *A Timing Perspective on the Utility Requirement in Biotechnology Patent Applications*, 12 ALB. L.J. SCI. & TECH. 647, 665 (2002) (discussing scholarship that considers a patent a grant of property rights).

transfer or license that right to other people. Despite the fact that it is not a tangible thing, the idea is considered her property, since she has the key rights of exclusion, use, and transfer.⁴¹

B. Property as the Fruit of One's Labor

As shown by Greg Lastowka and Dan Hunter,⁴² the Lockean conception of property provides perhaps the strongest support for the idea that virtual-world participants should have a substantial property interest in their virtual goods. Locke argued that each individual owned his own labor, and when an individual used that labor to create something from the common, the property right extended to what the individual created.⁴³ This point is often restated as the common-sense notion that an individual should be able to enjoy the fruits of his labor. This right is implicated in both social/creative virtual worlds and combat/collection virtual worlds, albeit in slightly different ways.

In social/creative virtual worlds such as Second Life, the act of combining labor with material from the commons to create items that can be considered property is clearly taking place. Second Life provides participants with three-dimensional creation tools, allowing them to combine existing objects into new forms.⁴⁴ It also provides a scripting language so that participants can

41. If it is still difficult to conceive that a person can own an imaginary piece of virtual gold, it may be easier to reconceptualize the situation in lower level terms. A virtual-world provider keeps all of the data defining a virtual world in a database. Each piece of gold and each item in the virtual world is represented by a piece of data in the database, as is every building, every treasure chest, and every avatar. Each piece of data representing a fungible item, like a sword, is associated with some other item that can hold it, like a treasure chest. When a participant enters the virtual world, the server queries this database to see which items are associated with the participant's avatar, and the server lets the participant use the items represented by that data. When the participant opens a treasure chest in the virtual world and removes a sword from it, the server makes a change in the database, removing the association between the sword and the treasure chest and creating a new association between the sword and the participant's avatar. In this way, possession of a piece of virtual property changes hands. So, although nothing tangible is being exchanged, there is a real manipulation of data happening in the database each time a virtual item changes hands. Conceptualizing the issue in these terms evokes comparison to the well-recognized interests involved with domain names. See David Nelmark, *Virtual Property: The Challenges of Regulating Intangible, Exclusionary Property Interests Such as Domain Names*, 3 NW. J. TECH. & INTEL. PROP. 1 (2004); Susan Thomas Johnson, Note, *Internet Domain Name and Trademark Disputes: Shifting Paradigms in Intellectual Property*, 43 ARIZ. L. REV. 465 (2001).

42. Lastowka & Hunter, *supra* note 14.

43. JOHN LOCKE, TWO TREATISES OF GOVERNMENT bk. II, § 27 (Legal Classics Library 1994) (1698) ("Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with it, and joyned to it something that is his own, and thereby makes it his Property."); see also Benjamin G. Damstedt, Note, *Limiting Locke: A Natural Law Justification for the Fair Use Doctrine*, 112 YALE L.J. 1179, 1184 (2003).

44. See Linden Lab, Corporate Background 1 (Oct. 2004), available at http://lindenlab.com/LindenLab_Background.pdf.

cause the objects that they have created to react to their environment and behave in interesting ways.⁴⁵ This artistic combining of geometric shapes and the creative addition of behaviors in order to create new virtual objects closely resembles the paradigmatic creation of property described by Locke.

Combat/collection virtual worlds such as *World of Warcraft* do not track the Lockean ideal as closely as creative virtual worlds do, but an exchange of labor for virtual goods is nonetheless taking place. The participant in *World of Warcraft* is not combining elements from the commons to create something never seen before, as in *Second Life*. However, it is difficult to claim that a participant who is repetitively performing arduous tasks in the world in the hope of finding rare items is not doing work or exerting effort. For an average participant to advance an avatar to the highest level, she will have to spend over 350 hours in the game—equivalent to nine weeks of work at a full-time job.⁴⁶ After reaching this highest level, participants then focus further on obtaining the best loot the game has to offer, sometimes killing tens of thousands of enemies before they can do so.⁴⁷ Thus, even though there is no invention of new objects as in *Second Life*, obtaining valuable items from the commons and developing high-level avatars in combat/collection-themed virtual worlds requires a significant investment of labor.

III. THE CURRENT RELATIONSHIP BETWEEN VIRTUAL-WORLD PROVIDERS AND PARTICIPANTS

Virtual-world participants do act as if virtual items are their property. Participants not only exercise the right to exclude other participants from items they possess through game mechanics,⁴⁸ but they have also used the courts to enforce their right to exclude against other people who have infringed those rights.⁴⁹ More important to this discussion is the fact that participants

45. See *id.*

46. See Posting of Nick Yee to PlayOn, Distribution of Leveling Times, http://blogs.parc.com/playon/archives/2005/09/distribution_of.html (Sept. 6, 2005, 11:22 PST) (describing the results of a survey of *World of Warcraft* participants and determining the average time to reach Level 60 to be 15.3 days).

47. See Interview with Brent Gustafson, a.k.a. "Vesicular," in the *Gorgonnash Realm*, *World of Warcraft* (Jan. 10, 2006).

48. See James Grimmelmann, *Virtual Worlds as Comparative Law*, 49 N.Y.L. SCH. L. REV. 147, 150–52 (2004) (describing the different ways in which code regulates use of virtual possessions) ("If I 'own' an enchanted sword, I am guaranteed to be the only player who can use that sword The game's interface typically won't even have a command allowing another player to attempt to use the sword; such a concept is inexpressible within the game's interface.").

49. See *Online Gamer in China Wins Virtual Theft Suit*, CNN.COM, Dec. 20, 2003, <http://www.cnn.com/2003/TECH/fun.games/12/19/china.gamer.reut> (discussing a case where a game player successfully sued a game company when his virtual property was stolen by a hacker).

have vigorously exercised their ability to transfer their interests in virtual goods. The exercise of these rights does not lead to the inescapable conclusion that they in fact have those rights, however. None of these virtual worlds would exist were it not for their respective providers. Since the providers write the code and sell the service, they have complete control over all aspects of the game world at all times. This Part investigates the details of how virtual-world providers have used contract to attempt to allocate and limit the property rights of participants with respect to virtual goods.

A. Why Contract?

Before virtual-world providers anticipated the growth of virtual-item commodification, they relied on existing intellectual property regimes—such as copyright⁵⁰—to protect the content of their worlds. However, the growth of virtual worlds brought uncertainty in how intellectual property rights could stop participants from exchanging virtual items for real-world currency. Providers were able to make it more difficult by preventing would-be sellers from using copyrighted art in their advertisements, but this was still not completely successful.⁵¹ Further, some commentators were beginning to suggest that the time and creativity used by participants while interacting with the virtual world might give the *participants* the ability to seek intellectual property protection for the personalities of their avatars.⁵²

Instead of relying solely on the default protections of intellectual property law, providers turned to contract to allocate rights to virtual items.⁵³ These contracts generally take the form of the familiar end user license agreement (EULA) that accompanies practically every software transaction.⁵⁴ While there are both pros and cons to the use of contract instead of intellectual

50. See *Micro Star v. FormGen Inc.*, 154 F.3d 1107, 1114 (1998) (granting a preliminary injunction forbidding the use of screen shots from a game in the marketing of an arguably infringing derivative work).

51. See Molly Stephens, Note, *Sales of In-Game Assets: An Illustration of the Continuing Failure of Intellectual Property Law to Protect Digital-Content Creators*, 80 TEX. L. REV. 1513, 1521–23 (2002).

52. See Kelly M. Slavitt, *Gabby in Wonderland—Through the Internet Looking Glass*, 80 J. PAT. & TRADEMARK OFF. SOC'Y 611, 619 (1998) (discussing the copyrightable nature of characters and arguing that an avatar could be sufficiently developed as a literary character to qualify for copyright protection); Daniel Terdiman, *Never Say Neverdie in a Virtual Economy*, ZDNET UK, Nov. 30, 2005, <http://insight.zdnet.co.uk/internet/0,39020451,39239133,00.htm> (describing how the avatar “Neverdie” gained fame and how he plans to turn that popularity into income in Project Entropia, now known as Entropia Universe); Ren Reynolds, *Hands Off My Avatar! Issues With Claims of Virtual Property and Identity 6* (Sept. 2003) (unpublished manuscript), available at <http://www.ren-reynolds.com/downloads/HandsOffMYavatar.doc>.

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

54. See *id.*

property law to determine these rights, there are at least two clear differences. First, the boundaries of the rights granted by contract are more definite. Some intellectual property doctrines contain great areas of uncertainty, such as the fair use defense to copyright infringement⁵⁵ or patent infringement under the doctrine of equivalents.⁵⁶ This uncertainty is largely eliminated by the EULAs because they explicitly allocate rights that may have previously been in doubt.⁵⁷ Proponents claim that the efficiency gained from this predetermination of rights outbalances any rights that the participants lose, while detractors worry that the power imbalance in EULAs drafted by the providers undermines the balancing of rights inherent in intellectual property law.⁵⁸

Second, EULAs can be used by providers to regulate participant activity beyond that which implicates intellectual property interests. An example of this is the regulation of undesirable behavior, such as the harassment of other participants or the dissemination of unrelated commercial advertising.⁵⁹ By inserting a term in the contract forbidding a participant to buy or sell virtual items for real-world currency, the providers gain the authority to stop this activity from taking place—an ability that would not be available to them under intellectual property law.

B. Analysis of the EULAs

Given the important role of EULAs in shaping the relationship between virtual-world providers and participants, knowing how the EULAs allocate rights and responsibilities with respect to virtual items is of great importance. It is necessary to examine the precise terms of the EULAs to determine what rights they grant to the participants when questioning whether participants' claims of ownership are legitimate. This Part does exactly that by dissecting the terms of the EULAs governing several popular virtual worlds.⁶⁰ Three

55. See Sarah Deutsch, Comment, *Fair Use in Copyright Law and the Nonprofit Organization: A Proposal for Reform*, 34 AM. U. L. REV. 1327, 1348 (1985) ("Current fair use analysis is replete with uncertainty and provides inadequate protection for copyright owners' interests.").

56. See Christina Y. Lai, *A Dysfunctional Formalism: How Modern Courts Are Undermining the Doctrine of Equivalents*, 44 UCLA L. REV. 2031 (1997) (discussing ways that courts have attempted to reduce the inherent uncertainty in the doctrine of equivalents).

57. See Miller, *supra* note 53, at 462.

58. See *id.* at 460–63.

59. See *id.* at 466.

60. The worlds included in this analysis are City of Heroes, City of Villains, Dark Age of Camelot, Entropia Universe, EverQuest, EverQuest II, Lineage, Lineage II, Second Life, The Sims Online, Star Wars Galaxies, There, Ultima Online, and World of Warcraft. Some of them have been chosen due to their popularity and therefore the size and importance of their secondary markets, and some have been chosen due to their unique treatment of virtual items.

aspects of the EULAs are particularly relevant to the existence of virtual-property claims and are analyzed below: (1) the explicit assignments of the right to use, the right to exclude, and the right to transfer; (2) the powers reserved by the provider to alter those arrangements and to strip participants of their virtual items; and (3) the remedies granted to participants when they feel their rights under the contract have been violated.

1. How Are the Rights Formally Allocated?

a. The Right to Use

Each provider treats the right to use virtual items and avatars in a similar way. Each EULA explicitly or implicitly grants participants the right to use the avatars associated with their accounts and the right to use virtual items associated with those avatars within the context of the game. Indeed, without those rights of usage, the notion of using an avatar in a virtual world to collect virtual items would not exist. However, if this right is compared to the absolute right to use that a person has over a tangible piece of property, it appears very limited. In addition to the absolute limitations on use enforced by the code,⁶¹ the EULAs further restrict the types of conduct in which participants may engage. As a condition of the right to use an avatar and the items associated with an avatar, providers require that participants adhere to particular rules of conduct.⁶² As examples of the types of conduct prohibited, all of the agreements restrict a participant from using her avatar to harass or offend other participants, impersonating a staff member of the provider, defrauding other participants, and using her avatar to conduct illegal activity.⁶³ Some of

61. The idea of limitations enforced by the code, or in other words, code as law, is an idea invented and popularized by Lawrence Lessig. See generally LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999). As a hypothetical example, if an avatar obtained a virtual copy of Black's Law Dictionary that is intended only as a passkey to enable the avatar to enter the meeting house of the Virtual Lawyer's Society, the code of the game would not likely allow the avatar to use it to club another avatar over the head. In this way, Lessig's concept that "code is law" restricts the right of use of virtual items in the way that laws of nature restrict the use of objects in the real world. See Grimmelman, *supra* note 48, at 150-51; LESSIG, *supra*, at 4.

62. These collections of rules are named differently by different virtual-world providers. For example, in EverQuest the agreement is called the "Rules of Conduct" and in World of Warcraft it is called the "Terms of Use." The general ideas governed by each of these policies are nevertheless the same.

63. If one were to engage in these types of activities in the real world, he may run afoul of the law; however, unlike in the virtual world, complying with the law in the real world is not necessarily a condition of ownership. That is, if a person prints up a newsletter that allegedly defames the company he works for, he may be fired, but his right to possess and use his printer, or the personal items he brought to work, will not necessarily change. Meanwhile, in the virtual world, using an avatar to defame the company providing the world may not lead only to summary exclusion from the world, but may also result in the loss of all

the rules of conduct go even further in preventing the use of items and avatars for specific conduct that would not be considered unlawful or even necessarily directly harmful to the virtual society, such as leaving an avatar unattended in the virtual world.⁶⁴

b. The Right to Exclude

The right to exclude—understood in this context to be the right to prevent others from exerting control over the virtual goods—is the property right most severely curtailed by the EULAs. This has been called the most important stick in the bundle of property rights,⁶⁵ but virtual-world providers do not give this right to the participants. Although the language differs from agreement to agreement, each EULA reserves the right for the provider to exclude with respect to avatars and virtual items. This is usually expressed as a retention of all rights, title, and interest in virtual objects and data,⁶⁶ and usually applies both to content created by the provider and content created by participants during their time in the virtual world.⁶⁷ The only provider to

associated property. This distinction helps illuminate the dramatic extent to which EULAs regulate activity and ownership in virtual worlds beyond the extent of legal regulation in the real world.

64. See *Star Wars Galaxies*, Rules of Conduct Supp. R. 3, http://starwarsgalaxies.station.sony.com/en_US/players/content.vm?page=Policies%20Community%20Standards&resource=policies (last visited Jan. 26, 2007) (forbidding participants from using their avatar or virtual items to block doorways or otherwise prevent access to world content); *Ultima Online* Service Rules of Conduct R. 6, http://support.ea.com/cgi-bin/ea.cfg/php/enduser/std_adp.php?p_faqid=347 (last visited Jan. 26, 2007) (forbidding participants from leaving an avatar or a pet unattended in the virtual world); *Dark Age of Camelot* End User Access and License Agreement § 1(B), <http://support.darkageofcamelot.com/kb/article.php?id=072> (last visited Jan. 26, 2007) [hereinafter *DAoC EULA*] (forbidding participants in *Dark Age of Camelot* from using their accounts for any sort of activity that can generate real-world money); *Entropia Universe* End User License Agreement § 16(n), <https://www.account.entropiauniverse.com/pe/en/rich/5185.html> (last visited Jan. 26, 2007) [hereinafter *Entropia Universe EULA*] (forbidding participants from using their avatars to spread rumors about *Entropia Universe* or its managing company).

65. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982).

66. See, e.g., *EA.com Terms of Service*, <http://www.ea.com/global/legal/tos.jsp> (last visited Jan. 26, 2007) ("Once you post or send any Content to EA.com, you expressly grant EA.com Inc. the complete and irrevocable right to quote, re-post, use, reproduce, modify, distribute, transmit, broadcast, and otherwise communicate, and publicly display and perform the Content in any form, anywhere, with or without attribution to your screen name in EA.com's discretion, and without any notice or compensation to you of any kind."); *World of Warcraft Terms of Use Agreement* § 11 (June 2, 2005), <http://www.worldofwarcraft.com/legal/termsofuse.html> ("All title, ownership rights and intellectual property rights in and to *World of Warcraft* (including without limitation any user accounts, . . . objects, [and] characters . . .) are owned by Blizzard Entertainment or its licensors.").

67. See *Miller*, *supra* note 53, at 463–64 (describing the limits on rights to creations in *Ultima Online* and *EverQuest*); *The Sims Online User Agreement*, https://player.thesimsonline.ea.com/user_agreement.jsp (last visited Jan. 26, 2007) ("[A]ll characters created, items acquired and developed, and content uploaded to the Game . . . as a result of, or for, game play are part of the Game and are the sole intellectual property of EA.").

permit any sort of right to exclude on the part of participants is Second Life, which allows participants to retain intellectual property rights to virtual content that they create.⁶⁸ Even in Second Life, however, the participants' right to exclude others from the content they create is not absolute.⁶⁹

c. The Right to Transfer

Unlike the right to exclude and the right to use, providers treat the right to transfer in a variety of different ways. This variety can be classified into three categories: providers that do not allow sales for real-world money, providers that allow sales for real-world money if done through the system run by the provider, and providers that allow transfers of some types of items but not others. None of the EULAs analyzed in this Comment allow completely unfettered exchanges of virtual items for real-world money.

The majority of the virtual worlds analyzed fall into the category of total restriction. This is true for most of the virtual worlds with the highest populations,⁷⁰ as well as a couple of the virtual worlds with smaller populations.⁷¹ These EULAs generally contain language similar to the following: "You may not buy, sell or auction (or host or facilitate the ability to allow others to buy, sell or auction) any Game characters, items, coin or copyrighted material."⁷²

68. See Second Life Terms of Service § 5.3, <http://secondlife.com/app/help/rules/tos.php> (last visited Jan. 26, 2007) (allowing participants to retain copyright interests in their creations in the virtual world); Cory Ondrejka, *Escaping the Gilded Cage: User Created Content and Building the Metaverse*, 49 N.Y.L. SCH. L. REV. 81, 87–88, 95 (2004) (describing the amount of participant-created content in Second Life, and Linden Labs' efforts to allow participants to retain intellectual property rights in their creations). The right to exclude granted by the Second Life Terms of Service is a major attraction for businesses setting up shop there, and entrepreneurs have been relying on the ability to control access to their creations. In fact, when Linden Labs recently suggested that participants in Second Life rely on legal relief via the Digital Millennium Copyright Act instead of a potentially foolproof technical solution to protect their creations from unauthorized copying, many virtual businesses closed in protest. See Posting of Cory Linden to Official Linden Blog, Use of CopyBot and Similar Tools a ToS Violation, <http://blog.secondlife.com/2006/11/14/use-of-copybot-and-similar-tools-a-tos-violation> (Nov. 14, 2006, 15:47 PST); Posting of ScuttleMonkey to Slashdot, Second Life Businesses Close Due To Cloning, <http://games.slashdot.org/article.pl?sid=06/11/15/1714241> (Nov. 15, 2006, 14:11 GMT).

69. See Second Life Terms of Service, *supra* note 68, § 5.3 (reserving certain usage rights for the virtual-world provider, and disclaiming any rights of the user to possess or access the data on the servers).

70. This list includes City of Heroes (and its sequel City of Villains), EverQuest, Lineage (and its sequel Lineage II), Star Wars Galaxies, and World of Warcraft.

71. This list includes There and Ultima Online.

72. EverQuest User Agreement and Software License § 9 (Aug. 21, 2006), http://help.station.sony.com/cgi-bin/soe.cfg/php/enduser/std_adp.php?p_faqid=16210.

The EULAs in this category differ in the lengths they go to in order to make this limitation clear to the participants,⁷³ but they otherwise have the same effect.

A small number of providers allow selling of only certain items related to the virtual world. The Sims Online allows participants to sell virtual items through third-party facilitators, but not to use such facilitators to sell their entire accounts.⁷⁴ The Dark Age of Camelot does not allow selling items, but it does allow selling entire accounts.⁷⁵

A growing number of virtual worlds fall into the category of restriction of method. EverQuest II, Second Life, and Entropia Universe all allow transfers of virtual items and avatars for real-world cash as long as the transfer happens through the system run by the provider. In EverQuest II and Second Life, it seems that the provider simply wants to be able to capture a portion of the revenue that can be generated by facilitating these transactions between participants.⁷⁶ In Entropia Universe, the situation is more complicated. Instead of utilizing each transfer of virtual items as an opportunity to charge a nominal fee as in EverQuest II and

73. The June 2, 2005 revision of the EULA for World of Warcraft went so far as to drop out of legalese to try to be perfectly clear to the rare participant who takes the time to read the contract:

Selling of Items. Remember, at the outset of these Terms of Use, where we discussed how you were "licensed" the right to use World of Warcraft, and that your license was "limited"? Well, here is one of the more important areas where these license limitations come into effect. Note that Blizzard Entertainment either owns, or has exclusively licensed, all of the content which appears in World of Warcraft. Therefore, no one has the right to "sell" Blizzard Entertainment's content, except Blizzard Entertainment! . . . Accordingly, you may not sell items for "real" money or exchange items outside of World of Warcraft.

World of Warcraft Terms of Use Agreement, *supra* note 66, § 8. Blizzard did not remain this whimsical, however: The October 16, 2006 revision removed the friendly language from this paragraph, replacing it with the more expected legalese (along with adding an express denial of the ability of participants to transfer accounts, something missing from the previous revision). See World of Warcraft Terms of Use Agreement § 8 (Oct. 16, 2006), <http://www.worldofwarcraft.com/legal/termsofuse.html>.

74. See Is It Illegal to Sell My TSO Items for Real Money?, http://support.ea.com/cgi-bin/ea.cfg/php/enduser/std_adp.php?p_faqid=5817 (last visited Jan. 26, 2007) ("It is not a Terms of Service violation to sell TSO items via eBay or through any other 3rd party vendors."). The Sims Online *does* allow the transfer of entire accounts, but requires use of their secure account-transfer system to do so. *Id.*

75. See DAoC EULA, *supra* note 64, § 1(E). This may be less a business decision and more a peculiar requirement of governing law. Dark Age of Camelot has the only EULA of the group analyzed here that chooses to be governed by the law of the State of Virginia, which prevents certain restrictions on the transfer of software licenses. See VA. CODE ANN. § 9.9A-408(a), (c) (2005). The EULA does take some steps to regulate even these transfers of characters. See DAoC EULA, *supra* note 64, § 4(A) (prohibiting "item loading," the transfer of virtual items to an account solely for the purpose of increasing its sale value).

76. Station Exchange FAQ, <http://stationexchange.station.sony.com/faq.vm> (last visited Jan. 26, 2007) ("Q. Will SOE ever create and sell characters, items or coin on Station Exchange? A. No, not for EverQuest II—all transactions on Station Exchange will be player-to-player."); Second Life Terms of Service, *supra* note 68, § 6.4.1. ("Currency Exchange does not include any issuance of new Currency by Linden or any purchase or sale of Currency by Linden.").

Second Life, Entropia Universe expects participants to pay cash directly to the provider as a way to obtain virtual currency.⁷⁷ Accordingly, Entropia Universe's virtual currency is directly convertible to cash and vice versa,⁷⁸ going so far as to provide real-world access to the virtual cash economy via real-world automated teller machines.⁷⁹ Further, the provider of Entropia Universe periodically creates new areas in their virtual world and auctions control of them to the general public.⁸⁰ Indeed, a major selling point of Entropia Universe is that participants have the opportunity to earn real-world money as a result of their actions in the game, and the business model of Entropia Universe relies upon this fact.⁸¹

Ultimately, the answer to the question of whether the right to transfer virtual items is granted to participants by the EULAs is an emphatic no. A growing number of virtual worlds have a tighter relationship between their virtual currency and real-world currency or allow carefully controlled transfers of items and cash between participants, but a sizeable majority of virtual-item sales take place outside of the rights granted by the EULAs.

2. What Power Does the Provider Have to Terminate or Modify the Agreement?

The initial allocation of rights between the parties is not the end of the discussion, because the participants and the providers have an ongoing relationship. To understand this relationship, one must look beyond the initial allocation of rights. Every EULA analyzed reserves certain crucial rights for the providers to alter the arrangement, including the right to cause forfeiture of virtual items, avatars and accounts, and the right to unilaterally modify the agreement.

77. About Entropia Universe, http://www.mindark.com/about_PE_e.html (last visited Jan. 26, 2007) ("Users must regularly upgrade their possessions via special automated service stations to retain full capacity. . . . EU's income base is the fees that the users pay for acquisition, repair, and renewal of the different assets and objects that the user chooses to use In-World.").

78. See Richard Duffek, *Project Entropia Q&A With Marco Behrmann*, MMORPG.COM, May 31, 2005 www.mmorpg.com/gamelist.cfm?setview=features&loadFeature=120&gameID=31&from=features&bhpcp=1 ("A unique aspect of Project Entropia is that a player may elect to transfer PED [Project Entropia Dollars] back into real life currency.").

79. See Entropia Universe Cash Card, <http://www.entropiauniverse.com/en/rich/5676.html> (last visited Jan. 26, 2007) ("The Entropia Universe Cash Card is a Reloadable Debit Card. Not associated with any bank, the Cash Card can be used to withdraw funds from your Entropia Universe PED account from over 1 Million ATM Machines Worldwide.").

80. See *Virtual Club to Rock Pop Culture*, BBC NEWS, Nov. 2, 2005, <http://news.bbc.co.uk/1/hi/technology/4385048.stm> (describing the sale of a virtual space station created in Entropia Universe, for \$100,000).

81. See About Entropia Universe, *supra* note 77.

Item, avatar, or account forfeiture can come about in a couple of different ways. First, all of the EULAs have a provision that allows the provider to stop running the virtual world, thereby causing the world and all virtual items and avatars within it to no longer exist.⁸² The chief way that these termination clauses differ from agreement to agreement is in the amount and type of notice that they give.⁸³ The common theme among the provisions is that the providers may stop providing the virtual world if they so choose, and that the most participants can expect in compensation is a refund of unused access fees.

The second way that forfeiture can occur is if the provider decides to terminate a participant's individual account. Most EULAs seem only to give the provider the right to terminate individual accounts when the participant has either breached the terms of the EULA or the rules of conduct.⁸⁴ This is a deceptively broad power, however, as it is left to the sole discretion of the provider to determine if such a breach has occurred, and the rules applied by the providers are often unwritten.⁸⁵

These terms are not simply idle threats used to keep participants in line—providers often use this remedy to prevent activity that comes anywhere near violating the rules of conduct. For example, Blizzard has been known to be particularly aggressive in canceling World of Warcraft accounts. During November 2006, Blizzard cancelled 105,000 accounts for various activities that purportedly violated the terms of use including, but not limited to, exchanging virtual currency for real-world cash.⁸⁶ The breadth of Blizzard's interpretation of their terms of use recently came under fire when they threatened to cancel accounts belonging to participants trying to recruit for a guild friendly to gay, lesbian, bisexual, and transgendered individuals. Blizzard

82. A prototypical example of this clause, from the EverQuest II EULA: "We may . . . terminate this Agreement if we decide, in our sole discretion, to discontinue offering the Game, in which case we may provide you with a prorated refund of any prepaid amounts." EverQuest II User Agreement and Software License § 6 (Aug. 21, 2006), http://help.station.sony.com/cgi-bin/soe.cfg/php/enduser/std_adp.php?p_faqid=12248 [hereinafter EQ II EULA].

83. Compare *id.* (providing no notice before termination), with Second Life Terms of Service, *supra* note 68, § 7.2 ("Linden reserves the right to interrupt the Service with or without prior notice for any reason or no reason."), and DAoC EULA, *supra* note 64, § 6(A). ("In the event Mythic, in its sole discretion, ceases to provide any or all of the information services offered hereunder, then Mythic may terminate this Agreement . . . upon not less than thirty (30) days prior notice, which notice may be delivered via Mythic's patching system, or posted on Mythic's web site, or via electronic mail.").

84. See, e.g., EQ II EULA, *supra* note 82, § 6 ("We may terminate this Agreement . . . immediately and without notice: (i) if you violate any provision of this Agreement; . . . (iv) upon game play, chat or any player activity whatsoever which we, in our sole discretion, determine is inappropriate and/or in violation of the spirit of the Game; (v) upon any violation of . . . the Game Rules of Conduct . . .").

85. See *id.*

86. World of Warcraft Accounts Closed Worldwide (Dec. 22, 2006), <http://www.worldofwarcraft.com/news/rss-12-2006.xml>.

claimed that this guild would violate the terms of use out of the fear that it might “provoke a response” from other participants.⁸⁷ While Blizzard eventually decided to allow the guild,⁸⁸ the incident is an example of Blizzard’s zeal in enforcing their terms of use through terminating accounts, and the scope of activities that can be considered by providers to fall within the rules of conduct.⁸⁹

The breadth of this power to terminate can even reach to “associated” account holders who did not themselves engage in any prohibited conduct.⁹⁰ Some EULAs go so far as to reserve for the provider the right to terminate user accounts for no reason at all.⁹¹ The effect of termination is generally forfeiture of all virtual items, avatars, and accounts, with no compensation required for any possible resale value in the virtual goods or the access fees paid by the participant.⁹²

Along with the right to terminate accounts, the EULAs all reserve the right for the providers unilaterally to alter the terms of the agreement.⁹³ The only substantial difference between the EULAs in this regard is the amount of time before the changes are effective and the quality of notice required.⁹⁴

87. See Posting of Nate Anderson to Ars Technica, *Blizzard Bans Recruiting for Gay Guild*, <http://arstechnica.com/news.ars/post/20060207-6129.html> (Feb. 7, 2006, 12:33 PST).

88. See Posting to Edge Online, *Blizzard CEO Responds to GLBT Issue*, http://www.edge-online.co.uk/archives/2006/03/blizzard_ceo_re.php (Mar. 10, 2006, 07:00 PST).

89. See *Banned from WoW for Using a Programmable Keyboard* (Mar. 18, 2003), <http://infernix.net/wowban> (describing the cancellation of an account with thousands of hours invested in two Level 60 characters for activity that is not clearly a violation of the Terms of Use).

90. See, e.g., *City of Villains User Agreement* § 4(j) (Nov. 2006), http://www.plaync.com/help/eula_cov.html (allowing termination of associated accounts, including accounts from the same Internet address, which could mean that a roommate or neighbor sharing an Internet connection with another participant could have her account terminated due to the unrelated actions of her roommate).

91. See, e.g., *Entropia Universe EULA*, *supra* note 64, § 6 (“MindArk may terminate this Agreement upon notice to the Participant. Such termination may be made without reason, and may be for one or more Participants.”); *Second Life Terms of Service*, *supra* note 68, § 7.1 (“Linden has the right at any time for any reason or for no reason to suspend or terminate your Account.”).

92. See, e.g., *Entropia Universe EULA*, *supra* note 64, § 6 (“In the event that your Account is locked or terminated, no refund will be granted.”); *DAoC EULA*, *supra* note 64, § 6(D) (“[I]n the event of termination, all the attributes of the account, including characters, items and currency associated with the account will be lost.”) (emphasis omitted). *But see* *Second Life Terms of Service*, *supra* note 68, § 7.1 (indicating that upon suspension for reasons other than fraud, illegal activity, or disruption of service, the virtual-world provider will auction off the participant’s virtual land and return the proceeds to him, minus a handling fee).

93. See, e.g., *EQ II EULA*, *supra* note 82, § 3 (“We may amend this agreement at any time in our sole discretion.”).

94. Compare *There Terms of Service* § 1, <http://webapps.prod.there.com/login/74.xml> (last visited Jan. 26, 2007) (providing notice via email fifteen days before the changes go into effect), with *Ultima Online Terms of Service* § 2a, http://support.ea.com/cgi-bin/ea.cfg/php/enduser/std_adp.php?p_faqid=21 (last visited Jan. 26, 2007) (providing no notice and requiring users to inform themselves when changes to the agreement are posted, which take effect thirty days after posting), and *City of Heroes User Agreement* § 1(b) (Nov. 2006), http://www.plaync.com/help/eula_coh.html (providing that changes are effective immediately upon posting, and that notice is provided the next time the participant attempts to enter the virtual world).

This right to amend the agreement is perhaps the broadest power reserved by the provider, as all of the other rights in the agreement are subservient to this right, and the only options generally provided for participants who are unhappy with the changes are to terminate the agreement or to accept the changes through continued participation.⁹⁵

3. What Are the Participant Remedies Under the EULAs?

Along with reserving rights for the providers to alter or terminate the agreements, the EULAs also restrict participants to specific, limited remedies in the event of breach on the part of the provider. The chief remedies granted to the participants by the EULAs are the rights to terminate the agreement and to recover a portion of any prepaid access fees.⁹⁶ These remedies are not likely to be considered useful to participants who feel that their rights to virtual goods have been violated. Once a participant has lost access to his virtual items, he will have completely lost the ability to capitalize on his past investments of time, effort, and money in the virtual world. Further, the desire to maintain social connections within the virtual space may make exit difficult,⁹⁷ and the threat of the exit of an individual participant is not likely to change the behavior of a provider unless that participant is particularly popular or influential among the rest of the participants in that virtual world.⁹⁸

Outside of the right to terminate the agreement, the EULAs expressly limit many other avenues of redress. Most of the EULAs contain terms disclaiming any right to or value in virtual items, avatars, and accounts.⁹⁹ This

95. See, e.g., Ultima Online Terms of Service, *supra* note 94, § 2a ("If any such revision is unacceptable to you, you may terminate your membership as provided in Section 9. Your continued use of the Service . . . will mean that you accept all such revisions."). But see DAoC EULA, *supra* note 64, § 5 (allowing a participant to transfer his account to someone else within sixty days if he is unhappy with material changes to the terms).

96. See, e.g., EA.com Terms of Service, *supra* note 66 ("You understand and agree that the cancellation of your Account or a particular subscription is your sole right and remedy with respect to any dispute with EA Online."); DAoC EULA, *supra* note 64, § 10 ("[I]n the event of a material breach of Mythic's obligations to provide access to and use of your account, . . . your sole and exclusive remedy shall be a refund of any paid access fees attributable to the period of wrongful denial of service, or three-months' access fees, whichever is less.") (emphasis omitted).

97. See Balkin, *supra* note 15, at 66.

98. See Grimmelman, *supra* note 48, at 173 n.112 (describing the situation in the world of The Sims Online, where influential participants constituting a "shadow government" are exerting increasing influence on the virtual-world provider).

99. See, e.g., DAoC EULA, *supra* note 64, § 10 ("You specifically acknowledge that the time you spend playing Dark Age of Camelot is for entertainment purposes only, and that you claim no interest in the value of such time as represented by the building up of the experience level of your character and/or the items your character accumulates during your time playing Dark Age of Camelot.") (emphasis omitted).

seems to be an attempt to respond to the increasing commodification of virtual items, as can be seen by comparing the EULAs from EverQuest (which does not allow the sale of virtual items) and its sequel EverQuest II (which does allow the sale of virtual items if done through the provider).¹⁰⁰ If a participant can nevertheless formulate a worthwhile claim against the provider, the EULA limits the ways in which she can pursue it. As with many consumer contracts, the EULAs have clauses compelling arbitration,¹⁰¹ specific venue, and choice of law. Most of the EULAs choose California or Texas law and venue, two jurisdictions thought to be particularly friendly to the holders of intellectual property rights.¹⁰² The outliers in the sample group are the EULAs governing access to Dark Age of Camelot, which chooses Virginia law,¹⁰³ and Entropia Universe, which chooses the Law of Sweden.¹⁰⁴ Some of the EULAs also have provisions that waive particular forms of relief¹⁰⁵ or set liquidated damages at small amounts.¹⁰⁶

100. A major difference between the EverQuest EULA and the EverQuest II EULA was the addition of this paragraph:

You will never assert or bring any claim or suit against SOE . . . which is related to or based on (i) a claim that you 'own' and virtual goods in any game, (ii) a claim for the 'value' of virtual goods if SOE deletes them (and/or terminates your account(s)) if you . . . violate any provision of . . . this agreement . . . , and/or (iv) a claim that the 'value' of any virtual goods has increased or decreased by virtue of any game modification that SOE has made or will make.

EQ II EULA, *supra* note 82 (emphasis omitted).

101. See Frederick L. Miller, *Arbitration Clauses in Consumer Contracts: Building Barriers to Consumer Protection*, 78 MICH. B.J. 302, 302 (Mar. 1999) (describing the growing prevalence of arbitration clauses in consumer contracts).

102. See, e.g., *Improving Federal Court Adjudication of Patent Cases: Hearing Before the Subcomm. on Courts, the Internet and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 8, 9 (2005) (prepared statement of Kimberley A. Moore, Professor of Law, George Mason University School of Law) (testifying that increases in case filings in Texas "reflect forum shopping on the part of opportunistic plaintiffs who perceive a benefit to filing in the Eastern District of Texas").

103. DAoC EULA, *supra* note 64, § 11.

104. Entropia Universe EULA, *supra* note 64, § 11.

105. See, e.g., EQ II EULA, *supra* note 82, § 14 ("You agree to waive any right to equitable relief including, without limitation, injunctive relief . . . ; however, the foregoing shall not preclude SOE and/or its licensors from seeking any injunctive relief.") (emphasis omitted); There Terms of Service, *supra* note 94, § 8 ("Company's entire liability and your exclusive remedy with respect to the use of any software provided or used by company shall be the replacement of such software found to be defective. Your sole and exclusive remedy for any other dispute with company is the cancellation of your account . . .") (emphasis omitted).

106. See, e.g., Ultima Online Terms of Service, *supra* note 94, § 7 (limiting liability to the cost of the CD and fees paid for the service); City of Villains User Agreement, *supra* note 90, § 12 (limiting liability to the account fees paid in the last six months).

C. Summary of the Current State of Contractual Rights to Virtual Items

In sum, virtual-world providers are attempting to fight the potential liability and loss of control associated with the commodification of virtual goods through the license agreements under which participants are allowed to enter virtual worlds. The providers undermine the legitimacy of ownership claims on the part of participants by severely restricting the property rights afforded to them. The providers consistently retain the right to exclude and restrict the right to use. While the providers are not consistent in how they treat the right to transfer, those who do give participants a right to transfer do so only in situations controlled by the providers. Since the participants are only given a tiny sample of the bundle of rights that constitute property, it does not appear that participants can claim to “own” outright the virtual items and avatars they create and acquire while in virtual worlds. Even if participants do try to protect their interests under the contracts, they will find that the fora and remedies available to them under the contracts are limited almost to the point of worthlessness.

IV. HOW CAN PARTICIPANTS PROTECT THEMSELVES FROM LOSING THEIR INTERESTS IN VIRTUAL GOODS OF SIGNIFICANT VALUE?

The contracts under which participants access virtual worlds give them very few rights over the virtual items they obtain. However, the participant community as a whole nevertheless treats virtual items and avatars as things of value.¹⁰⁷ A participant must spend a lot of time to develop a powerful avatar or to obtain rare virtual items, and the human capital required to do so has inherent value. That is why so many participants who do not have much free time are willing to spend real-world currency on such items instead of acquiring them through effort in the virtual world,¹⁰⁸ and why many participants who have gone through this process themselves object to the sale of virtual items for real-world currency.¹⁰⁹ The existence of real-world value in virtual items is becoming increasingly hard to ignore, as providers enter the market for

107. See Castronova, *supra* note 7, at 7.

108. See Ondrejka, *supra* note 68, at 97 (“Rather than simply not playing the game, time-constrained users can make the rational economic decision to use real world currency to advance their character rather than time.”).

109. See Wood, *supra* note 29 (describing the responses among the participant community to the launch of Station Exchange in EverQuest II).

facilitating cash transactions and participants have begun to turn profits on investments of time and money made in virtual items.¹¹⁰

Courts in other countries have found it hard to ignore claims that interests in virtual items have been violated, despite the lack of a genuine contractual right to those items as property.¹¹¹ If virtual-world participants in *this* country were to try to get relief for the loss of value that occurs when providers unfairly confiscate their virtual items, how might they be able to do so (assuming that complications surrounding arbitration clauses could be overcome)? This Part considers four possibilities: (1) alleging a violation of the minimal rights that are granted to the participants by the EULAs; (2) attacking the validity of the EULAs themselves in order to state a more sound property claim; (3) attacking the relationship established by the EULA under consumer protection laws; and (4) changing the rules of the game altogether through legislative action.

A. Alleging a Reasonable Right of Access

Although participants do not own virtual items, they nevertheless are given at least some minimal right to them under the EULAs. Some writers have described this right as “possessory,”¹¹² but it is important to consider what is possessed before trying to analogize to other areas of law that handle the violation of possessory rights. A right to possess a real-world object in the charge of another would seem to give rise to a relationship similar to that between a warehouse owner and a tenant, with the rights and responsibilities that follow from that relationship.¹¹³ Since the participants never have a right to physically possess either the virtual item or the data representing that item, that does not appear to be the relationship here. It is more accurate to say that what participants possess is a license to enter the virtual world and to use items in connection with that access. Transfers of virtual items, avatars, and accounts constitute not a transfer of possession of the virtual good itself,

110. See *Virtual Property Market Booming*, BBC NEWS, Nov. 9, 2005, <http://news.bbc.co.uk/2/hi/technology/4421496.stm> (“A gamer who spent £13,700 on an island that exists only in [Entropia Universe] has recouped his investment, according to the game developers. The 23-year-old gamer known as Deathifier made the money back in under a year.”).

111. See Posting of CmdrTaco to Slashdot, *Virtual Muggings in Lineage II*, <http://games.slashdot.org/article.pl?sid=05/08/18/1529229> (Aug. 18, 2005, 11:58 PST) (describing the story of a man arrested in Japan for creating a program that robbed other players in Lineage II).

112. See Grimmelman, *supra* note 48, at 151.

113. See, e.g., 12 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, REAL PROPERTY § 742 (10th ed. 2005) (outlining a landlord’s responsibilities under California law with respect to a tenant’s personal property when a tenant has violated his lease).

but instead a transfer of the license associated with use of the virtual good, subject to all of the forfeiture conditions that existed before the transfer.¹¹⁴

This relationship bears a striking resemblance to the sale of tickets to concerts and sporting events. When a promoter sells an event ticket, the purchaser obtains possession of an object (the physical ticket). While that person could be said to own the physical ticket, he does not own an absolute right to enter the venue during the event. Instead, the ticket represents a license to access the venue, subject to certain terms and revocable at the discretion of the venue.¹¹⁵ These terms are very similar to the relationship between a virtual-world provider and participant, in that they contain restrictions on use,¹¹⁶ exclusion,¹¹⁷ and transfer.¹¹⁸

The boundaries of the discretion of a venue owner to revoke the license granted by an admission ticket have changed over the years.¹¹⁹ The traditional common law rule was that property owners had an unconditional right to exclude patrons for any reason.¹²⁰ The absoluteness of this rule was only lessened if the proprietor was engaged in a public calling (such as innkeepers or common carriers).¹²¹ While this is generally the law in the absence of overriding

114. See Station Exchange FAQ, *supra* note 76 (describing the rights granted by the EULA to use or sell EverQuest II goods as a "limited license right, not an ownership right"); Second Life Terms of Service, *supra* note 68, § 1.5 (defining the term "sell" in relation to Second Life's currency exchange as "to transfer for consideration to another user the licensed right to use Currency in accordance with the Terms of Service").

115. For example, the back of a typical ticket to a sporting event may contain text such as the following:

This ticket is a revocable license, subject to termination with denial of admission at management's discretion upon refund of the purchase price The resale or attempted resale of this ticket at a price higher than that appearing hereon is grounds for seizure and cancellation of this ticket without compensation This ticket may not be used for advertising, promotion or other trade purposes.

Ticket Stub, Seattle Thunderbirds vs. Portland Winterhawks (Mar. 19, 2005) (on file with author).

116. See *id.* (preventing the ticket holder from recording the event or bringing certain items into the arena).

117. See *id.* (constituting a license, wherein the event promoter retains the right to exclude).

118. See *id.* (restricting the resale of the ticket). The controversies surrounding ticket scalping and the restriction thereof may provide a guide to how legislatures will seek to regulate the sale of virtual goods. For more about ticket-scalping regulation, see Daniel J. Glantz, Note, *For-Bid Scalping Online?: Anti-Scalping Legislation in an Internet Society*, 23 CARDOZO ARTS & ENT. L.J. 261, 266 (2005) ("Currently, twenty-nine states have statutes regulating the resale of entertainment tickets.").

119. See Steven Sutherland, Note, *Patron's Right of Access to Premises Generally Open to the Public*, 1983 U. ILL. L. REV. 533, 534–38, 540–46 (exploring the development and current state of the common law right of an owner of private property to exclude or eject patrons).

120. See *Wood v. Leadbitter*, (1845) 153 Eng. Rep. 351, 359 (Exch. Div.) (creating the traditional common law rule in England allowing arbitrary exclusion); *Griffin v. Southland Racing Corp.*, 370 S.W.2d 429, 430–31 (Ark. 1963) (applying the traditional English common law rule in American courts).

121. See Sutherland, *supra* note 119, at 535–36.

statutes, some courts have held that property owners must have a legitimate reason for excluding patrons.¹²² California courts historically have interpreted their state law to forbid ejectment of patrons without good reason.¹²³ While recent decisions may have put that prohibition in jeopardy, there is not yet binding authority that eliminates the requirement.¹²⁴ Violations of the patron's common law right of access can lead to claims seeking injunctions to compel admission, damages, or both.¹²⁵

Participants who have had their virtual items and avatars taken from them by providers may have some success attempting to assert claims on a theory of unreasonable denial of their right to access, but only in certain situations. The reason for exclusion will factor into the strength of the claim. If the provider can state a legitimate business reason for excluding the participant, then the participant is unlikely to succeed. If the reasons constitute a restriction on free expression or discrimination based on a protected classification, the chances of success for the participant increase.¹²⁶ If the provider revoked access arbitrarily, participants may be able to formulate a particularly strong claim.

B. Claims Based on Contract Theories

Virtual-world participants may also try to protect their interests in virtual items by attacking the terms of the EULAs under contract theories. While it is not likely that participants could successfully deny enforceability based on the fact that the EULA is presented as a click-wrap or shrink-wrap license,¹²⁷ two theories may still be of use to participants: attacking the contract

122. See *id.* at 540–41.

123. See Sande L. Buhai, *One Hundred Years of Equality: Saving California's Statutory Ban on Arbitrary Discrimination by Businesses*, 36 U.S.F. L. REV. 109, 109 (2001) ("Businesses may exclude customers for any reason so long as they do not do so for a statutorily prohibited reason. For over 100 years, California has taken a significant step further, prohibiting *all* forms of arbitrary business discrimination.").

124. See *id.* at 110 (arguing that recent lower court decisions narrowing the statutory protections against discrimination by businesses should not be given controlling authority because they have "not yet [been] ratified by the California Supreme Court," and are contrary to "a century of anti-discrimination jurisprudence" in California); see also *id.* at 133–37.

125. See Sutherland, *supra* note 119, at 533–34 n.7.

126. See Sarah G. Vincent, *The Cultural Context of the Shopping Mall: Tension Between Patron's Right of Access and Owner's Right to Exclude*, 37 UWLA L. REV. 221 (2004); *Harris v. Capital Growth Investors XIV*, 805 P.2d 873 (Cal. 1991) (holding that the Unruh Act still protects against discrimination by businesses based on protected categorizations listed in the Act).

127. See Kevin W. Grierson, Annotation, *Enforceability of "Clickwrap" or "Shrinkwrap" Agreements Common In Computer Software, Hardware, and Internet Transactions*, 106 A.L.R. 5th 309 (2003).

as unconscionable or attempting to circumvent the contract terms by asserting reasonable reliance on the promise of accumulated value.

1. Unconscionability

A court can choose not to enforce a contract that it deems to be unconscionable. The test for unconscionability has two prongs: procedural and substantive. If a contract is both procedurally and substantively unconscionable, the court may choose not to enforce it.¹²⁸ Procedural unconscionability concerns the manner in which the contract was formed, focuses on factors of oppression and surprise, and can often arise in cases of standard form contracts in consumer transactions.¹²⁹ Substantive unconscionability arises when the terms of the contract are unreasonably favorable to the party seeking enforcement.¹³⁰

Existing case law tends to weigh against parties attacking EULAs on grounds of unconscionability. In *Davidson & Associates, Inc. v. Internet Gateway*,¹³¹ a federal district court found that unconscionability arguments did not bar enforcement of a EULA that governed the use of certain early games and online services produced by Blizzard. The defendants had reverse engineered the network protocols used by Blizzard's games and had used the information to create an "emulator" that would allow players to play Blizzard's network games without connecting to and paying for Blizzard's network service.¹³² The EULA that governed use of the games prohibited such reverse engineering, and Blizzard sued for breach of contract.¹³³ First, the court found that the EULA was not procedurally unconscionable,¹³⁴ reasoning that even though there was unequal bargaining power involved, the EULA did not rise to the level of unconscionability. The court focused on the fact that the defendants were computer programmers familiar with the language used in the contract as opposed to unwitting members of the general public, had the choice to select a different video game or to return the software for a full refund if they did not agree with the terms of the EULA, and had notice that the games were subject to the EULA.¹³⁵ Second, the court found that even if the

128. See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (1965); CAL. CIV. CODE § 1670.5 (West 1985).

129. See *Davidson & Assocs., Inc. v. Internet Gateway*, 334 F. Supp. 2d 1164, 1179 (E.D. Mo. 2004) (internal citation omitted).

130. See *id.*

131. 334 F. Supp. 2d 1164.

132. *Id.* at 1172.

133. *Id.* at 1167, 1170–71.

134. *Id.* at 1180.

135. *Id.* at 1179–80.

contract was procedurally unconscionable, it was not substantively unconscionable because it did not involve contract terms that were “so one-sided as to ‘shock the conscience’ or that impose[d] harsh or oppressive terms.”¹³⁶ Since there was neither procedural nor substantive unconscionability, the court found that the EULA could be enforced.¹³⁷

Participants in virtual worlds may have more success attacking the EULAs for unconscionability than did the defendants in *Davidson*. First, participants who are already spending time in a virtual world cannot as easily choose to terminate their agreement when they discover new or changed contract terms as the defendants in *Davidson*. Participants who have spent a great deal of time, money, and social capital in a given virtual world will be much less willing to walk away from that investment than a customer who has just purchased a game and has not yet played it.¹³⁸

Second, surprise can be an issue in these EULAs in a way that was not contemplated in *Davidson*. While *Davidson* only concerned the enforceability of the initial terms that were provided when the defendant first purchased and installed the software, here there is an ongoing relationship between the participant and the provider, and the provider can alter the terms at any time.¹³⁹ This is more likely to give rise to a surprising term than the situation in *Davidson*.

Finally, while it is a fact-intensive inquiry, there appears to be a greater chance than in *Davidson* that the terms of these EULAs would, as a whole, “shock the conscience.” Many EULAs involve the provider’s ability to stop providing access to the virtual world for “any reason or no reason” at the provider’s complete discretion, even when participants have made significant investments in the virtual world. As an extreme example, in situations where participants may have given hundreds of thousands of dollars directly to the provider for access to virtual goods,¹⁴⁰ it does shock the conscience to think that the provider could simply retract access to the virtual goods yet keep the money that the participant paid for them.¹⁴¹ Even if a court would hold a single

136. *Id.* at 1180.

137. *Id.*

138. See Balkin, *supra* note 15, at 66.

139. But see Julian Dibbell, *Owned! Intellectual Property in the Age of eBayers, Gold Farmers, and Other Enemies of the Virtual State* (Nov. 2003), available at <http://www.juliandibbell.com/texts/owned.html> (describing the development of changes to a EULA as a negotiated contract between the virtual-world provider and the overall participant community).

140. See Peter Svensson, *Man Buys Virtual Space Station for \$100,000*, USA TODAY, Nov. 9, 2005, http://www.usatoday.com/tech/gaming/2005-11-09-virtual-real-estate_x.htm.

141. See Entropia Universe EULA, *supra* note 64, § 6 (“In the event that your Account is locked or terminated, no refund will be granted.”).

large investor to a higher standard of care, the same might not be true of large numbers of investors who each only invested a small amount.

2. Reliance/Promissory Estoppel

A promise made by one party that another party relies on to his detriment can be enforced on a theory of promissory estoppel, regardless of the existence or nonexistence of a contract requiring the promise to be carried out.¹⁴² To enforce a promise on the basis of promissory estoppel, a plaintiff must establish that there was a definite promise made, an expectation of reliance on that promise, actual reliance on that promise, and that an injustice would result if the promise is not enforced.¹⁴³

Might virtual-world participants be able to use this theory to obtain remedies from providers who unfairly confiscate their virtual items? It seems that if a participant spent a great deal of time amassing virtual items and developing avatars with the expectation that he would be able to sell them for a profit later, it would be easy to meet the burden of establishing actual reliance. If there are existing markets for the virtual goods so that the value of the forfeited items can be proven, it should also be possible for a plaintiff to establish that an injustice would occur if the items were wrongfully confiscated.

Claims on this theory are nevertheless highly vulnerable for two reasons. First, in order for a claim based on promissory estoppel to succeed, the plaintiff must be able to point to a definite promise made by the defendant.¹⁴⁴ To be considered definite, the promise cannot be alterable or optional on the part of the promisor, and cannot be so indefinite that it is unenforceable.¹⁴⁵ Virtual-world participants will have difficulty establishing this definiteness. Even the EULAs that do permit the sale of virtual goods for real-world currency contain clauses similar to the clauses from *Spooner v. Reserve Life Insurance Co.*¹⁴⁶ that allow the provider to change the terms of the agreement at any point.¹⁴⁷ Under these circumstances, it will be difficult for a participant to establish that the provider had made a definite promise.

142. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

143. See *Ricketts v. Scothorn*, 77 N.W. 365 (Neb. 1898) (outlining the requirements for a claim of promissory estoppel).

144. See *Spooner v. Reserve Life Ins. Co.*, 287 P.2d 735, 738 (Wash. 1955) (ignoring the other factors of a claim for promissory estoppel and holding a claim invalid because of “provisions contained in the promise which in effect [made] its performance optional or entirely discretionary on the part of the promisor”); RESTATEMENT (SECOND) OF CONTRACTS § 21.

145. See *Spooner*, 287 P.2d at 738.

146. 287 P.2d 735.

147. See *supra* Part III.B.2.

Second, these claims are vulnerable due to the questionable reasonableness of reliance on the part of the participant. If a court considers only the existence of sizable secondary markets for virtual goods, then it does seem reasonable to think that a participant should be able to take advantage of that market. However, courts will likely assume that the participants have notice of the terms of the EULAs, even if the participants have never read them.¹⁴⁸ All of the EULAs contain terms either preventing the sale of virtual goods or disclaiming any real-world value in virtual goods.¹⁴⁹ Some of these are very emphatic or are otherwise calculated to communicate the absence of value to laypeople.¹⁵⁰ Given courts' assumptions that the participants will be on notice of even technical contract terms, making the argument that relying on the promised real-world value of virtual goods is reasonable enough to support a promissory estoppel claim would be difficult.

One could argue that, regardless of the terms contained in the EULAs, the virtual-world providers implicitly recognize the legitimacy of real-world value of virtual items when they fail to take steps to shut down the secondary marketplace. Since all of the item transfers take place within the virtual world (even though the cash transfer may take place elsewhere), they therefore take place during interactions enabled by and observable by the provider. One could argue that if providers truly wanted to eliminate the secondary marketplace, they would alter the code governing the virtual world to completely prevent such transfers. Since they do not do so, they arguably implicitly endorse the real-world value of the items and therefore admit the reasonableness of believing in such value. While this argument may be plausible, any *effective* regulation of item trades through code would likely require the banning of *all* interparticipant trades of items, including trades currently allowed under the rules of conduct. Such trades are one of the driving forces behind the existing social networks, and such regulation may harm virtual worlds more than it would be worth.

A better argument for the reasonableness of believing in the promise of real-world value is that reasonableness increases with the legitimacy of commodification. It may not be reasonable to believe in the promise of real-world value in a virtual world that does not provide any mechanism for selling virtual items. However, as providers increasingly use the sale of virtual items as an income stream, and as they increasingly market their worlds as containing the

148. See *Hill v. Gateway 2000*, 105 F.3d 1147 (7th Cir. 1997) (holding a consumer bound to an arbitration agreement in a form contract contained within a product box that the consumer did not read).

149. See *supra* Parts III.B.1.c, III.B.3.

150. See *supra* note 73 and accompanying text.

ability to trade items for real-world cash, the reasonableness of a participant's belief that he will be able to access the cash value of virtual items he possesses increases. Comparing EverQuest II to Entropia Universe illustrates two different lengths to which this reasonableness might extend.

EverQuest II launched the Station Exchange service as an additional feature of the EverQuest world, thereby allowing participants to legitimately trade virtual goods for cash.¹⁵¹ However, the Frequently Asked Questions (FAQ)¹⁵² accompanying this rollout outlines many limitations. It states that the purpose of the Station Exchange is to give participants a secure environment in which to trade items for cash and to thereby protect them from scams. The stated purpose of allowing these trades is to give participants with more money than time the ability to experience more parts of the virtual world than they would normally be able to, not necessarily to allow participants who have already invested time and effort in the world to produce an income stream through the sale of items.¹⁵³ The FAQ goes so far as to expressly disclaim the granting of any ownership right to virtual items through the establishment of the Exchange and explains that the Exchange may not always exist and will not be available to all participants.¹⁵⁴ With this marketing, it does not seem reasonable for a participant to rely on the ability to exchange his virtual items in EverQuest II for cash.

Entropia Universe, on the other hand, bases a great deal of its marketing on the commensurability of virtual goods. The virtual world is described on the provider's web site as having a "Real Cash Economy."¹⁵⁵ The rest of the marketing also urges that there are real-world riches to be made in the world of Entropia Universe. For instance, the provider has issued press releases touting the vast sums made by current participants through investing large amounts

151. See Station Exchange FAQ, *supra* note 76.

152. "Frequently Asked Questions" (FAQ) is a common term for a document containing a list of questions and answers about a particular topic.

153. See Station Exchange FAQ, *supra* note 76 ("EverQuest II is a massive game, with much to see and do. Some players want to experience as many different aspects of the game as possible, but may not have enough time to play multiple character types. . . . By establishing a legitimate outlet for these activities, SOE will be a leader in determining the future direction and growth for this emerging market.").

154. See *id.* ("We will be introducing new servers that will be Exchange-enabled. There will be no current live servers switched to the Station Exchange ruleset."). That is, existing participants will not be able to use the Exchange to sell virtual items they have already collected, and future participants will be able to decide whether or not to play in a section of the virtual world where participants are able to sell and acquire virtual items for cash.

155. What is the Entropia Universe?, <http://www.entropiauniverse.com/about/Index.asp> (last visited Jan. 26, 2007).

of cash in the virtual world.¹⁵⁶ The provider has gone so far in linking its virtual currency to real-world currency as to begin licensing virtual banks that deal in the currency,¹⁵⁷ and to issue debit cards with which virtual funds can be converted to real-world cash via automated teller machines.¹⁵⁸ There is no attempt made in the marketing materials or web site to show that the ability to exchange these virtual goods for cash is subordinate to the provider's unlimited right to terminate accounts or to the provider's unlimited right to cease offering the service completely. Under these circumstances, it is more reasonable for participants to believe that they should be able to obtain the cash value of the items they possess in the virtual world, and this belief may be the basis for a stronger claim based on promissory estoppel.

C. Consumer Protection Laws

The breadth and flexibility of consumer protection laws may afford virtual-world participants the greatest amount of protection from arbitrary actions on the part of providers. The powerful consumer protection laws of California should be particularly relevant, as several of the EULAs choose California law, and courts in California tend to ignore contract terms dictating a different choice of law if they would cause Californians to lose the protections of their state's laws.¹⁵⁹

156. See, e.g., Press Release, MindArk PE AB, 22-Year-Old Gamer Pays Us \$26,500 for Virtual Real Estate in Largest MMORPG Purchase Ever (Dec. 15, 2004), available at <http://www.mindark.com/docs/pr/December-15-2004.pdf> ("The treasure island is a true prize in the MMORPG virtual gaming community as it provides instant Real cash revenue from 'mining and hunting' rights to the new owner. . . . The island also provides additional revenue potential through the selling of housing lots and market places"); Press Release, MindArk PE AB, US Film-Maker Pays US \$100,000 For Virtual Real Estate in the Largest Virtual Purchase Ever (Oct. 26, 2005), available at <http://www.mindark.com/docs/pr/October-26-2005.pdf> ("The Space Resort [is] a true high point in the MMORPG virtual gaming community as it provides instant Real cash revenue to the new owner.").

157. See Press Release, MindArk PE AB, Entropia Universe to Auction Off the World's First Virtual Banking Licenses (Jan. 9, 2007), available at http://www.marketwire.com/mw/release_html_b1?release_id=200858 (announcing the auction of five licenses to create virtual banks within Entropia Universe, which will be allowed to loan virtual currency to participants).

158. See Entropia Universe Cash Card, *supra* note 79.

159. See *Am. Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699, 702 (Cal. Ct. App. 2001) (invalidating a choice of law clause specifying Virginia law when it would cause the consumer to lose protections offered by the Consumer Legal Remedies Act). A more detailed examination of the choice of law issues surrounding which law applies to these EULAs in various situations is beyond the scope of this Comment. It is a particularly interesting question in the case of Entropia Universe, however, as it goes far beyond the other analyzed worlds in tying the value of virtual goods to real-world currency, and its contracts dictate that the law of a foreign country governs. See *supra* note 104 and accompanying text.

Claims under these laws would also probably not be subject to the arbitration clauses contained in the EULAs if the only remedy sought is injunctive relief.¹⁶⁰

California's most important consumer protection law is the Unfair Competition Law (UCL).¹⁶¹ A business can violate the UCL through business practices that are "unlawful, unfair, or fraudulent."¹⁶² The "unlawful" prong covers any business practice that violates any statute, and is not relevant here. The "unfair" prong covers any business practice that offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.¹⁶³ While this prong has been used to protect consumers from a variety of actions,¹⁶⁴ its uncertain nature makes analysis of its application in a given case difficult.¹⁶⁵ The "fraudulent" prong is the most likely place for participants to find protection from arbitrary and unfair practices by virtual-world providers.

To succeed on a UCL claim for a fraudulent business practice, a plaintiff only needs to show that a business practice as a whole is "likely to deceive."¹⁶⁶ This is not the same as a common law claim for fraud, which requires damages, actual falsehood, and intent to deceive.¹⁶⁷ Instead, it is the same as the standard in California's False Advertising Law,¹⁶⁸ which requires that a reasonable consumer is likely to be deceived.¹⁶⁹ "Likely to deceive" means that the business practice is such that it is probable that a significant portion of the general public, acting reasonably, could be misled.¹⁷⁰

Under this generous standard, it is possible that a participant could make out a claim against a provider for arbitrarily depriving him of access to virtual items. Since the business practice as a whole is considered, the precise

160. See *Cruz v. PacifiCare Health Sys., Inc.*, 66 P.3d 1157, 1165 (Cal. 2003) (holding that actions for injunctive relief under the California consumer protection laws are inarbitrable "unless there are indications of legislative intent to the contrary").

161. CAL. BUS. & PROF. CODE § 17200 (West 1997).

162. *Id.*

163. See *People v. Casa Blanca Convalescent Homes, Inc.*, 206 Cal. Rptr. 164, 177 (Cal. Ct. App. 1984).

164. See, e.g., *id.* (protecting consumers from nursing-home neglect); *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527 (Cal. 1999) (protecting consumers from the harmful effects of predatory pricing and antitrust violations); *S. Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 85 Cal. Rptr. 2d 301 (Ct. App. 1999) (protecting consumers from misleading calculations of interest rates).

165. See *Cel-Tech Commc'ns*, 973 P.2d at 564 (disfavoring *Casa Blanca*'s "amorphous" definition of "unfair" but not explicitly disapproving it in all situations).

166. See *Day v. AT&T Corp.*, 74 Cal. Rptr. 2d 55, 59 (Cal. Ct. App. 1998).

167. See *id.* at 59 (internal citation omitted).

168. CAL. BUS. & PROF. CODE § 17500 (West Supp. 2007).

169. *Comm. on Children's Television, Inc. v. Gen. Foods Corp.*, 673 P.2d 660, 668 (Cal. 1983) (internal citation omitted).

170. *Id.* at 210.

terms of the contract governing the relationship are not as important. If the behavior of the provider as a whole is such that a reasonable participant would believe that he should have the opportunity to try to sell items that he obtained, then a claim that the provider prevented him from doing so might be actionable. As game companies begin to build their business models around the commensurability of virtual goods (as in *Entropia Universe*) and attempt to draw in customers through providing services for the sale of virtual goods (as through Station Exchange in *EverQuest II*), it becomes more likely that reasonable participants will believe that they should be able to earn value for the time that they spend obtaining items in virtual worlds.

This should be easier than obtaining relief under a promissory estoppel theory. There is no requirement of showing a definite promise, and there is no requirement that reliance on that promise was expected by the provider. The likelihood of this argument succeeding increases along similar lines as the promissory estoppel theory; as the provider takes more steps to attract participants with the promise of virtual riches, the reliance is more likely to be reasonable. Since the business actions as a whole are analyzed under the UCL, the argument is even stronger: The participants will not have to point to a particular representation on the part of the provider, but will instead be able to argue based on the entire business model.

The increased likelihood of success under the “fraudulent” prong of the UCL is balanced by the relatively weak remedies available. If a business violates the UCL, a consumer may only sue for injunctive relief, not for actual damages or penalties.¹⁷¹ However, a participant has a vested property interest in the limited license to use those goods in the virtual world, and that interest should be recoverable as restitution.¹⁷²

An additional barrier to protecting participants’ interests via the UCL will be the necessary showing of monetary harm to establish standing,¹⁷³ a requirement recently added through a voter proposition.¹⁷⁴ If a court accepts that the virtual goods that the provider confiscated were commensurable with

171. CAL. BUS. & PROF. CODE § 17203.

172. See *Cortez v. Purolator Air Filtration Prod., Co.*, 999 P.2d 706, 712 (allowing the repayment of unpaid wages under the Unfair Competition Law (UCL) as restitution as opposed to damages because the plaintiff had a vested property interest in the money).

173. CAL. BUS. & PROF. CODE § 17204 (limiting standing for private citizens to “any person who has suffered injury in fact and has lost money or property as a result of such unfair competition”).

174. See Mathieu Blackston, Comment, *California’s Unfair Competition Law—Making Sure the Avenger Is Not Guilty of the Greater Crime*, 41 SAN DIEGO L. REV. 1833, 1859–61 (2004) (describing the reasons behind and effects of Proposition 64, the voter proposition that added a monetary-harm requirement).

real-world cash (or at least that the limited license to use those goods had real-world value), the necessary harm would be shown. If the court did not accept that assertion, it may be more difficult to establish standing, but it should still be possible. The participant can show that she paid access fees and that those fees purchased time needed to obtain the use of the deleted virtual items. Also, even if there is no additional cash value attached to the virtual items, they could at least be valued at the cost of the access time required to obtain them. Since courts are generous in construing the requirements of consumer protection laws in favor of the public policy behind them, it is likely that courts would accept this argument for standing.

D. Possible Legislative Responses

As more disputes arise between the proprietors of virtual worlds and their inhabitants, the awkwardness of fit between the existing legal structure and this new type of market will become more apparent.¹⁷⁵ There are several different views on how existing law should change to address the boundary between these growing virtual worlds and existing legal structures. At one end of the spectrum lie the virtual-world providers. They generally wish to keep as much control over the virtual world for themselves as possible, both to preserve the virtual worlds as places to “play,”¹⁷⁶ and to preserve their access to the related massive income stream. At the other end of the spectrum lie the participants in the secondary markets. While some participants who sell virtual goods do it as an incident of normal game play, some do it in an attempt to supplement their income in a considerable way.¹⁷⁷ This group would prefer the creation of a formal right of ownership in participants to their virtual items in order to protect their own ability to generate revenue, and concomitant restrictions on the ability of providers to confiscate those items.

Unfortunately, siding definitively with either of these groups will cause substantial harm to the interests of the other. Allowing the providers to

175. See F. Gregory Lastowka & Dan Hunter, *Virtual Crimes*, 49 N.Y.L. SCH. L. REV. 293, 316 (2004) (“Judges and legislators faced with adapting existing legal standards to the novel environment of cyberspace struggle with terms and concepts that the average American five-year-old tosses about with breezy familiarity.” (quoting *Am. Libraries Ass’n v. Pataki*, 969 F. Supp. 160, 161 (S.D.N.Y. 1997))).

176. If a game designer creates a virtual world where skill is hard to come by and prestige is indicated by particular virtual items, purchasing those items with cash can make the game less enjoyable for everyone because the game conceit has been breached, and the “game” of “obtaining items through skill” is no longer taking place. See Richard A. Bartle, *Virtual Worldliness*, 49 N.Y.L. SCH. L. REV. 19, 23, 35 (2004).

177. See Posting of Edward Castronova to Terra Nova, *Journalist Earns Significant Salary Trading Virtual Goods*, http://terranova.blogs.com/terra_nova/2004/04/journalist_earn.html (Apr. 15, 2004).

confiscate virtual goods for no reason will undermine the legitimacy of secondary markets and may give many participants less of a reason to make investments of time or effort in these virtual worlds. On the other hand, limiting the power that providers have over their own rapidly changing virtual worlds may make them practically unmanageable. Indeed, intensive management of virtual worlds is often required to ensure that the worlds remain usable and enjoyable for all of those involved.¹⁷⁸ If legislatures do attempt to step in, a middle ground must be found. This position should preserve the providers' ability to manage their virtual worlds, while also guaranteeing protection for participants from irrational, arbitrary, or otherwise unfair confiscations of virtual property. Outlining the details of such a "Virtual Due Process" right is beyond the scope of this Comment,¹⁷⁹ but it should be considered a goal when attempting to change existing law to fit this new situation.

CONCLUSION

[T]he neighborhood hasn't changed much, but the Street has. By getting in on it early, Hiro's buddies got a head start on the whole business. Some of them even got very rich off of it. That's why Hiro has a nice big house in the Metaverse but has to share a 20-by-30 in Reality. Real estate acumen does not always extend across universes.¹⁸⁰

Inhabitants of virtual worlds face a risky proposition when they seek to earn money from their virtual possessions. While they can claim some interest in virtual goods that they acquire, the providers of the virtual worlds currently stand in a position of complete control over those interests. What direction the law should take in addressing this issue is a complicated question. If the law fails to protect the rights of participants, they may rely unreasonably on being able to recover their investments and may end up suffering because of it. If the law protects the rights of participants too strongly, the ability of providers

178. See Elizabeth Kolbert, *Pimps and Dragons: How an Online World Survived a Social Breakdown*, NEW YORKER, May 28, 2001, at 92, available at http://www.newyorker.com/fact/content/?010528fa_FACT (describing the degeneration of the world of Ultima Online as a play space and the manipulation required to maintain it).

179. For further discussion of possible legislative solutions to these issues and the problems associated therewith, see Andrew E. Jankowich, *Property and Democracy in Virtual Worlds*, 11 B.U. J. SCI. & TECH. L. 173, 186–92 (2005) (discussing several proposed legislative responses); Edward Castronova, *The Right to Play*, 49 N.Y.L. SCH. L. REV. 185, 201–05 (2004) (describing a proposal called "interration," which would provide protection to the autonomy of providers of virtual worlds who chose to isolate them from the outside world).

180. NEAL STEPHENSON, *SNOW CRASH* 24 (1992).

to shape the virtual experience may be constrained to the point where they no longer have the ability to ensure that the worlds are enjoyable to the participants.

This discussion sheds light on the greater issues concerning contractual control over individuals' interactions in society. With the ubiquitous use of contracts to determine individuals' rights in many different types of interactions, similar efforts may need to be made in order to protect other common-sense rights.¹⁸¹ This analysis of rights in virtual worlds should assist in the future when individuals need to devise contractual, consumer protection, or legislative responses to their loss of control in other areas.

181. As one example, the growing use of digital rights management software for the distribution of various media may contractually limit fair use and consumption rights that consumers currently possess when purchasing a physical album, book, or newspaper.
