

TALES OF THE (VIRTUAL) CITY: GOVERNING PROPERTY DISPUTES IN VIRTUAL WORLDS

By Bobby Glushko

Since its creation, the internet has radically changed the lives of millions of people.¹ Arguably, the spread of the internet and corresponding advances in technology are among the most important events in the last decade. These technological advances include revolutionary improvements in video gaming, with single-player games being replaced with dynamic, networked games, particularly, virtual worlds.

Virtual worlds have developed into a serious economic force.² Economists have estimated that the total gross domestic product of virtual worlds exceeded seven billion dollars this year alone, comparable to the gross domestic product of Estonia or *Cote d'Ivoire*.³ Unsurprisingly, at least one government is showing interest in virtual economies; the U.S. Congressional Joint Economic Committee has launched an investigation into the possibility of taxing income derived from the sale of virtual prop-

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1. Pew Internet & Am. Life Project, Daily Internet Activities, http://www.pewinternet.org/trends/Daily_Internet_Activities_7.19.06.htm (last visited Mar. 23, 2007); see also JOHN HERRIGAN & LEE RAINIE, PEW INTERNET & AM. LIFE PROJECT, THE INTERNET'S ROLE IN MAJOR LIFE MOMENTS, Apr. 19, 2006, http://www.pewinternet.org/pdfs/PIP_Major%20Moments_2006.pdf (showing survey data that the internet had been very important in major life events, such as coping with illness, purchasing a car or real estate, or finding employment).

2. Discussing the economy of Norrath, the setting of the virtual world of Everquest, economist Edward Castronova remarks that:

[t]he nominal hourly wage is about USD 3.42 per hour, and the labors of the people produce a GNP per capita somewhere between that of Russia and Bulgaria. A unit of Norrath's currency is traded on exchange markets at USD 0.0107, higher than the Yen and the Lira. The economy is characterized by extreme inequality, yet life there is quite attractive to many.

Edward Castronova, *Virtual Worlds: A First-Hand Account of Market and Society on the Cyberian Frontier 2* (Ind. Univ. Bloomington, Dept. of Telecomms., CESifo Working Paper Series No. 618, 2001), available at <http://ssrn.com/abstract=294828>.

3. *Id.* Julian Dibble, a prominent commentator on virtual economies, agrees with this theory and comments on it frequently in his blog, Terra Nova. See Posting of Julian Dibble to Terra Nova, *MMO GDP, QED (WTF?)*, http://terranova.blogs.com/terra_nova/2005/04/h1mmo_gdp_qed_w.html (Apr. 22, 2005).

erty.⁴ Excluded from these financial figures is the emotional energy and time that players expend on their virtual creations.⁵ Based on these investments, virtual worlds could prove to be a powerful social and economic force. However, conflicts regarding ownership of the property rights in these virtual creations are on the rise and could dampen this promise.

This Note examines multiple virtual property disputes and suggests that although end user licensing agreements (EULAs) that govern the virtual worlds provide a method for resolving disputes, their unenforcement and uncertainty regarding their terms do not provide an adequate framework to protect players' investments. As currently drafted, most EULAs contain disclaimers that seemingly allow developers to escape liability for negligence. These EULAs allow too much developer discretion in enforcing their terms, preventing players from predicting what they can or cannot do and endangering player investments in time and money. These EULAs also fail to conform to players' reasonable expectations surrounding their rights in virtual property. To tap the potential of virtual worlds, developers should create EULAs that strike a better balance between their own needs and player expectations.

This Note begins with a primer on the nature of virtual worlds, virtual property, and EULAs, focusing on the relationships between the players, what they consider to be their virtual property, and the developers of the worlds themselves. Part II examines three recent incidents in virtual worlds that exemplify conflicts over virtual property and demonstrate the inadequacy of standard EULAs to govern these growing new worlds. Part III explains in greater detail the problems with most virtual world EULAs

4. Adam Reuters, *US Congress launches probe into virtual economies*, REUTERS SECOND LIFE NEWS CENTER, Oct. 15, 2006, <http://secondlife.reuters.com/stories/2006/10/15/us-congress-launches-probe-into-virtual-economies>.

5. Current scholarship, such as the work of Nicholas Yee, seems to indicate that for many users, their membership in a virtual world was one of, if not the most, satisfying experiences in their lives.

When respondents were asked whether the most positive experience they had experienced over the period of the past 7 days or the past 30 days occurred in an MMORPG or in real-life, 27% of respondents (n = 2170) indicated that the most satisfying experience over the past 7 days occurred in the game, and 18% of respondents indicated the same when the wording was changed to "over the past 30 days."

Nicholas Yee, *The Psychology of Massively Multi-User Online Role-Playing Games: Motivations, Emotional Investment, Relationships and Problematic Usage*, in AVATARS AT WORK AND PLAY: COLLABORATION AND INTERACTION IN SHARED VIRTUAL ENVIRONMENTS 187, 193 (Ralph Schroder & Ann-Sofie Axelsson eds., 2006).

and makes a normative argument for revising them. Finally, the Note offers suggestions on how EULAs could better govern virtual worlds.

I. A PRIMER ON VIRTUAL WORLDS, VIRTUAL PROPERTY, AND END USER LICENSING AGREEMENTS

Although multi-user online worlds have existed for quite some time, virtual worlds as they exist today—persistent, graphical, multi-user games—are a far cry from their video game ancestors. The following Section explains the nature of these new worlds, what “property” exists within them, and how the EULAs that govern these worlds function.

A. What Are Virtual Worlds?

Unlike the majority of video games, which exist solely where and when they are being played, virtual worlds allow users to interact in a shared, online environment. Virtual worlds come in many forms,⁶ but they share commonalities. Generally, virtual worlds possess the following characteristics: they are *shared*, allowing multiple users to access the space at a given time; they have some sort of *graphical user interface*, enabling the user to navigate the world; they are *immediate*, making all interactions take place simultaneously; they are *persistent*, meaning the world continues to exist whether or not there are users present; and they *allow for social interaction*, letting users communicate or otherwise interact with each other.⁷ Interactions in virtual worlds take place with the assistance of avatars, graphical representations of the players,⁸ and are mediated by the virtual world’s developers through their control of the operating software and the underlying computer code.

Some worlds emphasize problem-solving and adventuring, typically containing quests to complete and monsters to kill.⁹ Others are less task-

6. For example, some virtual worlds focus on gaming and social interaction, such as Everquest, EVE Online, or Second Life, while others focus on political discussion or education, such as AgoraXchange, or the online law school in There.com. For more on the types of virtual worlds, see Virtual Worlds Review, What is A Virtual World?, <http://www.virtualworldsreview.com/info/whatis.shtml> (last visited Jan. 28, 2007).

7. *Id.*

8. The term Avatar is derived from Sanskrit Hindu texts, where it is used to refer to the form a god takes when he or she descends to the earth. Avatars come in many forms, from simple ASCII icons, to idealized versions of the player, to grotesque monsters. Merriam-Webster Online Dictionary, Definition of Avatar, <http://www.m-w.com/dictionary/avatar> (last visited Feb. 28, 2007).

9. This is the traditional “game” instance of virtual worlds. Popular examples of this type of game are Everquest and World of Warcraft.

oriented, focusing more on interpersonal relationships and goals that are less tangible than slaying monsters and gaining power.¹⁰ There are also hybrids like EVE Online where players focus on gaining power and acquiring treasure, but player interaction remains paramount, either through trade, resource collection, piracy, or some combination thereof. Regardless of the focus of the game, all virtual worlds share the characteristics outlined above, and as players spend more time in them, they tend to develop meaningful relationships with the world, their avatar, and other players.¹¹

Virtual worlds feature substantial economies of trade in goods that exist solely within the online space.¹² The institutions inside these economies mirror the real world, with exchange brokers and currency trading houses,¹³ which exist either with or without the explicit approval of the developers.¹⁴ For example, Sony Online Entertainment, the developer of EverQuest, responded to player sales of virtual property by creating a website devoted to the sale of such goods.¹⁵ Other developers have taken a different approach by banning such sales, at least in name. However, even in games where the sales are “banned,” there are thriving black markets for virtual currencies, objects, and characters.¹⁶

Sales of virtual property break down into three categories: sales of “gold,” or whatever currency the world uses; sales of items, such as weapons, clothing, or even houses and land; and sales of accounts, that is, the password and login information to play a specific avatar. These sales take place in a variety of ways. Some sellers of virtual goods simply place an

10. The games *There* and *Second Life* fall into this category. In these games, players choose their own goals and set out to achieve them.

11. See Yee, *supra* note 5.

12. See Castronova, *supra* note 2, at 3-5 (discussing some early instances of these virtual economies, providing extensive evidence of their robustness and projected growth).

13. Game USD is often considered to be the “gold standard” of the going values for virtual currency. See GameUSD.com, Game Currency Price Research, <http://www.gameusd.com> (last visited Jan. 28, 2007) [hereinafter Game USD].

14. Blizzard, the developer of the virtual world “World of Warcraft,” for example, takes a dim view of players selling virtual property and has made public statements that it will punish and expel offenders. See World of Warcraft, Terms of Use Agreement, <http://www.worldofwarcraft.com/legal/termsofuse.html> (last visited Jan. 28, 2007) [hereinafter Warcraft ToU]. However, there still remains a thriving black market for virtual property in the World of Warcraft. See GameUSD, *supra* note 13.

15. Sony Online Entertainment runs Station Exchange, a website that facilitates virtual property transactions in the popular virtual world of EverQuest. See Sony Station Exchange, <http://stationexchange.station.sony.com> (last visited Jan. 28, 2007).

16. *Id.*

auction on a website like eBay.¹⁷ Others meet in-game and engage in transactions using third-party services like PayPal, although this practice has declined due to rampant fraud and sellers' failure to deliver goods.¹⁸

Consumers spend significant amounts of time and money in virtual worlds,¹⁹ and with advances in personal computing, the underlying technologies upon which the worlds run have become more powerful and easier to implement. As the virtual world experience becomes more fulfilling, and as people become invested in their experience, they often begin acquiring property.²⁰ Much like in the physical world, acquiring and trading property leads to a need for legal regulation.

B. A Comparison of Virtual and Physical Property

Black's Law Dictionary defines property generally as "the right to possess, use, and enjoy a determinable thing."²¹ This definition focuses on the "bundle of rights" notion of property, and encompasses real property, personal property, and even intellectual property.²² Like physical property, virtual property is persistent, interconnected, and rivalrous. Virtual property does not disappear when the player turns off her computer, much like a house does not simply disappear when its owner leaves for work. Within the virtual world an object can interact with other objects.²³ A player can

17. Hundreds of auctions for money, items, and accounts in EVE Online were ongoing at the time of this writing. While this practice is ostensibly in violation of Crowd Control Production's terms of service, they do not seem to be policing eBay too vigorously. However, eBay has recently banned the sale of much virtual property. It remains to be seen if another auction site will step in to fill the gap. Daniel Terdiman, *eBay bans auctions of virtual goods*, CNET NEWS.COM, Jan. 29, 2007, http://news.com.com/2100-1043_3-6154372.html.

18. This problem is compounded by the fact that since most sales are "illegal," that is, violations of the terms of service of the virtual world, the buyer has little recourse. For an anecdote about fraud in online transactions, see LawGuru.com, *Fraud Over Virtual Property*, <http://www.lawguru.com/cgi/bbs/mesg.cgi?i=90544755> (last visited Feb. 27, 2007).

19. Many video games set in virtual worlds have a multi-tier pricing structure, with the consumer acquiring the software to run the world, and then a membership fee to continue playing. World of Warcraft, *Frequently Asked Questions*, http://www.blizzard.com/wow/faq/faq_realms.shtml (last visited Feb. 27, 2007). Sometimes the software is offered for free, and then different levels of membership are available. For example, Second Life offers both free and pay levels of access. Second Life, *Membership, Land, & Pricing*, <http://secondlife.com/whatis/pricing.php> (last visited Feb. 27, 2007).

20. See Castronova, *supra* note 2, at 22-24.

21. BLACK'S LAW DICTIONARY 1252 (8th ed. 2004).

22. *Id.*

23. See Joshua Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047, 1054 (2005) ("[C]ode can be made interconnected, so that although one person may control it, others

restrict access by others to a piece of virtual property,²⁴ like how a real property owner can physically and/or legally exclude others from accessing their land.²⁵ And although simple computer code itself can easily be replicated, virtual property is nearly always treated as a rivalrous commodity.²⁶

Using the same categories as above, however, one can see how virtual property is also substantially different from physical property. For example, virtual property persists in multiple states, as a collection of ones and zeros that a machine reads and converts to an image and also as that perceivable image.²⁷ Although it makes sense to consider virtual property persistent, its persistence is contingent upon there being some meaningful way to render it. That is, while virtual property may *exist* in some sense on its own, if there is no way to interact with that property (for example, if the world in which the property is located ceases to exist), then the existence of the property is tenuous at best. This is important because developers almost universally retain the right to cease maintaining and running their virtual worlds. Therefore, the continued existence of the property is dependent on the developer's actions.²⁸

The interconnectedness and rivalrousness of virtual property also depends on its existence on the server of the virtual world. For example, a player cannot simply take her spaceship from EVE Online and fly around

may experience it. The value of a URL or an email address is not solely that the owner can control it; the value is that other people can connect to it, and can experience it.”).

24. See *id.* at 1053-54 (“By design, we make code that can only be possessed by one person. Thus, rivalrousness exists also in code. If one person controls rivalrous code, nobody else does. For example, no one but the owner of an internet address (or those the owner permits) can post content to that address.”).

25. For further examination of the similarities between virtual and physical property, see Fairfield, *supra* note 23, at 1052-55.

26. For a particularly striking counter-example of this claim, see LambdaMOO, a formerly popular virtual world. Felis Rex, LambdaMOO: An Introduction, <http://www.lambdamoo.info> (last visited Jan. 28, 2007). However, some say that the reason LambdaMOO did not have more users was the very non-rivalrousness of its property. See also Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CALIF. L. REV. 1, 11 (2004).

27. This can be analogized to music in MP3 format as opposed to a vinyl record; the MP3 exists both as a physical, transmittable file as well as a “song” when it is played by a computer program.

28. Section 2.6 of Second Life's ToS states: “Linden Labs may terminate or suspend your account at any time, without refund or obligation to you.” Second Life, Terms of Service, <http://secondlife.com/corporate/tos.php> (last visited Feb. 27, 2007).

Second Life.²⁹ Similarly, the rivalrousness of virtual property is limited in the sense that the rivalrousness of other digital goods is limited. It is easy to make a copy of the code that creates a piece of virtual property, much like it is easy to copy an MP3 or a DVD.³⁰ While each copy of the property is exclusive, the ease with which such copies are made undermines its exclusivity.

Defining virtual property has been the subject of much debate in recent scholarship. A number of scholars contend that players should hold some sort of a property right in virtual objects.³¹ Other scholars would have the law treat virtual property as purely fictional and with no economic value.³² They argue that the difficulties in negotiating virtual property disputes outweigh virtual property's largely speculative value and that generally, where property disputes arise, they can be resolved by adherence to applicable contracts or EULAs.³³

Other scholars argue that the law should not differentiate between the property rights attributed to a plot of land in Kansas and a plot of land in Second Life.³⁴ These strong protectionists make several arguments. First, they invoke the Lockean conception of property rights, arguing that the substantial investment players put into creating virtual property grants

29. This is a very important point. Since players cannot freely transfer virtual property between worlds, substantial "lock-in" issues arise. One of the critiques of greater player rights in the EULAs that govern virtual worlds is that the market will correct for bad bargains; that is, players will leave worlds that have bad EULAs for worlds that have good EULAs. This makes a degree of sense, but it fails to take into account the fact that a player will lose a substantial amount of time and money in the move.

30. Linden Labs has been struggling with a program that allows players to make unauthorized copies of property within Second Life. See Daniel Terdiman, 'Second Life' faces threat to its virtual economy, CNET NEWS.COM, Nov. 15, 2006, http://news.com.com/2100-1043_3-6135699.html.

31. See, e.g., Fairfield, *supra* note 23, at 1101; Michael Meehan, *Virtual Property: Protecting Bits in Context*, 13. RICH. J.L. & TECH. (forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=908924, at 47; Andrew D. Schwarz & Robert Bullis, *Rivalrous Consumption and the Boundaries of Copyright Law: Intellectual Property Lessons from Online Games*, 10 INTELL. PROP. L. BULL. 28, 29 (2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=927475.

32. RICHARD A. BARTLE, PITFALLS OF VIRTUAL PROPERTY, <http://www.themis-group.com/uploads/Pitfalls%20of%20Virtual%20Property.pdf> (on file with author).

33. *Id.*

34. See Fairfield, *supra* note 23, at 1101-02; see also Lastowka & Hunter, *supra* note 26, at 43-50.

some moral rights to it.³⁵ Second, they argue that players believe that virtual property belongs to them, and that belief puts normative pressure on the law to respect that property interest.³⁶ Third, they suggest there is a need for strong property rights to accommodate the existing market for virtual property, which encompasses thousands of dollars of virtual property available for sale at any given time with a variety of resellers.³⁷ Overall, the strong virtual property rights viewpoint argues that since there is a real value to the property, people believe that they own the property, and people work to create the property, it is more fair to have ownership vest in the creator of the property than in the hands of the developers of the virtual worlds.³⁸

Currently, property rights in these virtual worlds are defined by end user license agreements (EULAs) that players agree to when they first log on to the game. Nearly every virtual world has a clause in their EULA requiring that players assign the rights of all property created in-game to the developers of that world. For example, the EULA for World of Warcraft reads:

All title, ownership rights and intellectual property rights in and to the Game and all copies thereof (including without limitation any titles, computer code, themes, objects, characters, character names, stories, dialog, catch phrases, locations, concepts, artwork, character inventories, structural or landscape designs, animations, sounds, musical compositions and recordings, audio-visual effects, storylines, character likenesses, methods of operation, moral rights, and any related documentation) are owned or licensed by Blizzard.³⁹

While there are notable exceptions, such as Second Life, the norm is total developer ownership of all virtual property created in virtual worlds. How

35. Lastowka & Hunter, *supra* note 26, at 46 (citing JOHN LOCKE, TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION 32 (Charles L. Sherman ed., 1937) (1689)).

36. *Id.* at 48.

37. *Id.* at 50.

38. For an in-depth discussion of the rights which should be accorded to virtual property, see Cory R. Ondrejka, *Living on the Edge: Digital Worlds Which Embrace the Real World* (June 5, 2004) (unpublished paper, on file with Linden Research), available at <http://ssrn.com/abstract=555661>; see also Meehan, *supra* note 31, at 34; Schwarz & Bullis, *supra* note 31, at 24.

39. See World of Warcraft, End User License Agreement, <http://www.worldofwarcraft.com/legal/eula.html;jsessionid=FDE9F275AD70B33A5CB30301D9083F63.app05> (last visited Jan. 28, 2007) [hereinafter Warcraft EULA].

though, do these EULAs function, and what role do they play in adjudicating disputes over virtual property?

C. The Role of End User Licensing Agreements

Software programs come with a EULA that sets the terms of acceptable use of the program. In the context of virtual worlds, the EULAs ostensibly govern the world, with terms ranging from banning racism⁴⁰ to placing limits on the ownership of property.⁴¹ The game developer writes the EULA, and it accordingly tends to favor developer interests.⁴² As this Note will argue, the ways in which EULAs are drafted and enforced have strong implications for how disputes over virtual property rights are resolved.

First though, what is a EULA? A EULA is a type of software licensing agreement that serves to create a contract between a software developer and the purchaser of the software. The EULA is generally presented as a graphical computer window that pops up when the purchaser of the software begins running the program.⁴³ The purchaser is then presented with the terms of the license, and must click a button indicating that she has read and accepted those terms.⁴⁴ The software will only begin running if the user agrees to the EULA.⁴⁵

Although there is a split among the circuits, courts generally hold EULAs enforceable against the users of the software. For example, in *ProCD, Inc. v. Zeidenberg*, the Seventh Circuit held that the terms contained in a “clickwrap”⁴⁶ EULA that accompanied a software program were enforce-

40. EVE Online, for example, prohibits players from “be[ing] a member of any corporation or group within EVE Online that is based on or advocates any anti-ethnic, anti-gay, anti-religious, racist, sexist or other hate-mongering philosophies.” EVE Online, Terms of Service, <http://www.eve-online.com/pnp/terms.asp> (last visited Jan. 28, 2007) [hereinafter EVE ToS].

41. Warcraft ToU, *supra* note 14.

42. See, e.g., EVE Online, End User License Agreement, <http://www.eve-online.com/pnp/eula.asp> (last visited Jan. 28, 2007) (containing indemnification clauses and clauses allowing the developer to terminate EVE Online accounts) [hereinafter EVE EULA].

43. See EULA, The Free Dictionary, <http://computing-dictionary.thefreedictionary.com/EULA> (last visited Jan. 28, 2007).

44. *Id.*

45. EULAs that appear as pop-up windows when a computer program is run are commonly referred to as “clickwrap” contracts.

46. See Clickwrap, The Free Dictionary, <http://thefreedictionary/clickwrap> (last visited Mar. 19, 2007).

able.⁴⁷ However, in *Specht v. Netscape Communications Corp.*, the Second Circuit ruled that clickwrap EULAs required the assent of both parties to be enforceable, and that merely clicking “I Accept” did not necessarily indicate the assent of the purchasing party.⁴⁸ For the purpose of this Note, the general trend of enforceability will be presumed.

Some scholars and commentators have argued that software EULAs should not be enforceable when they contain provisions that allow the developer to change the terms of the licensing agreement at any time without informing the purchaser, requiring assent, or providing any consideration for the change.⁴⁹ This freedom to alter the terms of the EULA at any time allows the software developer to potentially change the terms of the contract every time the purchaser runs the program, with the only “assent” required being the player’s continued use of the program.⁵⁰ And since many times the purchaser has never read the terms of the EULA, or is unaware that terms have changed, this can lead to a substantial disconnect between the terms of the agreement and purchaser’s understanding of those terms.⁵¹

In virtual worlds, EULAs function as a mix between a constitution and a holy book.⁵² Game developers create the EULAs with almost no player

47. *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996).

48. *Specht v. Netscape Comm’ns Corp.*, 306 F.3d 17, 20 (2d Cir. 2002).

49. See Nicholas Aldrich, *Unplugged: The Music Industry’s Approach to Rolling Contracts on Music CDs* (Nov. 8, 2006) (unpublished paper, on file with University of Washington Law School), available at <http://ssrn.com/abstract=943607> (discussing this issue in the music industry); see also Research at Penn: Internet Games’ Virtual Goods Inspire a Real World Market, *In Norrath, Tattoine and Rubi-ka, Just What Are Your Legal Rights?*, Sept. 24, 2003, <http://www.upenn.edu/researchatpenn/article.php?725&tch; Warcraft ToU>, *supra* note 14.

50. *Warcraft ToU*, *supra* note 14.

51. A humorous example of this can be found in the following EULA:

Should you fail to register any of the evaluation software available through our web pages and continue to use it, be advised that a leather-winged demon of the night will tear itself, shrieking blood and fury, from the endless caverns of the nether world, hurl itself into the darkness with a thirst for blood on its slaving fangs and search the very threads of time for the throbbing of your heartbeat. Just thought you’d want to know that. Alchemy Mindworks accepts no responsibility for any loss, damage or expense caused by leatherwinged demons of the night.

Alchemy Mindworks, Details, <http://www.mindworkshop.com/alchemy/alchemy6.html> (last visited Jan. 28, 2007).

52. For further discussion of the “gods” of virtual worlds, see Lastowka & Hunter, *supra* note 26, at 51-59.

input.⁵³ These EULAs establish the basic principles that govern virtual worlds and the interactions within them. For example, most EULAs have clauses regarding ownership of intellectual property, clauses immunizing developers against suit, and clauses setting out billing rates with provisions stating that those rates can change at any time.⁵⁴ They also regulate the interactions between players. Frequently, the EULAs of virtual worlds have clauses forbidding theft, harassment, or sexist and homophobic speech.⁵⁵

EULAs are largely enforced at the developers' discretion, with many containing clauses indicating that while the developers "reserve the right to take any necessary measures for the purpose of preventing and acting against frauds and Non-Approved Transactions," they are not liable for any damages that "arise from a breach of this agreement or are made by other participants related to your use of the [virtual world] or the internet, or in connection with your transmission of any content using the [virtual world]."⁵⁶ The line between the two is fine; in this instance, the game developer reserves the right to take action to resolve disputes when it chooses, but does not warrant that it will. This flexible enforcement gives the developers the greatest leeway in administering their virtual worlds.⁵⁷

Not surprisingly, because EULAs potentially immunize developers from liability, grant developers sole discretion over enforcement, and do not require meaningful agreement from players, conflicts arise between players and the game developers particularly where virtual property is involved. Players often feel these conflicts are inadequately resolved, and these unresolved conflicts suggest that the EULAs could be constructed to better address this dissatisfaction. Part II of this Note examines particular instances of these conflicts.

II. A TALE OF THE VIRTUAL CITIES: PROPERTY ISSUES IN VIRTUAL WORLDS

As noted above, the landscapes of virtual worlds are shaped by their EULAs and the conflicts that arise within and around them. Players inte-

53. Notable examples of this, like Lambda MOO, are so rare as to prove the point.

54. See, e.g., Warcraft EULA, *supra* note 39.

55. *Id.*

56. Entropia Universe End User License Agreement, <https://account.entropiauniverse.com/pe/en/rich/5185.html> (last visited Jan. 28, 2007) (emphasis omitted) [hereinafter Entropia EULA].

57. That is, developers can maintain the right to enforce rules while having no obligation to do so.

ract with each other and the world itself, engaging in a multifaceted experience mediated by the software code provided by the developers of the world. In the course of these interactions, however, complex issues of ownership and property rights inevitably arise. The following Section examines three recent disputes over virtual property and illustrates the complexities of the legal relationships and the inadequacy of EULAs to mediate those relationships.

A. **Missing: Virtual Weapons of Mass Destruction. Legal Recognition of Property Rights in Virtual Worlds**

Li Hongchen had, for years and at significant expense in time and money, diligently pursued an illicit military research program, ultimately producing a fine stockpile of biochemical weapons.⁵⁸ With these weapons and the requisite technologies with which to deploy them, his global prestige increased substantially, and his ability to recruit other players and to intimidate the rest of the world would soon make him a global player.⁵⁹ That is, he would have had a hacker not stolen his weapons by exploiting a security flaw in the computer code running the virtual world.⁶⁰

Naturally, Li was upset when these weapons were stolen.⁶¹ He contacted Beijing Arctic Ice Technology Development Company, the developer of the online computer game Hongyue, or Red Moon, which Li was playing.⁶² Arctic Ice refused to return the weapons or to release the personal information of the player Li believed to have stolen them.⁶³ Li next went to the local police, who were unable to help return the weapons, pos-

58. Jay Lyman, *Gamer Wins Lawsuit in Chinese Court Over Stolen Virtual Winnings*, TECHNEWSWORLD, Dec. 19, 2003, <http://www.technewsworld.com/story/32441.html>.

59. *Id.*

60. *Id.*

61. It is important to understand the time and energy players invest in their avatars and property in virtual worlds. For example, in a recent case, the theft of a virtual sword in the game Legends of Mir 3 led to a real world murder. See *'Game Theft' Led to Fatal Attack*, BBC NEWS, Mar. 31, 2005, <http://newsvote.bbc.co.uk/1/hi/technology/4397159.stm>. While cases like this are, fortunately, extremely rare, the emotional and monetary value attributed to virtual property and the trend towards intense conflicts over those virtual assets are likely to increase, rather than diminish, over time. For an excellent discussion on the increasing relevance of virtual worlds, see Castronova, *supra* note 2, at 21-24.

62. *Court Grants Online Chinese Gamer Virtual Property*, CHINATECHNEWS.COM, Dec. 23, 2003, <http://www.chinatechnews.com/2003/12/23/628-court-grants-online-chinese-gamer-virtual-property>.

63. Will Knight, *Gamer wins back virtual booty in court battle*, NEWS SCIENTIST.COM, Dec. 23, 2003, <http://www.newscientist.com/article.ns?id=dn4510>.

sibly because they failed to understand the situation.⁶⁴ Li filed suit in the Beijing Chaoyang District People's Court against Arctic Ice, alleging that Arctic Ice was negligent in securing their servers against attack, causing Li's property to be stolen.⁶⁵

Li's suit resulted in the first judicial recognition of virtual property rights in the world.⁶⁶ The Beijing Chaoyang District People's Court ordered the game developers to return the weapons to Li, valuing them at twelve hundred dollars.⁶⁷ The court found that Arctic Ice was negligent in securing its servers against attack, and that negligence was directly responsible for the loss of Li's property.⁶⁸ The court rejected Arctic Ice's argument that it was immune to liability for negligent acts because Li had agreed to immunize Arctic Ice by accepting its EULA. The court recognized a property right in the virtual goods, ruling that the right of the owner to control them was good against the world.⁶⁹

Li's case illustrates the inadequacies of both the EULAs and the developers' response to player-on-player theft. Software developers have long attempted to avoid liability through immunity clauses.⁷⁰ Game developers are not wrong to want to limit their liability. However, the relationship that they have with the players of their games is different than the relationship between licensees of most consumer software and the developers of that software. Players within virtual worlds have an ongoing relationship with the game developer, other players, and virtual property within those worlds. As noted above, players also invest considerable time and money into the virtual world, a virtual world that continues to be under the control of the game developer. Because of this continuous and close relationship, developers of virtual worlds have a greater responsibility to their customers than most software developers. As the Chinese court found, because of this ongoing contractual relationship, and the property rights implicated in it, game developers cannot contract out of this responsibility.

64. *Court Grants Online Chinese Gamer Virtual Property*, *supra* note 62.

65. *See* Fairfield, *supra* note 23, at 1084-85.

66. Lyman, *supra* note 58.

67. *Id.*

68. *Id.*

69. *Li v. Beijing Arctic Ice Tech. Dev. Co.* (Beijing Chaoyang Dist. People's Ct., Dec. 18, 2003), available at <http://www.chinacourt.org/public/detail.php?id=143455>. For a full discussion of the court's reasoning, see Fairfield, *supra* note 23, at 1084-87.

70. *See, e.g.* Warcraft EULA, *supra* note 39.

B. The EVE Investment Bank Scandal: Uncertainty in EULA Enforcement

EVE Online is a massively multiplayer online game (“MMOG”) set in an outer space, science-fiction-based, persistent world. Players take the role of spaceship pilots seeking fame, fortune, and adventure in a huge, exciting, and sometimes hostile galaxy.⁷¹ There are many virtual worlds set in a wild-west-style space opera, but the world of EVE online is unique in two ways. First, unlike most virtual worlds, EVE Online does not “shard,” that is, all players in the entire universe exist on the same server, and all players of the game exist in the same world.⁷² This is significant because this makes EVE Online larger than games with more total players. It also means that every player of EVE Online is able to interact with every other player.

The second difference between EVE Online and other MMOGs is that EVE Online is primarily based upon interactions with other players but is more hostile and competitive than other relationship-oriented games like Second Life. Relationships in EVE Online can be cooperative, such as in trading resources or building ships, or hostile, such as pirating other players’ resources, cheating them in business deals, or destroying their ships and bases in combat.⁷³ Players form alliances, or corporations, and pool their resources.⁷⁴ These corporations often have significant assets, with large amounts of virtual property. While player groups are common in

71. See EVE Online, Frequently Asked Questions, http://www.eve-online.com/faq/faq_01.asp (last visited Jan. 28, 2007) [hereinafter EVE FAQ].

72. A shard is an instance of a world, realm, or playground in some massively multiplayer online games. In MMOGs, the term shard is often associated with Ultima Online and Silkroad Online; other MMOGs call them servers instead, although their function is the same. The usage originated with the Ultima Online story, where each of the game’s servers were said to be different images of the world, trapped in the shattered shards of a mystic gem. See Wikipedia.org, Shard, <http://en.wikipedia.org/wiki/Shard> (last visited Jan. 28, 2006). The lack of sharding in EVE Online is important, as a scam of the magnitude described above would be extremely difficult to attempt if it were necessary to create an individual bank for every instance of the server.

73. The basic role-playing and space simulation aspects of EVE are really just the tip of the iceberg. When players band together to form factions and alliances, the game progresses to a more grand-scale strategic level. Political intrigue, corporate espionage and the very essence of Darwinism bring dimension and depth to the game as the struggle for fame and fortune ebbs and flows with each new day in EVE.

EVE FAQ, *supra* note 71.

74. See EVE Online, Corporation Guide, <http://www.eve-online.com/guide/en/g12.asp> (last visited Jan. 28, 2007).

many online games,⁷⁵ the scope of EVE Online is massive, with over one hundred thousand players potentially online at any given time.⁷⁶ The size of the virtual world makes it important for players to band together to avoid being overpowered by more powerful players. Furthermore, since EVE Online attracts a sophisticated player base, the level of competition can be higher than in virtual worlds targeted at younger audiences.⁷⁷ Real world corporations even sell stock in speculative business ventures to players in the game.⁷⁸ It was within this setting that a player, whose avatar went by the name of Cally, created the Eve Investment Bank, a corporation that took deposits of players' in-game money for safekeeping.⁷⁹

For half a year, Cally had accepted in-game transfers of Inter Stellar Credits ("ISK") and paid interest on those deposits.⁸⁰ The interest rates were so high that some players appeared to be converting dollars to ISK through online currency traders just to earn a greater return than would be available in real-world dollars.⁸¹ Large-scale investors were guaranteed nearly a nine percent return on their money.⁸² During the nine months it was operating, the bank took in hundreds of billions of ISK, or nearly \$125,000.⁸³

Cally's avatar then left for uncharted in-game space with the depositors' money. He was frank in his closing statements: he was a pirate, and

75. For a look at how many of these groups there are in the World of Warcraft, see Warcraft Realms, <http://www.warcraftrealms.com/census.php> (last visited Jan. 28, 2007).

76. Press Release, EVE Online, EVE Online Reaches the 100,000 Subscriber Mark (Feb. 7, 2006), available at <http://www.gamespot.com/pc/rpg/evethesecondgenesis/news.html?sid=6143803>.

77. Games which primarily emphasize personal interaction tend to draw older audiences than games which focus on the acquiring of property and experience through accomplishing tasks, generally hunting monsters. Also, players tend to react negatively to having their property taken or their character killed by another human, as opposed to the game itself.

78. Mark Wallace, *EVE Online Mega-Corporation Goes Public*, 3POINTD.COM, Dec. 14, 2006, <http://www.3pointd.com/20061214/eve-online-mega-corporation-goes-public/#more-962>.

79. EVE Online is a dangerous place. A safe place to keep money would have been attractive to many players.

80. Tudor Stefanescu, *EVE Online Economy Suffers 700 Billion ISK Scam*, SOFTPE-DIA, Aug. 24, 2006, <http://news.softpedia.com/news/Eve-Online-Economy-Suffers-700-billion-ISK-Scam-33737.shtml>.

81. See EVE Online, EVE Insider Forums, <http://myeve.eve-online.com/ingameboard.asp?a=topic&threadID=347657> (last visited Jan. 28, 2007).

82. *Id.*

83. *Id.*

everyone foolish enough to trust him with their money got “owned”.⁸⁴ The removal of so much capital from circulation all at once sent shockwaves through the virtual economy and threw the EVE Online community into chaos.⁸⁵ As one commentator observed, “it might have been a scene out of some movie about the Great Depression; hundreds of frantic people tearing their hair out as they mob the doors to a bank, only to realize that the bank’s owners, along with their money, had vanished into thin air.”⁸⁶

In the successive days and weeks, the outcry prompted Crowd Control Productions (“CCP”), the makers of Eve Online, to release a statement in a virtual press conference, saying that while they recognized that the money stolen represented a huge investment in players’ time and money, they would not delete Cally’s account.⁸⁷ CCP indicated though that they would be closely watching the account to ensure that the ISK would not be converted to real-world currency.⁸⁸

The EVE Online community was upset by CCP’s response.⁸⁹ Even though most players understood that the game incorporated elements of deception and theft, the EVE Investment Bank scam went far beyond any previous scam and at least some players felt that CCP should intervene.⁹⁰ Furthermore, it is likely that some players had acquired ISK through online currency traders to invest in the EVE Online Bank.⁹¹ Until the scam, CCP had turned a blind eye to many violations of their restrictions on purchasing or selling ISK online, and this complacency contributed to the size of the players’ loss. While CCP has indicated that it will be closely watch-

84. Cally’s “confession” is available for download at <http://dl.qj.net/Cally-s-EVE-Online-Confession-Video-Movie-PC-Gaming-MMORPG-Other-Games/pg/12/fid/9542/-catid/476>. The term “owned” is used by gamers to “acknowledge a form of superiority through the downfall of another entity, be it another gaming clan, or a single user. This can be in the context of winning an online game, a debate on a forum, or attaining a successful hacking” Wikipedia.org, Owned, <http://en.wikipedia.org/wiki/Owned> (last visited Mar. 23, 2007).

85. At the time of this writing, Cally’s location is unknown. Presumably the avatar and the money he stole are off in some unknown area of EVE Online, or more likely, merely inactive.

86. Peter Pollack, *Online ‘banker’ runs off with cash, avatars cry foul*, ARSTECHNICA, Aug. 28, 2006, <http://arstechnica.com/news.ars/post/20060828-7605.html>.

87. Charles Husemann, *All about the ISK*, GAMING NEXUS, Sept. 9, 2006, <http://www.gamingnexus.com/Default.aspx?Section=Article&I=1181>.

88. *Id.*

89. Julian “rabbit” Murdoch, *612 Lawns*, GAMERS WITH JOBS, Aug. 29, 2006, <http://www.gamerswithjobs.com/node/26703>.

90. *Id.*

91. The large amount of ISK traded on the open market nearly assures that some of it ended up in the vaults of the EVE Investment Bank.

ing currency transactions to prevent Cally from converting his stolen ISK into real world currency, there are billions of ISK for sale through online currency traders, indicating that it is possible to sell ISK on the black market and that there is an incentive for similar scams.

CCP's laissez-faire attitude towards the EVE Investment Bank scandal does not reflect the rules set out in its terms of service ("ToS").⁹² The EULA bans many types of fraudulent behavior, including impersonating CCP staff, soliciting for "pyramid schemes and chain letters,"⁹³ and "violating any local, state, national, or international laws or regulations."⁹⁴ CCP retains an extensive right to control the importation of physical world material into the virtual world,⁹⁵ and has wide latitude to take action against players in the virtual world, such as suspending service, confiscating property, or terminating accounts.⁹⁶ Although it seems clear that CCP could take action in this case, return the stolen ISK to its owners, and hopefully deter future scams of this type, the ToS does not state that CCP *will* (or *must*) regulate such behavior.⁹⁷

The EVE Online banking scandal demonstrates the limitations that arise from governing virtual worlds through an agreement that can only be enforced by the game developer. Unfortunately for the players, the terms of the EVE Online EULA do not require game developers to assist players, and the game developers have incentives *not* to get involved in disputes among players; involvement would only have increased CCP's workload or potential for liability. The inability of players to enforce

92. See EVE ToS, *supra* note 40.

93. *Id.* This is a particularly interesting element, as the EVE Investment Bank was a classic pyramid scheme. Given their comments about the nature of EVE Online, perhaps CCP means this solely in a physical world context.

94. *Id.*

95. See *id.*

96. See *id.* CCP reserves the right to "close, temporarily or permanently, any user's account without advance notice" and "to delete all user accounts or inventory of characters as warranted." *Id.*

97. See *id.* CCP's ToS states rather dramatically:

YOU ACKNOWLEDGE THAT TERMINATION OF YOUR ACCOUNT BY CCP OR ONE OF ITS AUTHORIZED REPRESENTATIVES MAY RESULT FROM FAILURE TO ABIDE BY THESE RULES. SUCH TERMINATION WILL NOT ENTITLE YOU TO A REFUND OF ANY FEES PAID BY YOU FOR THE USE OF THE EVE ONLINE CLIENT, SERVERS OR WEB SITE. YOU WILL FORFEIT ANY UNUSED GAME TIME REMAINING AT THE TIME OF TERMINATION.

Id.

property rights in their virtual property is a key failing of the EULA as a tool to govern virtual worlds as they continue to grow.

C. Property Dispute in Second Life: What Does Ownership Mean?

Marc Wobegone, the online avatar of Mark Bragg, a Pennsylvania attorney, was a moderately successful nightclub owner and inventor in Second Life, a virtual world operated by Linden Labs.⁹⁸ The virtual world of Second Life is primarily designed for player interaction, with no set quests to complete. Instead, players interact with each other, form relationships, and design and market products.⁹⁹ Second Life is unique in that it advertises that players retain applicable rights in their property; what you create in second life, you own.¹⁰⁰ This policy has drawn thousands of users, with players spending and making substantial amounts of money.¹⁰¹ It also has spurred traditional business to take an active role within Second Life, with big brands selling products such as clothing and even automobiles.¹⁰²

Bragg began to accumulate capital in Second Life, eventually developing an interest in virtual real estate speculation, a growing and potentially lucrative field.¹⁰³ Within the Second Life world, Linden Labs sells parcels

98. Kathleen Craig, *Second Life Land Deal Goes Sour*, WIRED NEWS, May 18, 2006, <http://www.wired.com/news/culture/0,70909-0.html>.

99. Second Life's creator, Linden Labs, explicitly rejects calling Second Life a "game."

100. *Second Life* takes a very different approach [than other games], recognizing residents' intellectual property rights to their creations, allowing them to generate real-world income. . . . As a user-created digital world, the ultimate success of *Second Life* is coupled to the innovation and creativity of its residents, not to ownership of their intellectual property. This is also a practical decision, as MMOGs establish economic links to the real world independent of the wishes of the developers or world operators.

Cory R. Ondrejka, *Aviators, Moguls, Fashionistas and Barons: Economics and Ownership in Second Life 1* (Nov. 7, 2004) (unpublished paper) (on file with Linden Research), available at <http://ssrn.com/abstract=614663>.

101. In January 2006 "inside Second Life alone, people spent nearly \$5 million in some 4.2 million transactions buying or selling clothes, buildings, and the like." Robert D. Hof, *My Virtual Life*, BUSINESSWEEK ONLINE, May 1, 2006, http://www.businessweek.com/magazine/content/06_18/b3982001.htm.

102. Wagner James Au, *Adidas, Toyota, come to Second Life*, GIGAOM, Aug. 20, 2006, <http://gigaom.com/2006/08/20/adidas-toyota-come-to-second-life>.

103. See Julian Dibbell, *The Unreal Estate Boom*, WIRED MAGAZINE, Jan. 2003, available at http://www.wired.com/wired/archive/11.01/gaming.html?pg=1&topic=&topic_set=.

of land through online auctions, where registered users bid against other users for parcels of land, which they can then subdivide and re-sell.¹⁰⁴ Interested in learning more about land auctions, Bragg began reading online discussion forums on how to successfully speculate on land in Second Life.¹⁰⁵ One source indicated that a player could take advantage of the online auction interface by going to unlinked URLs and prematurely starting land auctions that would not be visible to players who did not know how to access them.¹⁰⁶ This allowed the player who initiated the auction to purchase land without having to face competing bids, allowing her to pay a significantly lower price.¹⁰⁷ Despite the likely illegality of this practice under the laws of Second Life,¹⁰⁸ Bragg self-initiated a land auction and became the owner of a parcel of land named “Taessot” for which he paid Linden Labs three hundred U.S. dollars.¹⁰⁹

Linden Labs took action as soon as they learned about the practice of users starting land auctions prematurely.¹¹⁰ Linden Labs froze Bragg’s account, deleted his avatar, and denied him access to all of his virtual property, including his nightclub.¹¹¹ Two months later, Linden Labs removed Bragg’s name from the title to “Taessot” and his nightclub without compensating him, and prepared them for future resale.¹¹²

After attempting to negotiate with Linden Labs for the return of his nightclub and his Second Life bank account, Bragg retained counsel and sued Linden Labs in a Pennsylvania state court asserting a number of causes of action including violation of consumer protection statutes, fraud, and breach of contract.¹¹³ Bragg alleged that he relied upon statements made by the owners of Linden Labs, which indicated that property rights in Second Life were inviolable.¹¹⁴ In particular, Bragg cited to a Linden Labs press release where Linden Labs altered its ToS to “allow[] subscrib-

104. *Id.*

105. Complaint at 9-10, *Bragg v. Linden Res., Inc.*, No. 06-08711 (Pa. Ct. Com. Pl. 2006) [hereinafter *Bragg Complaint*].

106. Craig, *supra* note 98.

107. *Id.*

108. It is unclear from Second Life’s ToS and EULA if the practice was illegal.

109. *Bragg Complaint*, *supra* note 105, at 20.

110. Craig, *supra* note 98.

111. *Id.*

112. White and Williams LLP, *Virtual Land Lawsuit Reveals Dark Side of Second Life*, YUBANET.COM, Oct. 6, 2006, <http://www.yubanet.com/cgi-bin/artman/exec/view.cgi/22/43381>.

113. *Bragg Complaint*, *supra* note 105, at 31-46.

114. *Id.*

ers to retain full intellectual property protection for the digital content they create."¹¹⁵ In the same release, Linden Labs' CEO, Phillip Rosedale said:

We believe our new policy recognizes the fact that persistent world users are making significant contributions to building these worlds and should be able to both own the content they create, and share in the value that is created. The preservation of users' property rights is a necessary step toward the emergence of genuinely real online worlds.¹¹⁶

According to Bragg's complaint, this statement, and others like it,¹¹⁷ were made primarily to attract players to the game by promising them rights in their virtual property, and that those statements induced Bragg to invest in Second Life.¹¹⁸

Bragg's dispute with Linden Labs illustrates the limitations of EULAs to adjudicate property disputes occurring in virtual worlds. The terms of Second Life's EULA seem at odds with Linden Labs' public statements regarding player ownership of content.¹¹⁹ While Linden Labs claims the right to confiscate and sell property owned by a player, this, in light of its public statements, may run contrary to player expectations. If EULAs are used by developers to manipulate player expectations, the EULAs should be written in a way so as to fairly govern all property disputes within virtual worlds.

The examples above illustrate that there are and likely will continue to be disputes over virtual property in virtual worlds, and EULAs have not provided an adequate framework for adjudicating those disputes. According to the EULAs governing Red Moon, EVE Online, and Second Life, the developer retains discretion and control over disputes that arise in their virtual world. Under that framework, developers are conceivably free to ignore any consequences for their negligent in-game behavior, to enforce rules at their discretion, and to take, sell, or destroy any property. This is

115. Press Release, Linden Lab, Second Life Residents to Own Digital Creations (Nov. 14, 2003), available at http://lindenlab.com/press/releases/03_11_14 (on file with author) [hereinafter Linden Press Release].

116. *Id.*

117. For example, Mr. Rosedale commented to Guardian United: Gamesblog, "we started selling land free and clear, and we sold the title, and we made it extremely clear that we were not the owner of the virtual property." Bragg Complaint, *supra* note 105, at 7-8 (emphasis omitted).

118. See *Virtual Online Worlds*, THE ECONOMIST, Sept. 30, 2006, at 62, available at http://www.economist.com/business/displaystory.cfm?story_id=7963538.

119. Linden Press Release, *supra* note 115.

an inadequate basis upon which to ground the growing interest and participation in virtual worlds.

III. THE INADEQUACY OF EXISTING EULAS TO GOVERN VIRTUAL WORLDS

The inadequacy of existing EULAs to govern virtual worlds will become apparent as virtual worlds grow in size and economic importance. The prevalence of property disputes and a failure to address those disputes will harm the economic and social potential of those worlds. The following Sections examine specific problems with current EULA drafting and construction for many current virtual worlds. In particular, EULAs fail to adequately protect player interests, permit inconsistent enforcement, and do not conform to player expectations about their rights. Finally, this Part offers a series of suggestions as to how EULAs could better govern virtual worlds.

A. As Currently Constructed, EULAs Do Not Provide Adequate Protections for Players

As one might expect, the developer-drafted EULAs generally protect developer interests over player interests. In particular, virtual world EULAs generally contain clauses that allow the developers to terminate a user account for any reason at any time without compensation,¹²⁰ clauses that immunize the developer from any legal liability,¹²¹ clauses that allow the

120. From the Second Life EULA:

Linden has the right at any time for any reason or no reason to suspend or terminate your Account, terminate this Agreement, and/or refuse any and all current or future use of the Service without notice to you. Upon request from Linden, you agree to delete any electronic or printed copies of information or software programs that you received from Linden. In the event that Linden suspends or terminates your Account or this Agreement, you understand and agree that: (a) you shall receive no refund or exchange for any unused time on a subscription, any Land Use Fees, any Linden Dollars (L\$) that you hold, or for anything else . . .

SL Modifies Terms of Service and EULA (sort of), SECOND LIFE HERALD, Oct. 6, 2004, http://www.secondlifeherald.com/slh/2004/10/sl_modifies_ter.html.

121. From the EVE Online EULA:

In no event shall CCP, its affiliates, licensors or suppliers be liable to you or to any third party for any special, indirect, incidental, consequential, punitive or exemplary damages (including without limitation, lost profits or lost data), arising out of or in connection with your Account, the System, Software, Game, Game Content, User Content, EULA, or any other services or materials provided in connection there-

developers to alter the EULA at any time for any reason,¹²² and clauses that allow enforcement of the EULA terms at the developer's discretion.¹²³ The amount of leeway these clauses grant the developers leads to issues similar to those raised in Part II.

1. *Substantive Unfairness of Current EULAs*

In the cases of Li Hongchen, the EVE Online scandal, and Mark Bragg, the ways in which the virtual worlds' EULAs were constructed offered the developers great protection. For example, had Arctic Ice prevailed in the Chinese court, they would have been immunized from their negligence in maintaining their server security. This would have been unfair to Li and players like him, and would have provided poor incentives for Arctic Ice and other developers to take adequate steps to protect players. In the case of the EVE Online scandal, the fact that CCP chose not to take action against Cally provided players with little redress for their losses and allowed Cally to escape punishment.¹²⁴ In Bragg's dispute with Linden Labs, the terms of Second Life's EULA, apparently in contradiction with its CEO's public statements and advertising, would conceivably allow Linden Labs to take Bragg's virtual property at any time with no compensation.¹²⁵ In all of the above instances, the developers of the virtual worlds could terminate the accounts of any player at any time, providing a disincentive for players to seek redress for their grievances.¹²⁶

Additionally, these above examples illustrate that EULAs were written solely for the benefit of the developer and do not take into account player expectations of fairness. After investing substantial amounts of time and

with, whether based on warranty, contract, tort or any other legal theory, and whether or not CCP is advised of the possibility of such damages, and even if any stated remedy fails of its essential purpose.

EVE EULA, *supra* note 42.

122. From the World of Warcraft EULA:

Blizzard reserves the right, at its sole discretion, to change, modify, add to, supplement or delete any of the terms and conditions of this License Agreement when Blizzard upgrades the Game Client. . . . Blizzard may change, modify, suspend, or discontinue any aspect of the Game at any time.

World of Warcraft EULA, *supra* note 39.

123. See Entropia EULA, *supra* note 56.

124. See Pollack, *supra* note 86; see also *Don't Bank on It!*, TENTONHAMMER, Sept. 9, 2006, <http://eve.tentonhammer.com/index.php?module=ContentExpress&file=index&func=display&ceid=11&meid=32>.

125. See *SL Modifies Terms of Service and EULA (sort of)*, *supra* note 120.

126. See *id.*; see also EVE EULA, *supra* note 42.

money into creating or purchasing virtual property, players begin to form expectations about the value of their virtual property.¹²⁷ This trend is furthered by the fact that the game developers themselves often approve, or at least turn a blind eye to, the sale and transfer of virtual property. The presence of so many third-party sellers of virtual property even in games where it is ostensibly banned makes it appear that developers are not aggressively enforcing their rules. EULAs of most games do not adequately guard against the ability of developers to destroy, confiscate, or even sell property that players reasonably believe belongs to them. Bragg's dispute is particularly illuminating. Linden Labs made public statements indicating that players would retain interests in any property they purchase or create in Second Life.¹²⁸ Linden Labs' EULA, however, contradicts these statements.¹²⁹ Regardless of the ultimate enforceability of the EULA or the outcome of Bragg's case, it seems unfair for players to have to choose between relying on a developer's public statements or its EULA.¹³⁰

Within the property "bundle of sticks" there is a presumption that property will persist, and that no third party can delete it at any time for any reason. However, most virtual world ToS and EULAs contain this language.¹³¹ While there are real-world counterparts to this, such as eminent domain, the government is required to compensate property owners for their loss.¹³² This is not generally so in virtual worlds. The potential damages that could be incurred by a developer deleting a player's virtual property could be so extreme that justification solely based on a clickwrap EULA raises questions of procedural or substantive unconscionability.¹³³ Regardless, it seems unlikely that there will be a reversal in the trend of courts finding no procedural unconscionability in clickwrap EULAs.¹³⁴ However, with players spending and keeping significant amounts of money in virtual worlds, courts should closely examine whether enforcing a EULA that allows a developer to delete nearly a million dollars in virtual

127. See Lastowka & Hunter, *supra* note 26, at 48-49.

128. Second Life Residents to Own Digital Creations, *supra* note 115.

129. *SL Modifies Terms of Service and EULA (sort of)*, *supra* note 120.

130. Bragg Complaint, *supra* note 135, at 11-12.

131. See *SL Modifies Terms of Service and EULA (sort of)*, *supra* note 120.

132. *Id.*

133. Procedural unconscionability fundamentally deals with whether both contracting parties were sufficiently aware of the terms of the contract into which they were entering, while substantive unconscionability deals primarily with whether the terms of a contract are so manifestly unfair that it seems impossible that a party could have willingly assented to them. For a far more detailed explanation of procedural and substantive unconscionability in virtual worlds, see Meehan, *supra* note 31, at 13-20.

134. *Id.* at 16.

assets (which support a twenty-five person corporation) is substantively unconscionable.¹³⁵

2. *Uncertainty of Enforcement*

The idea that developers can use their EULA to selectively enforce their rules, as in the case of Bragg's dispute with Linden Labs and the EVE Online scandal raises another issue about the inadequacy of current EULAs. If developers can enforce the terms of their EULAs selectively or escape liability for non-enforcement, players may develop different expectations about the range of permitted behavior.

B. Recommendations for Good Governance of Virtual Worlds

If the ways in which current EULAs are constructed are less than optimal, how should they be constructed? First, EULAs should be drafted substantively better: they should meet player expectations regarding their rights to virtual property and game developers should not be able to escape liability for injuries caused by their actions by placing clauses in their EULAs immunizing them from liability. Second, developers should pledge to enforce their EULAs consistently.

EULAs should match player expectations. This principle is consistent with basic fairness; given the generous attitude of the courts towards the enforceability of EULAs,¹³⁶ it seems only reasonable that developers should be required to make those EULAs reflect what players believe they do. Where players have reasonable expectations that they possess some property right in their virtual goods, or that the game developers will stop illegal activity inside their virtual worlds, the EULAs of those virtual worlds should match those expectations. For example, Bragg's expectations about the ownership of his nightclub was presumably reasonable because they were based upon the statements of Linden Labs.¹³⁷ Linden Labs should have had to compensate Bragg in some way for his property, perhaps by giving him some or all of the revenues generated by the sale of that property.

As argued above, virtual worlds possess many differences from other types of software or games. These differences are important, because if players are investing substantial sums of money into virtual worlds, they

135. Anshe Chung, a Second Life real estate developer, recently announced that she had acquired one million dollars in virtual assets. Akela Talamasca, *Anshe Chung: Millionaire*, SECOND LIFE INSIDER, Nov. 25, 2006, <http://www.secondlifeinsider.com/2006/11/25/anshe-chung-millionaire>.

136. See, e.g., *ProCD, Inc. v. Zeidenberg*, 86 F.3d 17, 20 (2d Cir. 2002).

137. *Second Life Residents to Own Digital Creations*, *supra* note 115.

will need greater protections than those provided by most EULAs. For example, if a player has a piece of property, and the developer of the virtual world simply chooses to delete it, the player has little or no recourse. Because they control the software upon which the virtual world runs, game developers hold most of the power with respect to that virtual world and the virtual property within it.

One of the most problematic elements of most virtual world EULAs are clauses immunizing game developers from liability for injuries proximately caused by their actions.¹³⁸ In the Li's dispute with Arctic Ice, it stands to reason that if the game developer did not believe itself to be immune from liability, then it would have taken greater steps to secure Li's property. Furthermore, for example, if Linden Labs were to negligently destroy a player's virtual property, it would also likely claim that they were immunized from liability under their EULA.¹³⁹ This is problematic because if players cannot expect any sort of stability in their property, or rely on game developers to refrain from destroying or confiscating their property, it will severely damage the ability of virtual worlds to grow as a place for economic and social activity. Developers should recognize the shortsightedness of blanket immunizations from liability for their actions, and incorporate limited liability into their EULAs. To do this they could pledge good-faith efforts to act consistently with their public statements, and with established legal doctrines, such as negligence.

Furthermore, the rules laid out inside those virtual worlds should be enforced consistently. This will enable players to predict what they can and cannot do, which is important because players invest substantial amounts of money and time into virtual worlds. For example, had CCP consistently enforced the terms of their EULA with regard to the EVE Online scandal, players would have likely lost less money to Cally, and they would have been able to seek redress from CCP for their losses.¹⁴⁰ Consistency in enforcement will also ensure adequate redress for conflicts inside those worlds.

IV. CONCLUSION

It is clear that most EULAs, as they are currently drafted, do not provide adequate protections for game players. Arctic Ice sought refuge in the

138. See, e.g., Warcraft EULA, *supra* note 39.

139. See *SL Modifies Terms of Service and EULA (sort of)*, *supra* note 120.

140. Had CCP taken action against Cally, it presumably could have returned the stolen ISK.

terms of their EULA when facing suit for negligently allowing Li's property to be stolen. Had the Chinese court not found for Li, Arctic Ice would have had less incentive to secure their systems to ensure that valuable virtual property was not stolen. In the EVE Investment Bank scandal, CCP, by choosing not to enforce their EULA, allowed substantial transfers of real-world assets into the game. Then, by not cracking down on Cally after the scam, CCP caused players to incur losses in excess of what they would have had CCP enforced the terms of its EULA. And in Bragg's dispute with Linden Labs, Linden Labs' EULA contradicted its public statements as well as its own terms in saying that individuals have ownership interests in virtual property that Linden Labs could destroy at any time.

The ability of players and developers to resolve conflicts surrounding virtual property in virtual worlds is an important issue. While there is a sense that developers of these virtual worlds feel that the terms of the EULA should govern disputes, recent issues illustrating the inadequacy of EULAs to fairly govern virtual worlds suggest that a better solution is needed. Player expectations about the alienability, value, and inviolability of their property should be backed up by reality. Developers should enforce the terms of their EULAs consistently and developers should not be able to shield themselves from liability for their actions. If these steps are taken, virtual world governance will be more in harmony with player interests, and the potential of virtual worlds will blossom.