

CONTRACTUAL COMMUNITIES: EFFECTIVE GOVERNANCE OF VIRTUAL WORLDS

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‘where large amounts of real money flow, legal consequences must follow ...’¹

I INTRODUCTION

In April 2010 a class action was filed in the US District Court, Eastern District of Pennsylvania, on behalf of persons who had owned, possessed, purchased, created or sold virtual land or other items of virtual property in Second Life.² The action claimed, among other things, that Linden Lab had misled the plaintiffs into investing in this property in the belief that the plaintiffs would own the property outright, free to deal with it as they saw fit.³ Instead, ran the allegations, the operators of Second Life, Linden Research (more commonly known as Linden Lab), and its former CEO Philip Rosedale, having made such representations in order to induce investment in Second Life, now intend to change its business model to open source, which would significantly devalue the property owned by the plaintiffs. The plaintiffs are seeking a minimum of US\$5 million in damages. Apart from its curiosity value as a case about the existence of virtual property, this case generates some serious questions for the future effective governance of virtual worlds. In particular, it brings into sharp focus the absolute power of the virtual world provider to dictate the terms of the relationship with the users through the End User Licence Agreement (‘EULA’) and thus the ability to unilaterally alter that relationship with a change to the provisions of the EULA.

Millions of people worldwide are now participants in virtual worlds, such as Second Life, and massive multiplayer online games (‘MMOGs’) such as World of Warcraft, EverQuest and EvE Online.⁴ As more people become engaged in

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1 *Evans v Linden Research Inc* (ED Pa, No 10-1679, 15 April 2010) (still at trial at time of print) Complaint [28] (‘*Evans*’).

2 *Ibid.*

3 *Ibid.*

4 This article assumes readers have a basic understanding of virtual worlds, including MMOGs. The key defining characteristics of these environments include:

these environments and as an increasing amount of commercial activity is conducted within them, users are seeking a higher degree of accountability and predictability with respect to their time and financial investment in them. Similarly, governments are becoming more interested in regulating conduct within these worlds. Joshua Fairfield has written extensively about the limitations of contracts as an effective regulatory mechanism in these environments.⁵ He advocates the need for any court called on to adjudicate disputes arising in virtual communities to take account of community standards established among the users in applying and interpreting the application of common law to such environments. Others, such as Viktor Mayer-Schönberger and John Crowley, have highlighted that the private and unilateral nature of such rulemaking, while highly tailored to that particular virtual environment, carries no guarantees of participation, transparency or certainty: ‘Without warning, users may suddenly find themselves in a changed environment in which some behaviour or activity may not only be simply restricted, but impossible to do.’⁶

This article will analyse the effectiveness of the EULA as a form of governance in online communities, contrasting the approach adopted in a social world, such as Second Life, to that in a game world, such as World of Warcraft. Although focused primarily on interactive platforms that users engaged in via an avatar, the implications of these conclusions will also have relevance for other online communities governed by an EULA, such as Facebook and Live Journal. In particular, this article will focus on the evolving and unpredictable nature of virtual communities, highlighting the difficulty inherent in attempts to encapsulate all relevant world laws in the EULA. This article will also examine the notion of consent as a predictable guide to community standards within that world. It will argue that the key problem with EULAs in this context is that they originated as software licences. This is the case because virtual worlds themselves are creations of code (providing the primary laws of the virtual environment) and because the developers of virtual worlds were software designers, rather than politicians, bureaucrats or lawyers. Just as software licences are written to accommodate multiple updates and patches, so too did virtual world providers envisage that their software and the laws that it created

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- the environment is shared and persistent (it continues to function when the user is logged off);
 - interactions occur in real time;
 - the world operates according to a defined set of rules or ‘physics’; and
 - the user participates through an avatar.

See Richard Bartle, *Designing Virtual Worlds* (New Riders, 2003). For further analysis of the concept of virtual worlds; see European Network and Information Security Agency, ‘Virtual Worlds, Real Money: Security and Privacy in Massively-Multiplayer Online Games and Social and Corporate Virtual Worlds’ (Position Paper, November 2008); F Gregory Lastowka and Dan Hunter, ‘The Laws of the Virtual Worlds’ (2004) 92 *California Law Review* 1.

- 5 See, eg, Joshua Fairfield, ‘Virtual Property’ (2005) 85 *Boston University Law Review* 1047; Joshua Fairfield, ‘Anti-Social Contracts: The Contractual Governance of Virtual Worlds’ (2008) 53 *McGill Law Journal* 427; Joshua Fairfield, ‘The God Paradox’ (2009) 89 *Boston University Law Review* 1017; Joshua Fairfield, ‘The Magic Circle’ (2009) 11 *Vanderbilt Journal of Entertainment and Technology Law* 823.
- 6 Viktor Mayer-Schönberger and John Crowley, ‘Napster’s Second Life?: The Regulatory Challenges of Virtual Worlds’ (2006) 100 *Northwestern University Law Review* 1775, 1794.

could evolve throughout the term of the licence without significant user disruption or interference.

The article will conclude that while contracts attempt to deal with all aspects of community life, they have limited value in accommodating the growth and expansion of such worlds. Some minimum government regulation to clarify key matters, such as intellectual property ownership, would assist both virtual world providers and users. This would provide greater certainty and encourage further development of burgeoning online communities.⁷

II THE EULA AS A GOVERNANCE MECHANISM

Generally, the EULA is the sole form of governance in virtual worlds. Providers have experimented with various modes of democratic ('town hall meetings') and non-democratic ('wizards') involvement of participants in decision making.⁸ However, due to the sheer number of participants and the limited resources of the platform provider, these have largely been abandoned in favour of the top down enforcement of the EULA. This mode of governance derives from the fact that online environments are essentially computer programs and hence the copyright of the platform owner. The 'clickwrap' licence, now the ubiquitous online contracting mechanism, evolved from the 'shrinkwrap' licence, which, in the days of off the shelf purchases of software, restricted users of software imposing a licence. A clickwrap licence enables the owner of the intellectual property to licence a user without individual negotiation of the terms. Of course, this means that users can only enter and remain in that virtual world on a 'take it or leave it' basis. Further, as discussed below in the context of Second Life, these agreements have tended to grow in length and complexity as new issues have arisen and problems need to be resolved.⁹

So the key influences in governance of virtual worlds have been contractual, founded principally in concepts of intellectual property ownership and use, and, to a lesser degree, issues of content regulation, such as restrictions on content that is overtly sexual or violent (particularly in the US and Australia) or in breach of

7 As demonstrated by *Evans* (ED Pa, NO 10-1679, 15 April 2010), uncertainty relating to key concepts such as intellectual property ownership operates as an economic disincentive for further investment in online worlds.

8 This creativity also extended to punishment of offenders against the social system, such as the notorious cornfield in Second Life, to which users were banished to plough an endless field of corn and to watch an educational movie from the 1940s. See Christopher Grant, 'Second Life Miscreants Punished by Boredom: The Corn Field' on *Joystiq* (4 January 2006) <<http://www.joystiq.com/2006/01/04/second-life-miscreants-punished-by-boredom-the-corn-field>>. For a discussion of the role of community in the punishment of anti-social in-world behaviour and the role of 'wizards' in the community, see Julian Dibbell, 'A Rape in Cyberspace or How an Evil Clown, a Haitian Trickster Spirit, Two Wizards, and a Cast of Dozens Turned a Database into a Society' (1994) 1 *Annual Survey of American Law* 471.

9 Andrew Jankowich, 'EULAw: The Complex Web of Corporate Rule-Making in Virtual Worlds' (2006) 8 *Tulane Journal of Technology and Intellectual Property* 1, 7.

human rights guidelines, is racist or demeaning (European Union).¹⁰ While these are both important aspects of virtual worlds they are narrow concepts on which to base a structure of community governance.

As will be seen from the analysis below, questions of virtual property are more accurately conceived of as questions of contract and intellectual property. It is a fundamental principle of copyright that one can own copyright in something independently from ownership of that item's physical property.¹¹ Further, narrow concepts of effective in-world governance have derived from the initial belief by virtual world providers that these are the *only* issues that they need to deal with, as with the licence of other software products. Once the world is built, quests established and tools granted to users, what more need they do?

Of course, it should be observed that rules are primarily implemented and enforced by the source code of the virtual world environments by permitting or prohibiting the player from engaging in certain activities. For example, in World of Warcraft, the software renders text chat between players from different factions into meaningless babble. Players cannot communicate by text and must resort to gestures. Further, players cannot trade or send items or money to players from another faction. In this way the underlying software enforces the division created by the game law.¹² Richard Bartle describes these rules as the 'physics' of the virtual world. Bartle argues that virtual world providers, particularly of game worlds, need to retain a 'god-like' authority over the environment in order to ensure that the integrity of the game, and ultimately the enjoyment of all players, is maintained.¹³ But, while control is exercised primarily by the code, in some cases the virtual world providers cannot simply exclude unwanted behaviour via coding to prevent it. For example, Bartle observes that certain anti-social behaviour, including swearing, can only be imperfectly filtered. In these cases, virtual world providers must have the right and ability to intervene to 'protect the game conceit'.¹⁴ Under this view, the EULA serves to reinforce the primary rule making mechanism – the code – and to remind players who is in control of the domain.

10 See, eg, Directorate General of Human Rights and Legal Affairs, Council of Europe Directorate of Human Rights and Legal Affairs, *Human Rights Guidelines for Online Games Providers* (July 2008) <[http://www.coe.int/t/dghl/standardsetting/media/doc/H-INF\(2008\)009_en.pdf](http://www.coe.int/t/dghl/standardsetting/media/doc/H-INF(2008)009_en.pdf)>.

11 *Pacific Film Laboratories Pty Ltd v Federal Commissioner of Taxation* (1970) 121 CLR 154.

12 William Sims Bainbridge, *The Warcraft Civilization: Social Science in a Virtual World* (MIT Press, 2010) 118–19. Of course this division is the site of some of the most creative targets of player endeavours. See, for example, the machinima 'Not Just Another Love Story', which portrays the love story of Romeo and Juliet through the courtship and marriage of a Horde and an Alliance character, thus overcoming both social and technical obstacles: Tristan Pope, *Not Just Another Love Story* (18 April 2005) Machinima.com <<http://www.machinima.com/film/view&id=1081>>. See Henry Lowood, 'Found Technology: Players as Innovators in the Making of Machinima' in Tara McPherson (ed), *Digital Youth, Innovation, and the Unexpected* (MIT Press, 2008) 165–96.

13 Richard Bartle, 'Why Governments Aren't Gods and Gods Aren't Governments' (2006) (Special Issue 7) *First Monday* <<http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/1612/1527>>.

14 Richard Bartle, 'Virtual Worldliness: What the Imaginary Asks of the Real' (2004) 49 *New York Law School Law Review* 19, 25–7.

This particular view of virtual worlds advocates for the complete insulation of virtual worlds against intervention from real world laws – the so called ‘Magic Circle’. The concept of the Magic Circle derives from the work of Johan Huizinga on play, and seeks to draw an impermeable boundary between activities carried on within and outside the game.¹⁵ This view rejects activities such as Real Money Trade (‘RMT’), which may interfere with or distort the game activities.¹⁶ RMT involves the trade of virtual items, such as rare or valuable weapons, or currency (gold), outside of the game platform – essentially trading money for time and skill in the game. This enables players to circumvent aspects of the game and for this reason is often banned.¹⁷ Bartle’s assertion that virtual world providers exercise power over their world through code and should be permitted to exercise unfettered discretion to change that world at will ‘so that the virtual world can evolve’, does not translate effectively to virtual worlds that permit and even encourage user created input.¹⁸ Even strong advocates of insulating virtual worlds from RMT, such as Edward Castronova, are now questioning whether this is truly what the majority of the online population now desires and expects.¹⁹

III THE VIRTUAL PROPERTY HARD SELL

The Complaint in *Evans*, based largely on Californian consumer protection laws, relies heavily on the earlier decision in *Bragg v Linden Research Inc*, a case that also concerned claims regarding rights of ownership in virtual property.²⁰ In that case, Robreno J held that the arbitration clause in the Second Life Terms of Service (‘ToS’) was unconscionable. The substantive matters between the parties were not resolved by the Court as the matter was settled out of court. After reclaiming his virtual property Bragg rejoined the Second Life community, continuing to blog about his experiences, but later formally withdrawing from Second Life in the face of what he regarded as property scams.

For many virtual world commentators, it was obvious that this dispute was inevitable – although the question concerned not so much about the nature of what is virtual property but the lack of clarity of the Second Life ToS. Notoriously, the Second Life ToS purported to grant users ownership of

15 Johan Huizinga, *Homo Ludens: A Study of the Play Element in Culture* (Routledge, 2003). See further, Katie Salen and Eric Zimmerman, *Rules of Play: Game Design Fundamentals* (MIT Press, 2004).

16 See further, F Gregory Lastowka, *Rules of Play* (2007) Terra Nova <<http://terranova.blogs.com/RulesofPlay.pdf>>; Edward Castronova, ‘The Right to Play’ (2004) 49 *New York Law School Law Review* 185; see also Vili Lehdonvirta, ‘Virtual Worlds Don’t Exist: Questioning the Dichotomous Approach in MMO Studies’ (2010) 10(1) *Game Studies* <<http://gamestudies.org/1001/articles/lehdonvirta>>.

17 For a fascinating account of the operation of RMT, see Julian Dibbell, *Play Money: Or, How I Quit My Day Job and Made Millions Trading Virtual Loot* (Basic Books, 2006).

18 Bartle, ‘Virtual Worldliness’, above n 14, 34.

19 Edward Castronova, ‘Lights Going Out in the Anti-RMT Bunker’ on *Terra Nova* (16 February 2010) <http://terranova.blogs.com/terra_nova/2010/02/lights-going-out-in-the-antirmt-bunker>.

20 *Bragg v Linden Research Inc*, 487 F Supp 2d 593 (ED Pa, 2007) (‘*Bragg*’).

intellectual property with respect to items they created within Second Life. However, as was questioned at the time, how could this be a true grant of intellectual property rights when this ‘grant’ was subject to a broad licence back to Linden, could possibly involve a range of underlying intellectual property rights belonging both to Linden and known or unknown third parties, and remained hosted on the Linden servers at all times?²¹ These limitations were long known but did not prevent Linden (and others) hailing the foresight of Linden offering such rights.²²

In his anthropological study of the early days of Linden Lab and the evolution of Second Life, Thomas Malaby discusses the pervasive nature of the underlying creative philosophy of Linden. In the conceptualisation and creation of Second Life, Linden programmers led by Rosedale and Cory Ondrejka (then Vice President of Product Development at Linden) sought to provide users with ‘tools’. Users were generally conceptualised as programmers and gamers, just as the developers themselves largely were: ‘Linden Lab provided the tools, and the world, and the users would make things.’²³ This provision of tools was distinct from the gaming worlds offered by MMOG providers such as Blizzard Entertainment Inc (‘Blizzard’), who designed their world to provide experiences that would lead to the creation of relationships and a sense of community, and hence encourage players to develop a sense of allegiance to the game and their fellow players and therefore return again and again (generating subscription fees) (see Part V, below).

This key difference between Second Life and MMOGs remains an important factor. Second Life is not a ‘game’; it has no object, no teams, no ‘levelling up’, although it does have rules of behaviour. Rather, Second Life is a platform, providing users with the opportunity to develop virtual land, virtual businesses

21 See Dan Hunter, ‘Second Life Announcement’ on *Terra Nova* (14 November 2003) <http://terranova.blogs.com/terra_nova/2003/11/second_life_ann.html>. Blogging live from the Second Life announcement at the State of Play Conference in New York, Dan Hunter wrote :

Philip Rosedale, the main guy at Linden Labs, just announced that Second Life today has changed its Terms of Use to allow users to retain real world property rights in the virtual world products they produce. This is really really encouraging and really really important.

Closely following this announcement Ren Reynolds replied:

Also live and direct from NY Law School:- I asked the Second Life guy and the There guy about turning off their servers and whether they have the right to deny access to people[’s] property if they have explicitly granted rights – the[y] both said, not [a] problem as our EULA \ TOS give them the out. Its going to be interestign how it plays out, copyright grants a whole set of stuff and if they ... do give players copyright then they are by definition constraining what ... [they] can do in ways that they may not be able to simply contract out of. I think that There and Second life have created problems for them selves, but i’m glad they have as it [is] going to be good to see these issues resolved’ (errors in original).

See also Melissa de Zwart, ‘Virtual Worlds: Copyright vs Contract – the New Frontier?’ (2008) 26(2) *Copyright Reporter* 79.

22 As noted by Cory Ondrejka in a characteristically humble observation: ‘The results of this decision will be closely watched in the years to come’: Cory Ondrejka, ‘Escaping the Gilded Cage: User Created Content and Building the Metaverse’ (2004) 49 *New York Law School Law Review* 81, 95; see also Mayer-Schönberger and Crowley, above n 6, 1805–10.

23 Thomas Malaby, *Making Virtual Worlds: Linden Lab and Second Life* (Cornell University Press, 2009) 54.

and virtual leisure. The development of a social dimension in Second Life was far more haphazard and unanticipated than the current nature of Second Life may attest, as Second Life was conceived as a place where people would build and create rather than as one where they would interact, shop, dance and romance. The programmers at Linden were surprised by the demands by users for social tools, social spaces and social events.²⁴ This very conception of Second Life as a platform of tools rather than a meeting place underscores why the rules regarding content creation focused far more on who would own those creations than on how this ownership may need to be mediated. Second Life started as a sandpit, but, contrary to what Rosedale and his developers had anticipated, it quickly became a shopping mall.

In contrast to Second Life, MMOGs such as World of Warcraft and EvE Online, provide a highly developed world complete with complex back story for the player to experience in a range of ways. These worlds require a significant investment of programming to keep ahead of the players as they level up to new skills and experiences. Linden made a conscious decision that Second Life would not operate as such a platform. Malaby discusses, that early on Linden realised that it may not have the resources to fuel the constant demand for new user experiences, and instead opted to empower its users to be creators. The very nature of Second Life therefore depends on unanticipated uses.²⁵ Linden Lab itself attempted to encourage its staff to operate in an environment similar to that which they wished to foster in Second Life, rejecting top down decision making, and providing staff with the time and the tools to contribute to the overall project. This approach has its roots in the cyber-utopian philosophy of the early days of the internet, reflecting a distrust of vertical authority and an overriding faith in technology and its ability to foster a legitimate outcome. As Malaby discusses, this approach to world development by Linden was inevitably reflected in their approach to governance as Linden's role as a platform developer evolved into the role of community manager, despite Linden's own attempts to outsource the development and management of 'community' to the users themselves.²⁶ As Sal Humphreys has discussed, this shift is not always an easy one to make.²⁷ Neither has it proved, as Malaby posits, that this model points to a new form of institution for the digital age characterised by something less than total control. The attempt to bridge the roles of facilitator and manager has proven extremely

24 Ibid 100–1.

25 Ibid 2–3.

26 Perhaps also reflecting a fundamental disconnect between Linden developers and the Linden marketing department, see *ibid* 113.

27 Sal Humphreys, 'The Concept and Conditions of Governance in Massively Multiplayer Online Games' in Christoph Beat Graber and Mira Burri-Nenova (eds), *Governance of Digital Game Environments and Cultural Diversity: Transdisciplinary Enquiries* (Edward Elgar, 2010) 115–16.

difficult for Linden. In fact, Linden has long sought to distance itself from responsibility for dispute resolution between residents.²⁸

The next section will analyse the two virtual property cases brought against Linden. The focus here is on what these cases indicate about user expectations versus platform provider promises and control via code versus control through the ToS.

IV 'YOU CAN'T FOR EXAMPLE JUST TAKE SOMEONE ELSE'S PROPERTY IN SECOND LIFE'²⁹

Bragg concerned the confiscation by Linden of the contents of Marc Bragg's inventory and suspension of his account. Bragg, a Pennsylvanian attorney, became a 'resident' of Second Life in 2005 through his avatar Marc Woebegone. By April 2006, when the dispute arose, he had significant assets including land, currency and virtual items. Linden claimed that Bragg had purchased a parcel of virtual land called 'Taessot' through the use of an 'exploit' in breach of the ToS. Under the Second Life ToS, Linden was entitled to suspend or terminate a user's account (including all associated accounts) for violation of the ToS.³⁰

In bringing an action to restore his account and virtual property, Bragg claimed he had placed significant reliance on claims made by Linden, and in particular by Philip Rosedale personally, that distinguishing Second Life from other online worlds was that users would own their in-world creations. The judgment of Robreno J cites a number of statements by Linden and Rosedale to this effect. For example:

Until now, any content created by users for persistent state worlds, such as Everquest® or Star Wars Galaxies™, has essentially become the property of the company developing and hosting the world ... 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.³¹

It is commonly accepted that the decision made and announced to the public in November 2003, that Second Life would grant users rights in their intellectual property, was prompted by the belief that it would otherwise be impossible for Linden to keep up with the content creation needed for the growing user base of Second Life. Further, it was encouraged by Lawrence Lessig, Stanford Law Professor and founder of the Creative Commons movement, who observed that

28 See, eg, its reluctance to become involved in the intellectual property disputes between members, prompting a class action to be brought against Linden headed by one of the most successful merchants in Second Life, Stroker Serpentine, otherwise known as Kevin Alderman: *Eros LLC v Linden Research Inc* (ND Cal, 09-cv-04269-PJH, 15 September 2009) (awaiting judgment).

29 *Evans* (ED Pa, 15 April 2010) (still at trial at time of print) Complaint, [116].

30 Linden Research Inc, *Terms of Service* (31 March 2010) Second Life <<http://secondlife.com/corporate/tos.php>>.

31 Linden Research Inc, 'Linden Lab Preserves Real World Intellectual Property Rights of Users of its Second Life Online Service' (Press Release, 14 November 2003), cited in *Bragg* 487 F Supp 2d 593 (ED Penn, 2007), Memorandum of Robreno J (30 May 2007) 4.

the grant of rights to users would facilitate greater creativity.³² This decision was then promoted as a point of difference with other online worlds. The Second Life website went so far as to assert: 'Second Life is an online, 3D virtual world, imagined, created and owned by its residents.'³³

However, the preliminary points at issue in *Bragg* were firstly whether Rosedale could dismiss the case against him personally for lack of jurisdiction and secondly the ability of Linden to enforce the compulsory arbitration clause in the Second Life ToS, to compel arbitration in San Francisco, rather than have the matter heard by the District Court in Pennsylvania. The Court found that, as the 'hawker sitting outside Second Life's circus tent, singing the marvels of what was contained inside to entice customers to enter', Rosedale had sufficient contacts to support personal jurisdiction.³⁴ Regarding the enforcement of the arbitration provision found in the ToS, the Court looked at both procedural and substantive unconscionability. Under the US *Federal Arbitration Act*, 9 USC § 1–14 (2010), written arbitration clauses are enforceable except in the event of general contract defences such as fraud, duress or unconscionability. Under Californian law, unconscionability has both procedural and substantive limbs. The procedural limb is made out through proving either '(1) oppression through the existence of unequal bargaining positions or (2) surprise through hidden terms common in the context of adhesion contracts'.³⁵ Judge Robreno held that the Second Life ToS were procedurally unconscionable as a 'contract of adhesion'.³⁶ Despite the fact that Bragg was an experienced attorney, he was presented with the Second Life ToS on a 'take it or leave it' basis, with no opportunity to negotiate those terms. Further, as 'the first and only virtual world to specifically grant its participants property rights in virtual land', there were no 'reasonably available market alternatives' to defeat the claim that this was a contract of adhesion.³⁷ The burying of the arbitration requirements in a paragraph headed 'GENERAL PROVISIONS' created an element of surprise, which combined with the other elements satisfied a finding of procedural unconscionability.

With respect to the question of substantive unconscionability, the Court found that the ToS provided 'Linden with a variety of one sided remedies to resolve disputes, while forcing its customers to arbitrate any disputes with Linden'.³⁸ These included the right 'at any time for any reason or no reason to suspend or terminate your Account, terminate this Agreement, and/or refuse any

32 Wagner James Au, 'The Second Life of Lawrence Lessig' on *New World Notes* (24 January 2006) <http://nwn.blogs.com/nwn/2006/01/the_second_life.html>.

33 This message was displayed on the website's front page at <www.secondlife.com>. This was changed after *Bragg* to read: 'Second Life is an online, 3D virtual world imagined and created by its residents.' It has recently been changed simply to say: 'Escape to the Internet's largest user-created, 3D virtual world community.'

34 *Bragg*, 487 F Supp 2d 593 (ED Pa, 2007) 14.

35 *Ibid* 26 citing *Comb v Paypal Inc*, 218 F Supp 2d 1165, 1172 (ND Cal, 2002).

36 *Bragg*, 487 F Supp 2d 593 (ED Pa, 2007) 27.

37 *Ibid* 29.

38 *Ibid* 34.

and all current or future use of the Service without notice or liability to you'.³⁹ Importantly for the Court's decision, the ToS also provided that 'Linden may amend this Agreement ... at any time in its sole discretion by posting the amended Agreement [on its website].'⁴⁰ The lack of mutuality, the ability for Linden to suspend the users' account unilaterally and on a mere 'suspicion' of fraud or other violation and then require the user to go to costly commercial arbitration to recover the suspended account and related funds, was held by the Court to count towards a conclusion that the arbitration clause was 'not designed to provide Second Life participants [with] an effective means of resolving disputes with Linden'.⁴¹ Therefore the arbitration clause was held to be unenforceable.⁴²

Having fallen at the first hurdle, with its ToS now vulnerable to attack from the Court, Linden chose the prudent course and settled the matter with Bragg for an undisclosed amount, with full reinstatement of his account and privileges.⁴³

Thus *Bragg* set the stage for a fuller consideration of the issues of virtual property and created the possibility for hammering further chinks into the Second Life ToS. In the meantime Linden undertook some restructuring and re-branding of its activities. Changes were made to start up procedures so that users were required to renew their acceptance of the ToS and, importantly, the advertising catch phrase was changed to remove the reference to users 'owning' the world of Second Life.

The follow up case of *Evans* amplifies and extends the issues first raised in *Bragg*. It relies on the findings in the earlier case that the District Court of Pennsylvania has jurisdiction over Linden Lab and Rosedale. In *Evans*, the plaintiffs' case is that Linden made a calculated business decision to attract a larger user base by claiming to offer users ownership and intellectual property rights in their virtual land and goods.⁴⁴ The Complaint makes detailed reference to a number of occasions in which Rosedale and Linden represented that users, and not Linden, would own their creations and related intellectual property and virtual property purchased in Second Life:

Thus by mid-2004, Linden and Rosedale's representations had caused significant dollars to not only be invested in Second Life, through the purchase of virtual land, but also a significant revenue stream generated from the taxation of that virtual land.⁴⁵

39 Ibid 33 citing Second Life Terms of Service [7.1].

40 Ibid 33 citing Second Life Terms of Service [1.2].

41 Ibid 41.

42 The Court estimated likely costs of arbitration to be US\$17 250: *ibid* 35. Given that the total value of Bragg's account was estimated to be US\$6000–US\$8000, this was at least double the amount he sought to recover.

43 Marty Linden, 'Resolution of Lawsuit' on *Second Life Blogs* (4 October 2007) <<http://blogs.secondlife.com/community/features/blog/2007/10/04/resolution-of-lawsuit>>.

44 *Evans v Linden Research Inc* (ED Pa, No 10-1679, 15 April 2010) (still at trial at time of print) Complaint, [45].

45 *Ibid* [61].

The Complaint details a series of representations made by and on behalf of Linden and links these representations about ownership of virtual property with the growing user base of Second Life.

This position was however soundly challenged by *Bragg*. As noted above, following the outcome of *Bragg*, the statement on the Second Life home page was amended to remove the reference to ownership. This is asserted in the Complaint as evidence that Linden knew that it was engaging in misrepresentation regarding the Second Life ownership arrangements.⁴⁶ Further, the Complaint refers to a document filed by Linden in *Bragg*, which refers to claims of property ownership as an analogy:

Defendants aver that the references to ‘selling land free and clear’ and selling ‘title’ are metaphors or analogies to the concepts of ownership of real property, as what is ‘owned’ with respect to ‘virtual land’ in Second Life is in fact a license to computing resources.⁴⁷

Despite these admissions, as the Complaint demonstrates, Linden and Rosedale continued to represent that users could ‘own’ virtual land. The Complaint emphasises the statement made by Rosedale in a podcast on 20 July 2006: ‘you can’t for example just take someone else’s property in Second Life.’⁴⁸

Each of the plaintiffs named in the Complaint lost virtual land or other items when their account was terminated by Linden without compensation. The plaintiffs claim that they were each induced into investing in virtual property and other items in Second Life on the basis of these representations made by Linden and Rosedale and repeated on the Second Life website and within Second Life itself, including within the ToS.⁴⁹ The plaintiffs therefore claimed they were the victims of fraudulent misrepresentations and false advertising.⁵⁰

The Complaint also highlights the proposal to move Second Life to an open source model, where content is hosted on the users’ servers rather than the current model where all content is hosted on servers owned or operated by Linden. While no clear time frame is provided regarding when or if this will indeed happen, it would disrupt the current business model, potentially to the detriment of current land owners (as the scarcity value of their land will disappear).

Importantly, the Complaint addresses the frequent and one sided nature of Linden’s amendments to the ToS, something users find both confusing and irritating. Of course, as an evolving platform, which has changed considerably from the initial concept stage in terms of both creator and user expectations, it should not be surprising that just as the platform code itself is subject to continual updates and revisions, so too have the ToS needed considerable revision. In other

46 Ibid [89].

47 Defendants Linden Research Inc and Philip Rosedale’s Answer to Complaint and Linden Research Inc’s Counterclaims against Plaintiff Marc Bragg: *ibid* [90].

48 Ibid [130].

49 Ibid [124].

50 Among other claims, including conversion, intentional interference with contractual relationships and unjust enrichment.

words, the ToS evolve and change to maintain and reflect the platform provider's control over the code. What may be more frustrating for users is perhaps the manner in which this has been done and the increasing complexity of the ToS provisions. As Tateru Nino, virtual world commentator, observes: 'seems to not just be written *by* lawyers, but appears to be written *for* lawyers.'⁵¹

The next section will consider the effect of the new Second Life ToS.

V THE VIRTUAL BECOMES ONCE AGAIN VIRTUAL: THE NEW SECOND LIFE ToS

Effective from 30 April 2010, Second Life adopted a comprehensive new set of ToS. These appear, and must be accepted by clicking 'I Accept', when a subscriber first accesses Second Life. All existing subscribers were also required to agree to the new terms. The ToS are available for review on the Second Life website.⁵²

Section 1 of the ToS provides that the Agreement may be changed by Linden effective immediately by notifying users via the Second Life website, at or after login to the user's account, by email or written communication (section 13.4). This is subject to the proviso that a 'Material Change' – defined in section 1 as a change to the Agreement 'which reduces your contractual rights or increases your responsibilities under this Agreement in a significant manner' – becomes effective 30 days after notification.

Importantly, in the context of the virtual property dispute, section 4 attempts to clarify the nature of Second Life and is headed: 'SECOND LIFE IS A VIRTUAL WORLD SERVICE'.

Section 4.1 is headed: 'Second Life is a virtual world service consisting of a multi-user environment, including software, websites and virtual spaces' and contains a number of definitions that are obviously intended to shift thinking about Second Life as a place citizens inhabit and own property to Second Life as an online platform. Second Life becomes a 'multi-user online service'.⁵³ Section 4.2 provides:

Second Life exists only as long as and in the form that we may provide the Service, and all aspects of the Service are subject to change or elimination.

Linden Lab has the right to change and/or eliminate any aspect(s), features or functionality of the Service as it sees fit at any time without notice, and Linden Lab makes no commitment, express or implied, to maintain or continue any aspect of the Service. You acknowledge that your use of the Service is subject to this risk and that you knowingly assume it and make your decisions to participate in the Service, contribute Content and spend your money accordingly.⁵⁴

51 Tateru Nino, 'The Virtual Whirl: The Emperor's New Terms' on *Massively* (3 April 2010) <<http://www.massively.com/2010/04/03/the-virtual-whirl-the-emperors-new-terms>>.

52 Linden Research Inc, *Terms of Service* (31 March 2010) Second Life <<http://secondlife.com/corporate/tos.php>>.

53 See also *ibid* s 4.3.

54 *Ibid* s 4.2.

Changes to the ToS such as this and other statements by Linden seemingly resiling from the position that residents ‘owned’ everything they bought or created in Second Life, are being relied on in the most recent cases filed against Linden as evidence that Linden deliberately misled the Second Life community (and its prospective members) regarding the nature of the property right actually being granted by Linden. However, they also reflect more closely the reality of a computer generated platform, which, as most users know from bitter experience, is subject to bugs, glitches and hacking. In May 2007, the Australian Broadcasting Corporation’s Island in Second Life was reported to have been destroyed by a ‘cyber-bomb’, leaving nothing but an enormous crater on the Island.⁵⁵ In fact, there had been no attack on the Island. The crater was due to a rollback error when the servers had saved the data during the Australian night, demonstrating the vulnerability of virtual land mass.

A statement regarding the nature of land in Second Life has also been inserted into its new ToS:⁵⁶

6. ‘VIRTUAL LAND’ IS IN-WORLD SPACE THAT WE LICENSE

Virtual Land is the graphical representation of three-dimensional virtual world space. When you acquire Virtual Land, you obtain a limited license to access and use certain features of the Service associated with Virtual Land stored on our Servers. Virtual Land is available for Purchase or distribution at Linden Lab’s discretion, and is not redeemable for monetary value from Linden Lab.

The Service includes a component of In-World Virtual Space that is stored on our Servers and made available in the form of virtual units (‘Virtual Land’). This ‘Virtual Land’ constitutes a limited license to access and use certain features of our service as set forth below.

...

When you acquire Virtual Land, Linden Lab hereby grants you a limited license (‘Virtual Land License’) to access and use features of the Service associated with the virtual unit(s) of space corresponding to the identifiers of the Virtual Land within the Service as designated by Linden Lab, in accordance with these Terms of Service and any other applicable policies, including the Second Life Mainland Policies as they exist from time to time.

...

You acknowledge that Virtual Land is a limited license right and is not a real property right or actual real estate, and it is not redeemable for any sum of money from Linden Lab. You acknowledge that the use of the words ‘Buy,’ ‘Sell’ and similar terms carry the same meaning of referring to the transfer of the Virtual Land License as they do with respect to the Linden Dollar License. You agree that Linden Lab has the right to manage, regulate, control, modify and/or eliminate such Virtual Land as it sees fit and that Linden Lab shall have no liability to you based on its exercise of such right. Linden Lab makes no guarantee as to the nature of the features of the Service that will be accessible through the use of Virtual Land, or the availability or supply of Virtual Land.

55 Ninemsn Staff, ‘ABC Island Destroyed in Second Life Attack’, *ninemsn* (online), 23 May 2007 <<http://news.ninemsn.com.au/article.aspx?id=268775>>.

56 Linden Research Inc, *Terms of Service* (31 March 2010) Second Life <<http://secondlife.com/corporate/tos.php>> cl 6.

What is the effect of such a declaration in the face of earlier claims by Linden that you owned virtual property outright? Clearly, this represents Linden Lab's lawyers' attempts to dispel the virtual property myth. There is a legal battle to be fought here, separating the puff of the promotional blurb from the practical realities underlying Second Life. As such, the class action is not truly about the nature of virtual property but rather about more fundamental legal tortious and contractual principles. In Australia, such a claim would also be based on section 52 of the *Trade Practices Act 1974* (Cth).

The new ToS contain extensive provisions dealing with ownership and use of intellectual property rights.

The ToS still assert that users retain all intellectual property rights in Content they submit to the Service, with an automatic licence to Linden and other users of Second Life to use such Content, including the right to create derivative works.⁵⁷ In the case of Linden this licence extends to use in the provision and promotion of the Service; in the case of other users, it applies only to use within Second Life or otherwise as part of the Service. There is also a licence related to photographs and video ('machinima') taken and created in Second Life. These licences to users terminate on deletion of the relevant Content or closure of the user's account, but the licence to Linden and the machinima and image usage licences are expressed to continue beyond deletion of the Content.

Section 7 includes some advice to users, including a warning that:

Because the law may or may not recognize certain Intellectual Property Rights in any particular Content, you should consult a lawyer if you want legal advice regarding your legal rights in a specific situation. You acknowledge and agree that you are responsible for knowing, protecting, and enforcing any Intellectual Property Rights you hold, and that Linden Lab cannot do so on your behalf.

Further, users who do not want to grant a User Content License to other users are advised to use Virtual Land tools to keep other users from accessing areas where private content is displayed.

The ToS are extended by a number of policies that govern in-world behaviour and provide further rules of conduct including the Community Standards, the Ageplay policy, Gambling Policy, Banking Policy and the Second Life Mainland Policies. Thus users are required to be familiar with a range of related documents. As a practical matter, it is unlikely that users will take the time to work through this raft of legalese. It is therefore desirable that virtual world providers work together to establish a coherent set of core standard policies that could apply across virtual worlds and MMOGs with provision for context specific user rules. These terms might encompass matters such as privacy, age appropriate content, intellectual property ownership and dispute resolution mechanisms. Such a set of core terms would provide greater certainty to users. Importantly such terms may avoid the conclusion that such contracts are

57 Linden Research Inc, *Terms of Service* (31 March 2010) Second Life <<http://secondlife.com/corporate/tos.php>>: 'Content' has defined in cl 4.1 as 'any works of authorship, creative works, graphics, images, textures, photos, logos, sounds, music, video, audio, computer programs, applications, animations, gestures, text, objects, primitives, scripts, and interactive features'.

vulnerable to claims of procedural and substantive unconscionability as emerged in *Bragg*.⁵⁸

The new ToS deal with the consequences of termination more adroitly than in the ToS giving rise to the *Bragg* case. Under section 11.3, a user's Account may be terminated or suspended for violation of the ToS. In the event of termination of an Account under this section, Linden will pay the user 'the stated current value of any credit balance held in your Account(s), i.e. amounts you have cashed out on the LindeX'. This marks the user's exclusive remedy and Linden Lab's sole liability.

Section 11.6 provides:

On termination of your Account, you will no longer be able to access your Account or access (or transfer or direct the transfer to any other Account) any Content or data you have stored on the Servers. All licenses granted by Linden Lab to use the Service, including without limitation any Linden Dollar Licenses and any Virtual Land Licenses will automatically terminate. You acknowledge that you have elected to procure Linden Dollar Licenses or Virtual Land Licenses or any premium account or paid features of the Services notwithstanding the possibility of termination of such license rights under the circumstances set forth in this Agreement.

You should ensure that you have only stored Content on the Servers to which you are willing to permanently lose access. You acknowledge and assume the risk of the possibility of suspension or termination of your Account as provided herein, and you represent that you will make your decisions to participate in the Service, contribute Content, spend your money and dispose of transferable licenses at all times knowingly based on these risks.

Finally, in the light of the significant emphasis placed on the representations made by Philip Rosedale in the virtual property cases, section 13.3 provides an 'entire agreement' clause. Further, the section reinforces 'that no other written, oral or electronic communications will serve to modify or supplement this Agreement, and you agree not to make any claims inconsistent with this understanding or in reliance on communications not part of this Agreement'.

VI THE NEVER ENDING QUEST: WORLD OF WARCRAFT, MODS AND THE EULA

Blizzard's exercise of intellectual property control provides an interesting contrast to the open ended ownership arrangements in *Second Life*. Blizzard operates the most successful MMOG in the Western world – *World of Warcraft* ('WoW') – with subscribers numbering in excess of 11 million, generating US\$1.5 billion per year for Blizzard.⁵⁹ Unlike *Second Life*, Blizzard retains tight control over its intellectual property.

In 2006 Blizzard threatened proceedings against MDY Industries LLC ('MDY'), the owner and distributor of the Glider program that facilitated

58 See below Part VI, closing paragraph.

59 Bainbridge, above n 12, 4.

automated play of WoW. MDY sought summary judgment against Blizzard in order to settle the matter and Blizzard counterclaimed for contributory and vicarious copyright infringement, violation of the *Digital Millennium Copyright Act*, 17 USC §§ 512, 1201–5 (2000) ('*DMCA*'), and tortious interference with contract. In particular, Blizzard claimed that use of the Glider program in conjunction with the WoW software exceeded the licence granted to users by the EULA and Terms of Use ('ToU') to use the WoW software. Blizzard claimed that loading the WoW software and using that software in conjunction with Glider automatically created infringing copies of the game client (when the user loaded the game) and hence transformed licensed users into infringers.⁶⁰ The Court held that the limited licence granted to users to use the WoW game client software was expressly subject to the terms of the EULA and the ToU.⁶¹ Use of Glider was in breach of the ToU, which prohibited 'the use of "bots" or any "third party software designed to modify the [WoW] experience"'.⁶² As well, as use of Glider necessarily involved copying the game software to RAM, it infringed copyright as an act outside the scope of the licence. In a later judgment, the Court also held that MDY had breached sections 1201(a)(2) and 1201(b)(1) of the *DMCA*.

What lessons can be learned from these cases? Is there a need for government intervention or should such issues be left to be resolved by virtual world providers and their users? Should the option of 'exit' remain the key bargaining tool for users? The next section will analyse the key governance issues arising from the cases.

VII GOVERNING THE 'GAME'

As the Complaint in the *Evans* virtual property dispute itself demonstrates, there remains a lack of understanding regarding the nature of virtual worlds. That Complaint sets out a number of broad claims about virtual worlds in general and about Second Life in particular, and despite being targeted at a Court with prior virtual world experience and unashamedly based on an earlier decision regarding Second Life, it draws a number of incorrect conclusions.

Notably, the Complaint begins by stating that Second Life is a massively multiplayer role playing game ('MMORPG'). Second Life is not a game and does not involve a role playing element. But the Complaint complicates this initial position with the further assertion that '[a]lthough referred to as a "game", Second Life is a business operated to generate a profit for Linden'.⁶³ It continues,

60 *MDY Industries LLC v Blizzard Entertainment Inc; Blizzard Entertainment Inc v Donnelly* (D Ariz, CV-06-2555-PHX-DGC, 14 July 2008) slip op 5 ('*MDY v Blizzard*'). See also the Order and Permanent Injunction dated 10 March 2009. Note that this case is currently on appeal to the US Court of Appeals for the Ninth Circuit.

61 *Ibid* 8.

62 *Ibid* 10.

63 *Evans* (ED Pa, No 10-1679, 15 April 2010) (still at trial at time of print) Complaint, [22].

‘Rosedale has publicly stated that Second Life is not a game but rather is a “platform”’.⁶⁴ While the drafting of the Complaint may well reflect advocacy at the expense of accuracy, it nonetheless highlights the confusion regarding the characterisation of online worlds.

Flowing from this, characterising something as a role playing game may in fact have important consequences for the governance structures that may be significant to that game. In particular, such categorisations will have ramifications regarding what conduct users have consented to in terms of behaviour by other players.⁶⁵ Notably, several of WoW’s realms or shards are officially set aside as role playing realms.⁶⁶

Tom Boellstorff, an anthropologist who undertook an extended study within Second Life, concisely highlights what he terms the ‘four confusions’ about virtual worlds:⁶⁷

- Virtual worlds are not games: ‘they may contain games within them; they may even be largely structured in a game like manner; but there is no way to equate virtual worlds with games without defining “game” so vaguely as to include all social life under its purview.’
- Virtual worlds are not necessarily graphical or even visual.
- Virtual worlds are places or rather a “medium”, in the sense of a material with which one crafts things’.
- Although online accounts may allow or require users to choose a name or identity different from their own, participation in a virtual world does not necessarily mandate anonymity or role playing.

While Boellstorff intends these factors to underpin his discussion of ethnographic approaches to research in virtual worlds, they also have importance for the formulation of appropriate governance structures and the application of external laws to online environments. In particular, it moves us beyond the fixation with the notion of the ‘game’ and the consequent adherence to the Magic Circle’s exclusion of real world consequences. Rather, we should acknowledge then that users invest significant time and money in these environments.

64 Ibid.

65 For an analysis of the unique approach to involving players in game management adopted by the frontier space MMOG, *EvE Online*, see Melissa de Zwart, ‘Piracy vs Control: Various Models of Virtual World Governance and Their Impact on Player Experience’ (2009) 2(3) *Journal of Virtual Worlds Research* <<http://www.jvwresearch.org>>.

66 Bainbridge, above n 12, 6–7. Bainbridge also cites the Blizzard policy on role playing: ‘Players who choose to play on an RP realm should abide by the Role-Playing realm policies and remain in-character at all times’: see Blizzard Entertainment Inc, *Realm Types, World of Warcraft* (undated) <<http://www.worldofwarcraft.com/info/basics/realmtypes.html>>.

67 Tom Boellstorff, ‘A Typology of Ethnographic Scales for Virtual Worlds’ in WS Bainbridge (ed), *Online Worlds: Convergence of the Real and the Virtual* (Springer-Verlag, 2010) 127–8.

Fairfield notes that the game rules are created

by the intersection of at least four legal sources: contractual end-user licence agreements (EULAs) drafted by game gods (the companies that create and maintain virtual worlds), community-negotiated norms, player consent, and background laws.⁶⁸

Quite rightly, Fairfield acknowledges that the concept of consent is core to the issue of how these sources combine to form the law of the game. Drawing on analysis from sports law, Fairfield argues that in determining the laws applicable to virtual worlds, one should examine the issue of who has consented to what and with whom. As between player and platform provider, the provisions of the EULA should prevail as the agreed to rules, but as between players, community norms or individual agreements should prevail (as the EULA does not of course operate as a contract between players).⁶⁹ In particular, participation in the game, just as in football, indicates consent to all of the formal and informal rules and to some degree of rule breaking, such as an illegal tackle. The difficulty with this of course is just how far this consent extends.⁷⁰

Despite the large user bases of online realms such as World of Warcraft, these places remain proprietary environments, owned and created by private corporations. However much users may like to think that their involvement makes them citizens of such environments, this is only a fantasy encouraged by the providers to pander to the users' sense of belonging and willingness to pay ongoing subscription fees. A recent case in the US District Court, Central District of California, *Stern v Sony Corporation of America*, which concerned the issue of whether Sony was required under the US Federal *Americans with Disabilities Act of 1990*, 42 USC §§ 12101–213 (2009) ('ADA') to make reasonable accommodations to its game software to suit the needs of players with disabilities, considered the issue of whether a virtual environment was akin to a public space.⁷¹ The plaintiff, who had visual and other learning difficulties, required Sony to provide or enable modifications ('mods') that would provide visual and auditory cues in order to play Sony Online Entertainment games, such as Everquest. The judge dismissed the claim on the basis that the relevant provisions of the *ADA* apply only to physical places or goods or services connected to physical places.⁷² The claim based on the fact that inability to fully

68 Fairfield, 'The Magic Circle', above n 5, 831.

69 Ibid 832–3.

70 Courts are familiar with the need to adjudicate on issues of consent in the context of sport. See the significant body of law related to sports-related injuries.

71 *Stern v Sony Corporation of America* (CD Cal, CV09-7710PA, 23 October 2009).

72 Similarly, in the recent case *Estavillo v Sony Computer Entertainment America* (ND Cal, No C-09-03007 RMW, 22 September 2009), Whyte J dismissed the plaintiff's claim that a ban from the Sony Playstation 3 Network (due to violations of the Sony ToS regarding use of the Network with respect to verbal comments made by him during his use of the public forums while playing 'Resistance') violated his free speech rights under *United States Constitution* amend I:

participate in the games limited the plaintiff's ability to participate in gaming conventions organised by Sony was also dismissed. In reaching his decision that no such accommodations were necessary, Anderson J stated:

The problem with Plaintiff's assertion is that he does not seek an auxiliary aid or service to foster effective communication at a place of public accommodation such as Sony's conventions, or to take full advantage of the goods, services, and privileges available at the conventions, but to fully enjoy the video games, which as the Court has already concluded, are not sufficiently connected to a place of public accommodation. To hold otherwise would create potential liability under the *ADA* for manufacturers of all manner of products if those manufacturers failed to make available auxiliary aids allowing the entire panoply of individuals with disabilities the full enjoyment of their products.⁷³

As Debora Halbert reminds us:

Gaming worlds and social networking sites are autocracies where game owners control activity within the game, despite the feeling by many users that these spaces function as 'public' and therefore democratic spaces.⁷⁴

However, this must at some point be a two way process as the users are the paying customers as well. As Humphreys observes: 'good governance of the game spaces is one of the things that will determine their profitability'.⁷⁵ Therefore effective control cannot come at the cost of retaining and even extending the user base. At the end of the day, if the governance terms are too oppressive, users will simply exit (although of course they will lose their investments in terms of time, property and social connections).

In this context it is useful to ask: how much control will be considered too much?

On the one hand, proponents of the Magic Circle concept, such as Bartle, argue that the virtual world can only survive and indeed thrive with the recognition of god like powers being vested in the provider. On the other hand, Fairfield argues that this level of control may ultimately result in increased levels of external legal intervention in the world. He asserts that the greater control the virtual world provider exercises, the greater the risk that courts will impose liability on it for acts occurring within that environment. He describes this as the 'God Paradox': 'the more control a game god keeps in order to avoid legal

Sony's Network is not similar to a company town. The Network does not serve a substantial portion of a municipality's functions, but rather serves solely as a forum for people to interact subject to specific contractual terms. Every regulation Sony applies in the Network is confined in scope only to those entertainment services that Sony provides. Although the Network does include 'virtual spaces such as virtual 'homes' and a virtual 'mall' that are used by a substantial number of users ... these 'spaces' serve solely to enrich the entertainment services on Sony's private network. In providing this electronic space that users can voluntarily choose to entertain themselves with, Sony is merely providing a robust commercial product, and is not 'performing the full spectrum of municipal powers and [standing] in the shoes of the State': at 3.

73 *Stern v Sony Corporation of America* (CD Cal, CV09-7710PA, 23 October 2009) Court Order, Civil Minutes, 8 February 2010, 4.

74 Debora J Halbert, 'Public Lives and Private Communities: The Terms of Service Agreement and Life in Virtual Worlds' (2009) 14(12) *First Monday* <<http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/viewArticle/2601/2405>>.

75 Humphreys, above n 27, 115–16.

liability, the more responsibility it will ultimately bear'.⁷⁶ Further, he concludes that 'the more control that game gods claim in their EULAs, the more likely it is that the EULA will be held unconscionable.'⁷⁷

How can these views be reconciled and why is it that Linden Lab, which purports to offer the most open, user controlled world, has been the subject of more legal actions than any of the other, more tightly controlled MMOGs? Does this mean that Bartle's tightly controlled world, managed by all powerful gods, is happier than one simply proffered on an as is basis by a benevolent caretaker?

The nature of the legal actions brought against virtual world providers certainly indicates that it is in contexts of the greatest openness and uncertainty that legal disputes arise. *MDY v Blizzard* occurred in the context of an initial general ambivalence displayed by Blizzard to add-ons, bots and mods. The higher levels of WoW are largely dependent on user created mods and add-ons and Blizzard has therefore facilitated the creation of third party software without explicitly supporting it. In its Motion for Summary Judgment, MDY had argued that bots were not generally prohibited by the EULA until revisions to the WoW EULA effective on 11 December 2006, reinforcing the point that the users' community and Blizzard itself had an ambivalent attitude to their place within the game. Blizzard further dealt with the use of add-ons in a revised 'Add-On Development Policy' in March 2009, which required add-ons to be made available free of charge to other users (but notably not prohibiting their development and distribution).⁷⁸ Thus it is easy to see why some users may have only a vague concept of what conduct is permissible. The difficulty for platform providers is that encouraging interaction with the game platform increases the interest in and attachment to the platform (a desirable outcome when returns are based on a monthly subscription fee). However, participation and interaction can also create feelings of ownership and investment.

If the claims of the plaintiffs in the so called 'virtual property' case were to be upheld, Linden Lab would most likely be obliged to pay damages to the plaintiffs with respect to their confiscated property. However, the success of that claim would depend on finding rights that exist under tort or contract, or consumer protection law, rather than pursuant to property law. For this reason it is also unlikely that the Court would uphold the valuation that the plaintiffs had placed on such property, given that the remedy will not be a proprietary one. It is then likely that this would see a rush of similar claims on Linden Lab, causing a significant financial drain on the company, possibly ending in its insolvency.⁷⁹ Due to the unique nature of the claims made by Philip Rosedale and Linden Lab,

76 Fairfield, 'God Paradox', above n 5, 1018.

77 Ibid 1045.

78 Blizzard Entertainment Inc, *World of Warcraft User Interface Add-On Development Policy*, *World of Warcraft* (undated) <<http://www.worldofwarcraft.com/policy/ui.html>>.

79 For an analysis of the potential claims against Linden Lab in the event of insolvency, including recovery of data from its servers, see Joshua Fairfield, 'The End of the (Virtual) World' (2009) 112 *West Virginia Law Review* 53.

the consumer protection aspects of this case are unlikely to have significant ramifications for other existing virtual worlds.

In fact, by purporting to grant users intellectual property rights, Linden was making a claim that it could not actually fulfil. In other words, by purporting to grant users rights in virtual property, in effect the intellectual property vested in the underlying code, Linden was purporting to alienate something that could not in fact be separated from the underlying platform. At all times, in order to be accessed, viewed and interacted with, that content had to remain hosted on the Linden Lab servers. At most, as is common with software agreements, the Second Life ‘residents’ were being granted a software licence. It is impossible for users to separate their intellectual property rights from the Second Life platform – a problem of ‘indivisibility’ from the code, if not the contractual control. Therefore, any remedy cannot ultimately be in intellectual property law, any more than it can be in property law.

It is this aspect of the case that may have significant ramifications in the context of increased encouragement of user generated content in other platforms such as Twitter, Facebook and other social networks. Any investment of time and money leads consumers to believe that they have some rights of ownership with respect to the finished product, even where they agree to EULAs that state otherwise or readily accept the terms of Creative Commons licences that grant share alike rights to the world at large. These open source type licences still depend ultimately on the underlying rights holder having the copyright with respect to which they can grant broad licence rights, but they remain just that: rights under a licence rather than ownership of property. They do not reflect the absence of intellectual property rights, but rather a construction of rights and permissions on top of that ownership right, without which there would be chaos and uncertainty.

The imposition of liability on virtual platform providers with respect to the terms of the EULA may lead them to revert to code to enforce their control. This runs counter to users’ increasing demands to interact with their chosen platform and developers’ desires to foster a long-term relationship with their users. Thus the interests of both providers and consumers would be improved by the recognition of a core set of terms that clarify these issues of ownership and use. Such a core set of terms would encompass clear identification of the relevant intellectual property rights and the contractual allocation of those rights between platform providers and users, privacy protection, rules regarding age appropriate content, and, following *Bragg*, clear and fair dispute resolution procedures. In *Bragg*, for example, the arbitration clause was held to be unconscionable, not only because it was offered on a take it or leave it basis, but also importantly because of its one sided nature. Therefore it is reasonable to assume that US courts (where it is likely these matters will be litigated) will look at the fairness of the specific terms before determining their enforceability. Thus Fairfield’s warning to avoid over regulating the virtual environment with strict terms of use needs to be tempered with a warning to include sufficient certainty to avoid disputes between users and platform providers.

VIII CONCLUSIONS

We are witnessing a period where providers of online platforms are struggling to find appropriate governance mechanisms. As online communities evolve from places of marginal interest, populated by enthusiasts and early adopters, to channels for mainstream communication, the providers seek to offer broad based solutions to questions of property, tort, intellectual property rights and privacy. Until now this has largely been achieved through the application of contract law – what does the EULA say? Providers have responded to emerging issues with changes to the EULA, constantly tweaking and revising it to accommodate and address issues as they arise, just as they do with updates and patches to the underlying software, with some changes being more popular or more disruptive than others. It would also be unfair to suggest that all of these changes have occurred due to change of operational approach by the platform providers; some were simply in response to issues that had not yet arisen or been considered by the provider. However, as Fairfield and others have pointed out, governance through contract alone has its limitations.⁸⁰

In his lament to the lack of truly immersive role playing in virtual worlds, Castronova states:

I agree that player consent, player cultures, and player norms should have a very strong voice in what happens in virtual worlds, and that the best contract is not the EULA but a social contract among players.⁸¹

While notions of consent are useful in determining the scope of acceptable conduct within virtual worlds, as those worlds are still evolving it is difficult to determine precisely to what this general level of consent extends. It is suggested that, while the recognition of community norms and intra-user consent is very helpful in determining matters of in-world conduct such as ‘griefing’ and cheating, there needs to be a minimum level of regulation related to key matters such as privacy, intellectual property ownership, age appropriate content and dispute resolution. The attitude of domestic governments should be more facilitative and less hostile to such environments, given their growing importance as a communication and socialisation platform, not to mention as fora for economic activity. It is recommended that domestic governments should, with the assistance of input from platform providers and users, develop a set of legal frameworks for online communities prescribing a minimum level of regulation. Any regulatory initiatives should be coordinated at an international level to avoid balkanisation of the online experience. This initiative should also support the development of a standard set of terms of service for such environments, with the need for any deviation from those standard terms to be brought to the user’s attention. These terms would also be subject to regulation under principles of unconscionability and consumer protection and would provide guidelines regarding how and how frequently such terms may be amended.

80 Fairfield, ‘Anti-Social Contracts’, above n 5.

81 Castronova, ‘Lights Going Out in the Anti-RMT Bunker’, above n 19.

The use of contract to regulate communities raises interesting issues for lawyers and law students. However, it is also important not to overlook sensitivity to and awareness of the unique nature of these communities. Virtual property is indeed virtual and should be treated as such. This does not mean it is more or less valuable than real property, but merely creating an analogy does not go far enough in determining the rights and obligations of platform providers or users with respect to that property in order to resolve the disputes currently before the US Courts. Further, it does not provide any clear guidance as to how the investment of time and energy in user generated content may be appropriately recognised to support the long-term interests of the platform providers and users. The reality that code is computer software that is hosted on a server owned and maintained by a private entity cannot be ignored. The indivisibility of the platform code from the creations built from that code creates a unique problem in purporting to grant new and separate rights of property in those creations. Even when these platforms move to a dispersed open source system, the ownership of the code and its effective licensing to accommodate the needs of the platform providers and users in recognising 'new' creations remains at issue.