Getting to Conscionable: Negotiating Virtual Worlds' End User License Agreements without Getting Externally Regulated[1]

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Currently, virtual world governance is the product of end user license agreements (EULAs), contracts which attempt to provide a complete legal and enforcement system to the virtual world. This method of governance is flawed, however, and results in participant frustration. Alternative approaches that have been advanced so far include governmental regulation, which has begun in some countries. However, numerous pressures and precedent resist such an application in the United States.

The following argues against keeping just the license agreements as the body of law, and also against a shift to governmental regulation. Instead, a compromise—establishing a standards-setting body of developers, referred to here as a virtual world council—is an efficient solution. This is a daunting task; however, numerous examples exist for the developers of virtual worlds to follow and they are explained below. The proposed result is a two-tier system that retains EULAs, and supports a common law approach rooted in standardization for resolving what EULAs cannot.

Introduction

Virtual worlds are "the next generation of the internet: three-dimensional social environments that combine top-of-the-line videogame graphics with latest-generation social-networking technology."[2] They are interactive, persistent simulations of first-person physical environments.[3] Millions of people participate in these virtual worlds for diverse reasons: for example, escapism, profiteering, or for a sense of belonging to a community. Developers create virtual worlds and make them immersive and debatably addictive.[4] The developers charge fees for property within virtual worlds, or for access to the virtual world, and use these revenues to recover their development and operating expenditures. They also attempt to regulate these virtual worlds, with varying success. Here, I examine those attempts (with indebtedness to prior works) and then suggest a new method which is a compromise between the current methods of regulation.

Prior works on the regulation of virtual worlds have identified major defects with the two current methods of regulating virtual worlds. The primary method is the developer's End User License Agreement (EULA)—a contract between the developer and the participant that communicates the developer's expectations for the virtual world to the participant, and the participant's agreement communicates their intent to be bound by those expectations.[5] This EULA usually gives the developer the power to adjudicate and punish participant behavior that is outside of those expectations, and power to set expectations. A real-world analogy is the developer controlling the legislative and judicial branches of government, and running the government as a for-profit enterprise. These EULAs set the laws of the land for the virtual world, trying to incorporate a bare minimum of real-world legal principles to keep their participants complacent.

Real-world citizenship is often a matter of where you were born. By contrast, "[p]eople joining virtual worlds have the power of choice. . . . they can choose the society in which they want to live, migrating their online activities from place to place with much greater ease than real-world immigrants can move their physical lives."[6]

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[1] An electronic version of this and other articles are available at http://www.brendanjamesgilbert.com and I am available at bjg@brendanjamesgilbert.com. I would like to thank Professor Mark Bartholomew, my mentor, guide, and best critic.

[2] Joshua A.T. Fairfield, *Anti-Social Contracts*, 53 McGILL L.J. 427, 429 (2008).

[3] Mark Bartholomew, *Advertising in the Garden of Eden*, 55 BUFF. L. REV. 737, 741–42 (2007).

[4] McKenzie Funk, *I was a Chinese Internet Addict*, HARPER'S MAGAZINE (March 2007) (article regarding Chinese internet addiction rehab clinics and the prevalence in China: "Also in Shanghai, it was reported that a young man who'd played online games for six years would be stuck forever in a sitting position. His back was fused at a 90-degree angle; doctors said there was nothing they could do." Another participant in Tianjin played *World of Warcraft* for 36 hours before committing suicide, complete with leaving a note about being "off to meet the game's characters.")

[5] EULA is used throughout this Note to refer to contracts similar to EULAs. Other names include Terms of Service or Terms of Use; here, they have been changed to EULA where possible. For an overview of EULAs, see Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1048, 1082–84 (2005), *available at* http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID925213_code410303.pdf?abstractid=807966.

[6] Viktor Mayer-Schönberger and John Crowley, *Napster's Second Life?: The Regulatory Challenges of Virtual Worlds*, 100 Nw. U. L. REV. 1775, 1802 (2006).

As a result, "[v]irtual world providers who operate within this market-dynamic measure their success in terms of the size of their user base, and they consequently pursue two goals: attracting people to join their virtual world, and retaining them over time."[7]   Because virtual-world citizens can pick their government and regulation, developers must make them appealing.

The other method of regulating virtual worlds has not yet been used in the United States, but is waiting in the wings: real-world governmental regulation. Virtual-world developers and participants regard this method with horror, recalling the file-sharing service Napster. Regulation fractured Napster's centralized peer-to-peer community into *de*centralized peer-to-peer communities that are too small to feasibly regulate.[8]

Real-world regulators want to avoid this outcome. Questions abound about the method of regulation. Should regulators regulate the virtual-world providers within the regulator's jurisdiction, or to coordinate inter-jurisdictionally?[9]   Should regulators limit participants' ability to switch worlds, or limit participants to virtual-world developers within their real-world jurisdiction?[10]   No clear answer exists for these, and persuading jurisdictions to agree and cooperate is difficult.

A compromise suggested is for developers of virtual worlds to form a virtual-world council. This council can promote standardization of EULAs between developers. Standardization will provide consistent virtual-world governance and consistent provisions for courts to look to. This council can also collectively draft model real-world regulation and create standards-setting bodies for virtual worlds to guide real-world regulators. Participants being participants, they will test the rules of their virtual world: they will find loopholes in the provisions of their developer's EULA. Real-world regulation "floating" above the EULA is needed to catch this. It protects participants from behaviors not prohibited by the EULA but deserving of punishment.

This compromise is efficient because developers are best equipped to find the shortcomings of their EULAs. User feedback, litigation, and research while drafting EULAs accomplish this. Additionally, each developer must draft a EULA and having the virtual world council help draft provisions is efficient. Developers also wield the power and political muscle to lobby for real-world regulations to control behavior in virtual worlds, particularly if they form a group and present a unified front. Standards will also lower the high precedential value of the first "lucky" jurisdiction to have virtual-world-based litigation go to trial.

Organizing this council is a difficult task. However, the credit card companies American Express, Discover Financial Services, JCB International, MasterCard Worldwide, and Visa, Inc. launched a similar effort in 2006. Called the PCI Security Standards Council, the Council's mission has been to develop a consistent "Data Security Standard" which has been implemented into each company's data security compliance program.[11]   Retail merchants now know of a set of standards that apply to them if they are to be "PCI-compliant"—just as participants and courts considering a virtual world that is "virtual-world-council-compliant" will know what to expect from it.

This consists of four Parts. Part I introduces virtual worlds and their sources of regulation. Part II examines the reasons why EULAs alone have failed or will fail as the only source of regulation. Part III examines the reasons why external regulation alone will fail regardless of implementation, and how to prolong the life of any proposed regulation. Part IV will show the benefits of consistency that a virtual-world council could provide to a two-tier system of regulation, and why it is the most efficient solution.

1.   Virtual Worlds and the Sources of Virtual-World Regulation

Modern virtual worlds' heritage runs to textual virtual worlds, which are given a variety of names to denote their purpose.[12]   An example is *LambdaMOO*, which began a discussion on virtual world's "parallel alternative to existing legal systems, where new forms of social regulation can be explored."[13]   On *LambdaMOO*, "public and

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[7] *Id.*

[8] *Id.* at 1824 ("If real-world regulators push too hard, one potential outcome could be that we may witness 'Napster's Second Life,' the transformation of virtual worlds onto a highly decentralized P2P infrastructure that is hosted on individual users' computers."); Phillip Stoup, Note, *The Development and Failure of Social Norms in* Second Life, 58 DUKE L.J. 311, 340–41 (2008) ("Similar to the fracturing that occurred after the government heavily regulated internet file-sharing programs like the popular program 'Napster,' real-world regulation could lead to the dissolution of Second Life.").

[9] Mayer-Schönberger et al., *supra* note 5 at 1821.

[10] *Id.*

[11] PCI Security Standards Council, About the PCI Security Standards Council, https://www.pcisecuritystandards.org/about/index.shtml.

[12] For a discussion of the acronyms used and their meanings, *see* F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CAL. L. REV. 1, 19 n.84 (2004). Referenced here, " 'MOO' stands for 'MUD Object-Oriented,' denoting the programming methodology—object orientation—which was used to build the MUD." *Id.*

[13] *Id.* at 11.

comm[unal] property was [virtual property's] prototypical form of ownership."[14]   The virtual world's "[e]xperienced players also build their own rooms and spaces within the MOO, or, using an object-oriented programming language, create objects that they and other players can manipulate or expand."[15]   These "[p]articipants in the MOO are literally building their own universe room by room. At the same time, they are building their own social structure, as well as their own legal system."[16]

Eventually, real-world-property issues infected *LambdaMOO*: air-space rights over properties (for virtual aircraft), private versus public property, whether property could be bequeathed, and server-side-data quotas per participant.[17] These required "making property an explicit part of the system and creating an official governance mechanism to recognize and allocate it." Property interests are tied to Western society such that asserting property rights is instinctual. Therefore, virtual worlds have come to require regulation to support participants' view that their virtual-world property is able to be protected just like their real-world property.

Virtual property here is closer to real property or chattels than intellectual property. A participant's virtual property has their ownership right recorded somewhere in a database that the virtual world relies on.[18] The participant then expects the use and control of the property to be one of their rights.

On *LambdaMOO* and in many textual virtual worlds the communities are close-knit. Developers knew the participants and were "benevolent dictators," styling themselves as "wizards."[19] Three years after its creation, arch-wizard Pavel Curtis decided that his social experiment had grown up: "the wizards are pulling out of the discipline/manners/arbitration business; we're handing the burden and freedom of that role to the society at large."[20] These wizards made themselves the community's code architects—their functions "might be analogized to a cross between an administrative agency and a higher court." Significant issues go to a public vote and volunteers staff a binding arbitration system. The system is not without its flaws.[21]

Unlike the virtual worlds that have since made the industry famous, *LambdaMOO*'s legal system has been shaped by the community, rather than the legal system made to shape the community. Property issues were not contemplated and a EULA drafted prior to participation; they arose when participants clamored for them. Curtis's intent in getting out of the discipline business was to allow the community to self-govern.[22] This effort ultimately failed; within two years Curtis "restored the rule of the wizard by fiat."[23]

Compare *LambdaMOO*'s system of regulation by the community to more recent virtual worlds' systems of developer-designed regulation of the community. Some virtual worlds support participant creation of rooms and objects within the virtual world, such as *Second Life*.[24] Other worlds' developers carefully create and balance their content and allow participants little to no autonomy in content creation. They focus on allowing participants to virtually "acquire" developer-created property.[25]

All of these recent virtual worlds have "millions of dollars of venture capital at stake," moneys that are ventured to build cash flows for the developer to maximize investors' contributions.[26] From the developers' perspective, governance by the community is not structured such that investor return is maximized, and is therefore inferior. Their solution is top-down governance.

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[14] *Id.* at 35 (*citing* ELIZABETH HESS, YIB'S GUIDE TO MOOING: GETTING THE MOST FROM VIRTUAL COMMUNITIES ON THE INTERNET ch. 7 (2003)).

[15] Jennifer L. Mnookin, *Virtual(ly) Law: The Emergency of Law in LambdaMOO*, 2 J. COMPUTER-MEDIATED COMM. (1996), *available at* http://jcmc.indiana.edu/vol2/issue1/lambda.html (last visited April 5, 2009).

[16] *Id.*

[17] Lastowka et al., *supra* note 11 at 35.

[18] Theodore J. Westbrook, Note, *Owned: Finding a Place for Virtual World Property Rights*, 2006 MICH. ST. L. REV. 779, 782 (2006).

[19] Mnookin, *supra* note 14.

[20] *Id.*

[21] *See id.* (The current system of LambdaLaw is viewed as corrupt and "[t]wo very different approaches have emerged for confronting the limitations of the current system: one approach favors increased formalization of LambdaLaw, while the other wants LambdaLaw eliminated." Formalizer's attempted petitions for legal reform have been stymied by Eliminators; Eliminator's attempted petitions to mock "Lambda-politicians" with a humorous bent stymied by Formalizers. Like any democratic system, *LambdaMOO* has all kinds of citizens with different intents for their experience in participating.).

[22] Mayer-Schönberger et al., *supra* note 5 at 1795.

[23] *Id.* at 1796.

[24] Linden Lab, *Second Life | Terms of Service*, *available at* http://secondlife.com/corporate/tos.php. ("You acknowledge that: (i) by using the Service you may have access to graphics, sound effects, music, video, audio, computer programs, animation, text and other creative output . . . provided under license by independent content providers, including contributions from other users of the Service . . . .")

[25] *World of Warcraft* End User License Agreement § 4 (A), *available at* http://www.worldofwarcraft.com/legal/eula.html. ("All title, ownership rights and intellectual property rights in and to the Game . . . []including without limitation any . . . objects, characters, character names, stories, dialog, catch phrases, locations, concepts, artwork, character inventories, structural or landscape designs, animations, sounds, . . . are owned or licensed by Blizzard.")

[26] Lastowka et al., *supra* note 11 at 59.

The results are "EULAs that attempt to dismantle even the potential of virtual rights."[27] These EULAs provide as few rights as possible, and also set up regulatory systems to enforce developer's expectations for participant behavior. *LambdaMOO*'s alternative might erode the developer's rights in their virtual world, where they "should have a right to do exactly as they please," as goes the argument.[28] Therefore, EULAs usually present a system tilted toward the developer. In the next Part, reasons why this scheme fails are examined.

2. EULAs Fail to Provide Regulation to Both the Developer and User, Requiring External Regulation

EULAs are contracts between virtual world's developers and their customers.[29] They provide what customers can and cannot do with the virtual world, and provide what rights customers have in their avatars and creations in the virtual world and the real world.[30] EULAs are the primary source of virtual-world law and regulation. When drafting a EULA, usually only the developer and the developer's counsel are at the table.[31] As a result, the developer arrogates all rights it could possibly want to it, often including the rights to any participant creations within the developer's virtual world.[32]

Participants first encounter the EULA after their coworkers, friends or family cajoles them into joining. They have, in most cases, already made their decision. They have people relying on them to swing a sword for them or bandage them up. They have a friend who has created a massive art gallery in *Second Life* or *There* and wants their feedback. After installation and even account creation, participants encounter the EULA on a "take-it-or-leave-it" basis.[33] To get in requires acceptance of the EULA—a complicated legal document that looks like real estate boilerplate.

The EULA tries to define participants' behavior, which often includes forbidding communicating other user's personal information.[34] Developers have an interest in implementing provisions of the EULA as programmatic constraints—meaning virtual-world code-based—on the participants where possible.[35] This lowers the developers' use of resources to police the EULA.

EULAs' regulatory framework is fraught with problems. First, the developers' superior bargaining strength results in a stilted EULA that is susceptible to the unconscionability doctrine. Second, participants aggrieved by other participants within the virtual world often have recourse under the EULA only at the developers' discretion, either due to the EULA's terms or because of relying on the developer to provide personal information of the other participant. Third, the developers' intent is to keep subscribers happy, paying, and enlisting their friends as subscribers, not act as their virtual world's judiciary.[36] Fourth, participants who are determined to exploit the

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[27] *Id.*

[28] *Id.* at 60; *see also EverQuest*'s slogan of "You're in our world now[,]" *id.* at 59 n.312.

[29] *See* Fairfield, *supra* note 4 at 1082–84.

[30] *Id.*

[31] *But see* Facebook's invitation of its users to contribute to their EULA, via "virtual Town Halls," 30 day public comment periods, and statements of changes. Press Release, Facebook, Facebook Opens Governance of Service and Policy Process to Users (February 26, 2009), *available at* http://www.facebook.com/press/releases.php?p=85587.

[32] *See* Fairfield, *supra* note 1 at 453 ("Thus, one could imagine that virtual-world creators might resist arguments that the EULA creates any property interest at all in its licensees.").

[33] *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 606 (D. Pa. 2007) ("Although Bragg is an experienced attorney, . . . he was never presented with an opportunity to use his experience and lawyering skills to negotiate terms different from the [EULA] that Linden offered.").

[34] *See World of Warcraft* Terms of Use § 9 (B)(v), *available at* http://www.worldofwarcraft.com/legal/termsofuse.html; Second Life | Terms of Service, *available at* http://secondlife.com/corporate/tos.php ("In addition to abiding at all times by the Community Standards, you agree that you shall not: . . . (v) take any actions or upload, post, e-mail or otherwise transmit Content that contains . . . personal information[.]").

[35] *See* Stoup, *supra* note 7 at 320 ("Code-based norms can be created and employed by [developers] to fulfill the virtual world's important objectives, but unlike non-code-based norms, these rules are enforced through the very computer code of [the virtual world]." Using the code-based alternative "defin[es] what conduct or behaviors are possible in the computer program's virtual world," for example, making a theft-proof purse to store items.)

[36] *See* Ben Quarmby, *Pirates Among the* Second Life *Islands—Why You Should Monitor the Misuse of Your Intellectual Property in Online Virtual Worlds*, 26 Cardozo Arts & Ent. L.J. 667, 690 (2009) ("Linden Lab is aware that its approach may fail to satisfy many owners of intellectual property, but responds that it does 'not intend to become the law enforcement of Second Life;' " Quarmby's analysis also states that "[a]s a commercial entity . . . Linden Lab is understandably reluctant to take on the mantle of a police state. It simply reserves the right to terminate the accounts of individuals who appear to be infringing on others' intellectual property - a step that it will not take lightly.").

programmed rules of the virtual world, whether for personal gain or pleasure, do so without meaningful repercussions.[37] The following section covers these four problems in-depth.

2.1 EULAs and the Unconscionability Doctrine

Modern findings of unconscionability arise under Section 2-302 of the Uniform Commercial Code, stating that courts "may refuse to enforce an unconscionable contract or clause, or may limit an unconscionable clause to avoid an unconscionable result."[38] Because the Code does not define unconscionability,[39] courts have generally required that both procedural and substantive unconscionability exist. The traditional wisdom is that courts fail to find unconscionability.[40] By contrast, arbitration provisions, which are often employed in EULAs, have proven rather susceptible to holdings of unconscionability.[41] Many of these holdings were in California or applying California law.[42]

To a court, holding EULA provisions unconscionable should be a controversial decision. Many commentators believe that unconscionability should be reserved for gross injustice and beyond the pale behavior. For example, consider a retail store who sells separate items of furniture over a number of years via installment lines of credit to a single parent raising a large family on public welfare. If the store buried a provision in fine print that keeps a balance due on all items until each and every item is paid off in full, such that when the customer defaults the store can sue for every piece of furniture otherwise fully paid for and "sold," that provision should be held unconscionable.[43] Courts that apply this doctrine to participants who either did not read the EULA, or enjoyed the service provided by the EULA then breached its terms, may be viewed as activist. Notwithstanding this risk, federal courts have found unconscionability in EULAs.[44]

The first part of the test, procedural unconscionability, looks at the agreement for unequal bargaining power. EULAs usually meet this part.[45] Participants have zero bargaining power in EULAs; they are designed to be contracts for millions of participants to accept, typically without reading.[46] Contracts of adhesion tend to indicate procedural unconscionability.[47] Generally, they come on pre-printed forms for the mass-market, giving the consumer no ability to negotiate.[48] They also use general terms and reflect the developer's interests.[49] The participant's actual surprise as to the harshness of provisions subsequent to agreement to the contract is also an element of procedural unconscionability within California.[50]

The second part, substantive unconscionability, looks to the terms of the agreement, and is indicated by "harsh, one-sided or oppressive terms. . . ."[51] EULAs usually meet this part as well. Most of them give the developer "unilateral, unchecked, godlike power, while the customer has few or no rights."[52] Even virtual worlds that purport to protect participants' intellectual property rights[53] retain complete control over their currency,

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[37] Stoup, *supra* note 7 at 339 ("there will likely always be individuals who have the inclination to ignore the clear rules and the knowledge necessary to tear down Linden [Research]'s code laws. When the fencing of Linden's automated code fails, the regulations of real-world authority will be needed to effectively govern Second Life.")

[38] Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 190 (2004).

[39] *Id.*

[40] *Id.* at 194.

[41] *Id.* ("A systematic examination shows that in 2002–2003, litigants raised issues of unconscionability in 235 cases, and courts found contracts or clauses to be unconscionable in 100 of those cases, . . . Of those 235 cases, 161, or 68.5%, involved arbitration agreements." Of arbitration agreements, "50.3% [were] . . . unconscionable, as opposed to 25.6% of other types of contracts.")

[42] *Id.* at 194–95; s*ee infra* note 55 for the importance of California caselaw in arbitration provisions of EULAs.

[43] RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. e, illus. 5 (1981).

[44] Randall, *supra* note 37 at 194.

[45] Jason T. Kunze, Comment, *Regulating Virtual Worlds Optimally: The Model End User License Agreement*, 7 NW. J. TECH. & INTELL. PROP. 102, ¶ 22 (2008).

[46] Alfred Fritzsche V, *Trespass to (Virtual) Chattels: Assessing Online Gamers' Authority to Sell In-Game Assets Where Adhesive Contracts Prohibit Such Activity*, 8 U.C. DAVIS BUS. L.J. 235, *available at* http://blj.ucdavis.edu/article/666/.

[47] *Id.* at n.217; *Bragg*, *supra* note 32 at 605 ("A contract or clause is procedurally unconscionable if it is a contract of adhesion.").

[48] *Id.* at nn.223–24; *Bragg*, *supra* note 32 at 606.

[49] *Id.*; *Bragg*, *supra* note 32 at 606.

[50] *Bragg*, *supra* note 32 at 606 (*quoting Gutierrez v. Autowest, Inc.*, 114 Cal.Rptr.3d 267, 275 (Cal. Ct. App. 2003)); *see infra* note 55 for the importance of California caselaw in arbitration provisions of EULAs.

[51] Randall, *supra* note 37 at 191.

[52] Kunze, *supra* note 44 at ¶ 17.

[53] Linden Research claims that their *Second Life* virtual world protects customer's intellectual property rights. Quarmby, *supra* note 35 at 670 n.19 (*citing* Press Release, Linden Lab, *Second Life* Residents to Own Digital Creations (Nov. 14, 2003)). However, a filed Complaint alleges Linden Research activities that are not consistent with this press release. Kathleen E. McCarthy, *User Generated Content Affecting Trademarks, Including Real Trademarks in Virtual Worlds*, 962 PLI/Pat 657,

"analogous to a casino arbitrarily eliminating the market for its chips and keeping all of its customer's money."[54] Furthermore, EULAs typically allow developers to change the agreement at any time without notice to the user, in addition to their "godlike power" already reserved.[55]

Federal courts have held these agreements unconscionable.[56] In *Bragg v. Linden Research, Inc.*, the Eastern District of Pennsylvania struck down *Second Life*'s provision requiring arbitration.[57] Bragg purchased a number of parcels of land in Linden's virtual world *Second Life*, paying real money for the property right.[58] Linden deemed that one of these parcels for which Bragg paid $300 off of an auction site was purchased via an "exploit."[59] Based on that, Linden "froze Bragg's account, effectively confiscating all of the virtual property and currency[.]" Bragg sued Linden in Pennsylvania, and Linden moved for dismiss for lack of personal jurisdiction. The court found that Linden's national campaign to induce investment met minimum contacts for specific personal jurisdiction in Pennsylvania.[60]

After settling that, the court moved to Linden's motion to compel arbitration, based on a provision in the EULA.[61] They found that the provision intended to take the participant by surprise, "buried . . . in a lengthy paragraph under the benign heading 'GENERAL PROVISIONS.' "[62] Because of the EULA also met the requirements of a contract of adhesion, this was held to meet procedural unconscionability.[63]

Substantive unconscionability was met by a number of the EULA's elements.[64] These included a lack of mutuality in forcing the participant to arbitrate while the developer has a choice of forums, and the excessive cost incurred by the participant in arbitrating in San Francisco versus the cost in filing in court in Pennsylvania.[65] Also considered were the venue restriction for arbitration in light of the small size of financial transactions most participants have with *Second Life*, and the confidentiality of arbitration proceedings, which results in "a one-sided means which tilts unfairly, in almost all situations, in Linden's favor."[66]

The *Bragg* court demonstrates that courts are willing to erode the terms of EULAs. This creates a chilling effect for both developers and participants, each uncertain of the terms of their agreement.[67] For example, *Second Life*'s EULA allows Linden Research to completely control *Second Life*'s currency up to and including removing it all. Any measures taken by Linden Research to use that EULA provision, however, will send *Second Life* participants to federal courts in droves to recover their real money losses.[68] The system to exchange real money for *Second Life* currency and vice versa operated by Linden Research[69] underscores the substantive unconscionability of allowing Linden Research to use this provision.

The question to developers and participants becomes: Which of these EULA provisions are enforceable in court, and which can I disregard? If EULAs are not modified by developers to withstand these challenges, developers will have them modified by courts, inspired by the *Bragg* court, to protect participants.

719–46 (according to Complaint, Linden Research failed to protect USPTO registered trademark within *Second Life*; a week after the Complaint was filed, Linden Research challenged the mark claiming it was fraudulently obtained).

[54] Kunze, *supra* note 44 at ¶ 17.

[55] *Id.*

[56] Several prominent virtual worlds are developed by corporations in California, including Linden Research, Inc.'s *Second Life* and Blizzard Entertainment's *World of Warcraft*. In addition, their EULAs often include forum selection clauses that compel plaintiffs to either raise suit in California or have California law applied to their suit. *See also* Andrew Jankowich, *EULAw: The Complex Web of Corporate Rule-Making in Virtual Worlds*, 8 TUL. J. TECH. & INTELL. PROP. 1, 58 (2006) (Annex B, containing a table of virtual world jurisdictions; California is home to approximately half of all virtual worlds.).

[57] *Bragg*, *supra* note 32 at 611.

[58] *Id.* at 596–97.

[59] *Id.* at 597.

[60] *Id.* at 601–02.

[61] *Id.* at 603.

[62] *Id.* at 606.

[63] *Id.*; the *Bragg* court also cites *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165 (D. Cal. 2002) as "most instructive[,]" a class action of individuals challenging PayPal's arbitration provision, which was held unconscionable.

[64] *Bragg*, *supra* note 32 at 607.

[65] *Id.* at 607–11.

[66] *Id.*

[67] Kunze, *supra* note 44 at ¶ 32 ("A chilling effect occurs when behavior might run afoul of the EULA, but the agreement may potentially be unenforceable, so parties err on the side of too much caution in order to avoid the potential risk that exists in the grey areas of the agreement.").

[68] *Id.* at ¶ 33.

[69] This currency exchange is called the LindeX, described in detail at *id.* at ¶ 2 n.4; Second Life | Terms of Service, § 1.5, *available at* http://secondlife.com/corporate/tos.php.

2.2 Participants' Recourse under EULAs

In the real world, if your neighbor cutting down a tree in his yard with a chainsaw at 3 a.m. annoys you, your first means of recourse is through the police to stop them from cutting down trees at ungodly hours. After that, you have civil courts for nuisance and restraining orders, letters to the Arbor Day Foundation, and a whole host of extra-legal recourses. In virtual worlds, if a participant is aggrieved by a neighbor building garish signs with political messages adjacent to their property[70] their first means of recourse is through the EULA's provisions.

Usually, this means "opening up a ticket" or filing an abuse report that is queued for service from an employee of the developer.[71] The employee interprets the EULA, exercising the developer's rights appropriately. For example, the employee may warn or suspend the account of a harasser. Or, the employee may remove or alter materials that should not exist in the virtual world.[72] All of these occur at the employee's or developer's discretion. A real-world analogy would be the employee representing the police, judge, jury, and jailor.

The maximum punishment meted out in many virtual worlds is account termination.[73] Developers typically do not report any activity within their virtual world to authorities even if it is likely in violation of civil or penal laws, unless subpoenaed.[74] Developers often do not facilitate participants' attempts to sue other participants by providing IP addresses[75] or personal information of the other participant. Even if a participant would be entitled under real-world law to a greater remedy than the EULA and developer allow, the EULA and the developer's privacy policy usually protect personal information from disclosure.[76]

This generally makes participants' attempts to pursue remedies outside of the developer's EULA futile. To do so, the participant would have to know their intended defendant's name and address.[77] Under many privacy policies, the participant must also convince the developer to release this personal information.[78] The developer also may not be able to provide useful information about a participant for outside remedies. For example, *Second Life* now requires just an email address to register.[79]

Participants often rightly blame the EULA and the developer's policies for making them unable to fight for a remedy. It drives some participants to extremes. For example, an acquaintance of Qiu Chengwei stole and sold Chengwei's rare sword from a Chinese virtual world.[80] Chengwei went to the police, who believed the

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[70] Stoup, *supra* note 7 at 331 ("For example, a Second Life resident named Lazarus Devine angered many other users by erecting garish virtual signs calling for an end to the war in Iraq and to "Impeach Bush" on property he purchased adjacent to the disgruntled users. . . . Despite the best efforts of the disgruntled users, Lazarus Devine continued his campaign to erect garish signs.") (internal citations omitted).

[71] McCarthy, *supra* note 52, contains an example of this process: "I filed an abuse report immediately, a procedure you follow in [Second Life] when there is an issue with another resident." The report "automatically notes the precise location of your avatar when the report is filed, and it included a snapshot of the scene I saw there, with the infringing[] sign. I received e-mail confirmation of the abuse report."

[72] *Id.*

[73] *See* Stoup, *supra* note 7 at 331 ("Even Second Life's harshest sanction, the threat of account termination, which is prescribed as a possible punishment in the virtual world's Term [sic] of Service, is also likely an ineffective sanction."); *see also* Quarmby, supra note 35 at 690.

[74] *See* Leonard T. Nuara et al., *No Man is an Island, not even in a Virtual World*, 943 PLI/Pat 523, 557 n.159 (2008) ("In compliance with a subpoena . . . Linden Lab and PayPal provided Catteneo's IP address to Alderman."). Commentators advocate that certain activities, in particular illicit and pornographic ones, should receive real-world reporting to authorities from developers. *See* Stoup, *supra* note 7 at 337.

[75] An IP address is a unique identifier for a computer that is accessible through the internet.

[76] *E.g.* Linden Lab, *Second Life | Terms of Service*, *available at* http://secondlife.com/corporate/tos.php. ("Linden Lab will not give any of your personal information to any third party without your express approval except: . . . to law enforcement or other appropriate third parties in connection with criminal investigations and other investigations of fraud[.]"), *see also* Linden Lab, Second Life | Privacy Policy, *available at* http://secondlife.com/corporate/privacy.php. ("Linden Lab *may* disclose your personal information *if required to do so by law* or in the good faith belief that such action is necessary to: . . . (b) protect and defend the rights or property of . . . the users of Second Life[.]") (emphases added)

[77] *See* Fed. R. Civ. P. 4 (a)(1)(B) (requiring summons to be "directed to the defendant") and Fed. R. Civ. P. 4 (e)(2)(B) (leaving summons at "dwelling or usual place of abode").

[78] Linden Lab, *supra* note 75.

[79] Quarmby, *supra* note 35 at 692. ("Formerly, Linden Lab required prospective users to provide a valid credit card or Paypal account, or to respond to a cell phone SMS text message, in order to open an account. After June 6, 2006, however, its users may create an account with only an e-mail address." Quarmby goes on to indicate Linden's other sources of user information: "[Linden] should, however, still be in a position to provide that user's IP address. But even that is not always guaranteed. [Software programs] allow users' computers to generate a new IP address every time they go online, thus thwarting attempts to easily track down an infringer by IP address alone.") (internal citations omitted).

[80] Jacob Rogers, Note, *A Passive Approach to Regulation of Virtual Worlds*, 76 Geo. Wash. L. Rev. 405, 409 (2008); Westbrook, *supra* note 17 at 789.

acquaintance broke no laws because the sword was virtual property and therefore not protectable.[81] Therefore, he took matters into his own hands a month later—he stabbed the acquaintance to death.[82] At trial he confessed and received life imprisonment.[83]

For every participant who lashes out like Chengwei due to their lack of a sufficient remedy, countless more simply become dissatisfied with the virtual world and its developers. These participants stop paying and leave the virtual world.[84] What ties them to the world are all of their virtual possessions, which are generally not transferable and not able to be sold, and their reputation within the virtual world.[85] These create lock-in and network effects.[86] Because of the emigration from EULAs that fail to provide remedies, and the bad press from occurrences like Changwei's, the ineffective remedies provided to participants by EULAs should be of concern to developers.

A counterargument is that these virtual worlds are merely games and incidents like Changwei's are caused by unstable humans, not their participation in a game. Unlike traditional games, virtual worlds cross massive distances. If this kind of activity occurred in the real world and nearby, participants could pursue less severe options. Having no options pushes them to extremes. Given the real world ability to pursue vengeance, they do so.

The United States lags behind other countries in this lack of real-world recourse for virtual-world participants. In South Korea virtual worlds have much greater traction due to the success of NCsoft's Lineage, released in 1998.[87] South Korea protects virtual property, which "cannot be bought or sold commercially, but it can be exchanged between non-merchant individuals for in-world trade or currency. Theft of virtual property is a criminal offense."[88] Additionally, Dutch and Japanese courts have convicted for theft of virtual property.[89] Other foreign jurisdictions have begun to map real-world rights and regulation into virtual worlds,[90] and as a result become more or less attractive to business investment.[91]

2.3 Developer's Intent with EULAs

Developers countervail their self-imposed duties[92] to punish and correct with their desire to retain paying participants.[93] They aren't creating virtual worlds for the sake of creating virtual worlds and social experimentation, as *LambdaMOO* did.[94] Instead, they have returns to maximize for investors and shareholders.[95] Because of this, there is an interest in creating as oppressive a regulatory regime as possible. Doing so lowers administrative and litigation expenses,[96] so long as it doesn't scare away potential subscribers or drive out existing

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[81] Sean F. Kane, *Virtually Lawless: Legal and Economic Issues in Virtual Worlds*, 929 PLI/Pat 553, 565 (2008). China is notable for now protecting virtual property—if Changwei had contacted the police after those protections were enacted, his story may have ended differently. *See* Fairfield, *supra* note 4 at 1085.

[82] Rogers, *supra* note 79 at 789.

[83] *Id.*

[84] David Assalone, Comment, *Law in the Virtual World: Should the Surreal World of Online Communities be Brought Back to Earth by Real World Laws?*, 16 VILL. SPORTS & ENT. L.J. 163, 195 (2009) ("With no means to appeal a Linden Lab decision within the TOS, a dissatisfied user who wants to dispute only has one method to voice their discontent: leaving the game platform.").

[85] *See infra* Part II.C (discussing real money trading).

[86] *See* Kunze, *supra* note 44 at ¶ 6; Mayer-Schönberger et al., *supra* note 5 at 1793 ("[P]articipants in virtual worlds incur significant social and financial costs when they are forced to leave. They not only have to leave behind a network of friends and their accumulation of social and other capital, but also are forced to abandon the persistent narrative that they have constructed . . . .").

[87] Per Prof. Fairfield, "The South Korean population is 48 million. As of February 1, 2004, 30 million users had accessed the Lineage virtual environments. Over two million users access Lineage regularly. Over forty-one percent of South Korean teenagers spend significant amounts of time in virtual worlds." Fairfield, *supra* note 4 at 1087–88 (internal citations omitted).

[88] Joshua A.T. Fairfield, *The Magic Circle*, VAND. J. ENT. L. & PRAC. (forthcoming 2009) (manuscript at 14–15), *available at* http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1304234_code718923.pdf?abstractid=1304234.

[89] *Id.* (manuscript at 1–2).

[90] Jeff W. LeBlanc, *The Pursuit of Virtual Life, Liberty, and Happiness and its Economic and Legal Recognition in the Real World*, 9 FLA. COASTAL L. REV. 255, 281–82 (2008).

[91] *Id.* Australia in particular is considering taxing virtual transactions. China's virtual property protection is "part of the Chinese government's initiative to build a competitive virtual world industry." Fairfield, *supra* note 4 at 1085.

[92] *Supra* Part II.B.

[93] *Supra* note 35.

[94] *Supra* Part I.

[95] *Id.*

[96] Lastowka et al., *supra* note 11 at 59 n.314.

ones en masse.[97]   Therefore, a virtual-world equivalent to real-world incarceration's long-term separation of the convicted from society does not exist; the convict would quickly leave the virtual world.[98]

The intent of developers is usually expressed as retaining "the ability to modify the world as they see fit, without being limited contractually."[99]   Even if that is their intent, commentators dispute whether the EULAs that are drafted achieve this goal.[100]   Instead, these EULAs create chilling effects from uncertain rights and potential for lawsuits—all of which would be lowered by "drafting the terms fairly—or at least less lopsidedly[.]"[101]

Developer's drafting of EULAs has also been intended to preclude any property right in virtual property acquired or created by participants. Because the EULA is up front, developers may allege, participants are on notice. They should not become too attached to their characters and possessions because ultimate control rests with the developer. This argument disregards theories through which participants should (and absent a possibly unconscionable contract provision, would) have a property interest in their virtual property.[102]   It also undermines the premise of virtual worlds—developers make these worlds to inspire participants to invest time and energy in *their* character, with the expectation that the developer won't seize their property.

Another intent expressed by developers is to prevent real money trade, "the sale of in-game items, currency, characters or other data in order to obtain real money."[103]   Certain developers have embraced this activity, while others have forbidden it.[104]   Many of the developers who embrace it do so because the revenue from selling virtual property is becoming substantial; *Second Life* and *Everquest II* have real money trade operations owned and sanctioned by the developer, possibly to derive commissions and yet another income source.[105]   Market interest in real money trade is forecasted to increase.[106]

If the participants' virtual property rights are recognized, however, developers that forbid real money trade may find courts willing to hold that forbiddance unconscionable. But for the EULA provision forbidding real money trade,[107] *World of Warcraft*'s over 11.5 million subscribers[108] would be able to trade and sell their virtual property interests in their character and inventory. It shocks the conscience to see a contract of adhesion put this severe a restraint on such a valuable property interest.[109]

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[97] *Id*; Michael Risch, *Virtual Third Parties*, 25 Santa Clara Computer & High Tech. L.J. 415, 418 (2008) ("[P]roviders want to take little or no responsibility for interactions between their users so long as users do not leave in droves.").

[98] *Contra* Stoup, *supra* note 7 at 330 ("The cornfield purgatory sanction entailed banishing a resident who violated one of the rules of Second Life to [an area] where all the resident could do was ride a tractor in a field of corn." To their chagrin, "[t]his sanction was ultimately an ineffective deterrent because many residents wanted to see the cornfield purgatory and started to purposefully violate Second Life's rules to experience the tractor ride.")

[99] Kunze, *supra* note 44 at ¶ 19.

[100] *Id.* (among the reasons: the EULAs are already so in the favor of the developer, it's hard to see how they are limited; also the lack of notice militates against enforceability.)

[101] *Id.* at ¶ 22.

[102] *See* Fritzsche, *supra* note 45 at Part II; Westbrook, *supra* note 17 at 801.

[103] Square-Enix, *Questions & Answers*, Real Money Trading.
https://secure.playonline.com/polapps/s/s.kb.html.Qa?ZUID=3&polg_loc=en&id=2802.

[104] *World of Warcraft*'s Blizzard Entertainment has "banned over 59,000 accounts and removed 22,000,000 gold from the virtual economy" due to real market trade. Fritzsche, *supra* note 45 at Introduction. *Final Fantasy XI*'s Square-Enix has a "Special Task Force . . . dedicated to stopping the use of both third-party programs and RMT-related activities." *Id.* By contrast, "Linden Lab encourages [real money trade] activity" in *Second Life*; *EverQuest* banned and *EverQuest II* permitted it; and *Ultima Online* embraced real money trade. Fritzsche, *supra* note 45 at Part III.

[105] Fritzsche, *supra* note 45 at Part III.

[106] *Id.*

[107] *World of Warcraft* Terms of Use § 11, *available at* http://www.worldofwarcraft.com/legal/termsofuse.html (agreeing to "no right or title in or to . . . virtual goods or currency appearing or originating in the Game[.] . . . Blizzard does not recognize . . . the purported sale, gift or trade in the "real world" of anything that appears or originates in the Game.").

[108] Press Release, Blizzard Entertainment, *World of Warcraft* Subscriber Base Reaches 11.5 Million Worldwide (December 23, 2008), *available at* http://www.blizzard.com/us/press/081121.html.

[109] *See* Fritzsche, *supra* note 45 at Part III; *contra* Jamie J. Kayser, Note, *The New New-World: Virtual Property and the End User License Agreement*, 27 Loy. L.A. Ent. L. Rev. 59, 78 (2006) ("[A]t the level of basic contractual analysis, the clear intent of the parties is manifested and easily discernable by the court. . . . Players have agreed not to buy or sell virtual objects outside of the virtual world of [*World of Warcraft*]." Therefore, courts should "defer to the express terms of the agreement and give Blizzard total control over the virtual world . . . .")

2.4 *Spy vs. Spy*[110] Online—Virtual-World Participants' Attempts to Outwit Developers' EULA and Programmatic Constraints

In virtual worlds where the EULA forbids real money trading, a black market still engages in real money trading.[111] Businesses operate around the lucrative premise of generating virtual property to offer for real money trade. The market was in 2007 worth approximately one billion dollars. This has several negative effects on participants' experience: the inability to prevent this black market arouses participants' resentment of the black-market merchants' EULA violations,[112] and the risk of fraud rises.

Entire participant accounts are also traded and sold, again generally in violation of EULAs. This is done to be able to have characters, who can participate in groups with other friends who have invested a lot of time into their characters and also to impress others with all of their seemingly hard-earned virtual possessions.[113] Developers' police listings on popular auction sites such as eBay and successfully prevent some sellers.[114] The same black market's negative effects above apply to these transactions.

Lowering these negative effects is one reason for developer-sanctioned and -operated real money trade operations, as discussed in II.C. Doing so allows developer control over the market—they can "ensure performance on all contracts, thus eliminating fraud and thereby generating heightened customer satisfaction."[115] Real money trading regulation, as opposed to prohibition, is an increasing trend in virtual world governance—*EverQuest II*'s allowance was a reversal for a major virtual-world developer in this area.

Aside from virtual property restraints, virtual-world law also involves other areas of real-world law. Consider torts: having millions of people interacting in these virtual worlds will necessarily create some virtual libels, batteries, and intentional inflictions of emotional distress. The feeling of anonymity granted by the internet, enhanced by a participant's character being a literal "troll,"[116] leads to behavioral extremes in virtual worlds. During a news interview within the virtual world, animated phalluses attacked a real-estate mogul in *Second Life* with real-world portraits of the mogul's player holding a giant phallus.[117] Virtual world developers as a social experiment created a trader in *A Tale in the Desert* who "caused an uproar when he 'declared he would not sell to women and then inquired whether one female character was for sale.' "[118]

These, too, are often forbidden by EULAs.[119] But such provisions are impossible to enforce adequately, and usually sanctions for such activity are not severe. Participants, who engage in such activity, often create false pretenses to explain why they did so when asked by the developer's employees, under II.B's abuse reports—they claim to be role-playing or that they were provoked. Generally, the true purpose is for comedic value or 'lulz,' "the joy of disrupting another's emotional equilibrium. 'Lulz is watching someone lose their mind at their computer 2,000 miles away while you chat with friends and laugh,' said one ex-troll . . . ."[120]

To summarize, EULAs taken alone present a flawed method of governance of virtual worlds. First, they are rooted in contracts that are susceptible to unconscionability and courts are finding it. Second, participants are not the intended beneficiaries of this source of virtual world law indicated by their lack of recourse under the EULA, which undermines their participatory experience. Third, the developers' intent is not to provide a judicial system, only to keep subscribers complacent and paying. Finally, participants have the motivation and capability

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[110] "Spy vs. Spy is a wordless black and white comic strip that has been published in *Mad* magazine since 1961. . . . The comic features two spies, Black and White, who are constantly warring against each other, and coming up with increasingly sophisticated ways of doing away with the other." Wikipedia, Spy vs. Spy, http://en.wikipedia.org/wiki/Spy_vs._spy.

[111] *See* Kane, *supra* note 80 at 558-59; LeBlanc, *supra* note 89 at 272-73.

[112] See Kane, *supra* note 80 at 559 (discussing class-action plaintiffs at a disadvantage for not buying virtual gold on *World of Warcraft* in *Hernandez v. IGE U.S., LLC,* Case No. 07-21403-Civ-Cohn/Seltzer. (D.Fla. August 26, 2008) This case has since settled but the class-action may be resumed (*see* Joint Stipulation at ¶ 1, *available at* http://virtuallyblind.com/files/hernandez/hernandez_stipulation.pdf).).

[113] *See* Kayser, *supra* note 108 at 74.

[114] *See id.* at 66; Kane, *supra* note 80 at 558; Fairfield, *supra* note 4 at 1063; Fritzsche, *supra* note 45 at Introduction; *see also* Kunze, *supra* note 44 at ¶ 43 (*eBay* now afraid to deal in virtual goods).

[115] Kayser, *supra* note 108 at 79.

[116] *Trolls* are a blue-skinned race "renowned for their cruelty and dark mysticism. Barbarous and superstitious, the wily Trolls carry a seething hatred for all other races." Participants may select to play as one in *World of Warcraft*. Races -> Trolls, http://www.worldofwarcraft.com/info/races/trolls.shtml. In internet culture, *troll* also has a figurative sense that is fitting here: "someone who intentionally disrupts online communities." Mattathias Schwartz, *Malwebolence*, N.Y. Times, August 3, 2008, *available at* http://www.nytimes.com/2008/08/03/magazine/03trolls-t.html.

[117] Assalone, *supra* note 83 at 179–80.

[118] Rogers, *supra* note 79 at 413 (*quoting* Daniel Terdiman, *Heavy Price for Free Speech*, Wired, Nov. 2, 2004, *available at* http://www.wired.com/gaming/gamingreviews/news/2004/11/65532).

[119] *See World of Warcraft* Terms of Use § 9 (B), *available at* http://www.worldofwarcraft.com/legal/termsofuse.html (forbidding language deemed offensive by the developers; posting personal information; spamming participants with unwanted messages; activities deemed fraudulent by the developers; impersonation of real people; and more).

[120] Schwartz, *supra* note 115.

to circumvent EULA provisions. Because of these failings, external regulation is necessary as a second tier of rulemaking.

3. Current External Regulatory Attempts Fail to Properly Regulate, Requiring EULAs

Even at its best, external regulation will not protect every instance of behaviors not protected by EULAs in virtual worlds. There are problems, including jurisdiction of participants of virtual worlds, which are common to the internet itself.[121] Traditional notions of jurisdiction greatly increase the difficulty of litigants bringing real-world actions based on virtual-world acts; many of their potential defendants are in distant or extra-national jurisdictions.[122] Federal statutes to regulate this would provide intra-national consistency, but would be helpless in cases from outside the nation.

Because of this, Professor Joshua A.T. Fairfield argues for a common-law-codified-to-statute approach for the internet: "Rules for regulation of the Internet have developed according to the same process as the common law elsewhere: business norms have developed into industry standards, which in turn are adopted by courts, and the resulting common law rules are codified by statutes."[123] The solution proposed in Part 4 formalizes the business norms and industry standards portion of this method for the virtual world industry, giving courts ready access to standards to consider; this Part considers alternative routes to regulation.

3.1 "The Blind Are Not Good Trailblazers"[124]

Because of the differences between EULAs, courts and legislators will have great difficulty deciding virtual world issues without any guidance. Essentially, each virtual world has its own legal system, coined as 'EULAw' by one commentator.[125] "Federal legislation in the new arena of virtual worlds also runs the risk of outstripping congressional understanding of the issues and technology of virtual worlds, as it has in other areas of technology."[126] Some virtual worlds even have a notion of caselaw.[127] These complicate any one-size-fits-all solution devised by regulators. Per Judge Easterbrook, "If we are so far behind in matching law to a well-understood technology such as photocopiers . . . what chance do we have for a technology such as computers that is mutating faster than the virus in The Andromeda Strain?"[128]

Mapping current regulatory methods into virtual worlds also has significant problems, albeit different from EULAs. Unlike real property, virtual property is susceptible to bugs in the virtual world that can reduce its utility and value.[129] The development process also leads to newly created virtual properties unbalancing the existing virtual world, and subsequent re-balancing efforts to correct that. The developer also retains an interest—a possessory interest at the code level—of virtual property.[130] Other regulatory schemes have had similar difficulties when applied to virtual worlds.[131]

Commentators question whether external regulation is required at all. Because current property doctrines do not fit virtual worlds, Dan Lawrence argues that "new property law doctrines to protect virtual property" would be required.[132] Even if needed, only a "narrow range of circumstances entitl[e] a virtual property holder to a legal remedy." Lawrence determines that current contractual arrangements and courts' declaring certain provisions

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[121] *See* Assalone, *supra* note 83 at 188–89 (jurisdictional issues with tax regulation of virtual worlds); Joshua A.T. Fairfield, *Cracks in the Foundation: The New Internet Legislation's Hidden Threat to Privacy and Commerce*, 36 ARIZ. ST. L.J. 1193, 1200 (2006) ("[T]he possibility of nearly infinite access to people in other jurisdictions, combined with the ease and low expense of such contacts, has operated to raise the frequency of cross-border transactions to an unprecedented degree.").

[122] *Id.* at 1219–20 (discussing federal CAN-SPAM Act's limitations against out-of-country spammers).

[123] *Id.* at 1199.

[124] Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 207 (1996).

[125] Jankowich, *supra* note 55 at 8.

[126] Rogers, *supra* note 79 at 414 (*quoting* Jankowich, *supra* note 55 at 5).

[127] For example, *World of Warcraft* has occasional and uncodified pronouncements on their forums that clarify like the Internal Revenue Service's regulations, and known infractions and their corresponding penalties have some precedential value. *Contra* Mnookin, *supra* note 14 (arbitrators "may [not] . . . call for a new law as the result of the arbitration . . . In practical terms, . . . [i]t means that except by providing potentially persuasive examples of community norms, disputes have no precedential value.") .

[128] Easterbrook, *supra* note 123 at 210.

[129] *See* Dan E. Lawrence, Note, *It Really is Just a Game: The Impracticality of Common Law Property Rights in Virtual Property*, 47 WASHBURN L.J. 505, 521–23 (2008).

[130] *See* Assalone, *supra* note 83 at 177.

[131] *See* Assalone, *supra* note 83 at 172 *et seq.* (discussing issues with property, criminal and taxation being applied to virtual worlds).

[132] Lawrence, *supra* note 128 at 524–25.

unconscionable is sufficient for virtual property, and the attention afforded virtual worlds "does not per se demonstrate the need for new laws." If existing laws work, use them.[133]

This argument is flawed for virtual worlds when applied outside of property, including property-based torts and torts against the person. These differ from Mr. Lawrence's example of real-world tortious acts that are allowed and accepted within the virtual world, such as the ability for your character to steal property in *Ultima Online*[134]; these are acts arising from or related to conduct in the virtual world that is a real-world tort directed at the participant, not their character in the virtual world. These are generally forbidden by EULAs,[135] but are not enforced in the same manner as a court would. Examples above show that the developer's business model provides financial reward for the developer to lack interest in providing the same remedies that a court could provide to participant-to-participant interactions.[136]

These failures to provide remedies have contributed to real-world murder and other crimes from frustrated participants. Chengwei's sword was not protected under China's property laws at the time, resulting in grave consequences.[137] Currently in the United States, it would also not be protected. Applying real-world regulation and modifying it as needed to specifically address torts arising from virtual worlds is justified—existing laws do not work. Existing laws' and EULAs' failures make participants desperate.

The argument also fails to protect virtual property transactions that are outside the terms of the EULA, which is an agreement between just a participant and the developer, not between participants. Participants who would have a colorable legal claim against another participant need to apply the third-party beneficiary doctrine. "To date, . . . the practical and theoretical boundaries of . . . application to virtual worlds have yet to be fully explored, perhaps because of an overly narrow doctrinal conception."[138] Even if found to apply, "[t]he question becomes which terms are actionable by one member against another and which terms are not."[139]

It is likely that this doctrine will change as a result of virtual worlds—another indicator that current contract law is not sufficient. Existing property law did not anticipate these kinds of contractual wrinkles coming into play. Therefore, regulation must change or new regulation be introduced to support virtual world participation, involving more than just virtual property.

3.2 Regulation Will Likely Split the Virtual World's Community, Frustrating Regulatory Attempts

Prior regulatory attempts at Internet applications have worked like a cudgel, splintering the communities they were intended to regulate. Consider the attempted regulation of Napster, which changed centralized file sharing to decentralized file sharing.[140] The ability of users to emulate servers of virtual worlds and avoid the centralized server provided by the developer indicates the same future is possible here. It would result in virtual world "providers themselves disappear[ing], and with them almost any hope on the part of real-world lawmakers to directly influence the governance inside virtual worlds."[141] Currently, developers have been active in policing the attempts of others to emulate the developer's virtual world server; such behavior is generally against their EULAs.[142] If worlds become decentralized, there would be less developer presence.

As an additional result, the current regulatory scheme of EULAs would be completely lost. Having no developer control over the world creates a vacuum of enforcement, and players in these decentralized virtual worlds would have no recourse. As with *LambdaMOO*, "[w]hen the [developers] abdicated authority over social conflicts, one character named Mr. Bungle took advantage of the vacuum of rule enforcement to pursue actions online for which he knew he would face no real-world consequences: he engaged in the verbal sexual assault of other avatars."[143] Regulatory efforts may in fact therefore make the current oppressive EULA regime break and

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[133] *Id.*; *accord* Easterbrook, *supra* note 124 at 210 ("[K]eep doing what you have been doing. Most behavior in cyberspace is easy to classify under current property principles.")

[134] Lawrence, *supra* note 128 at 526 n.109.

[135] *See supra* note 118.

[136] *Supra* Parts II.B and .C.

[137] *Id.*

[138] Risch, *supra* note 96 at 415 (*citing* Lawrence, *supra* note 128 at 530–32; Fairfield, *supra* note 1 at 449).

[139] *Id.* at 420. Risch goes into further detail as to which EULA provisions may create intended beneficiaries and therefore be actionable—his examples include anti-spam and anti-harassment provisions, as well as others relating to property and cheating. *Id.* at 422 *et seq*.

[140] Mayer-Schönberger et al., *supra* note 5 at 1780.

[141] *Id.* (internal citations omitted).

[142] *World of Warcraft* End User License Agreement § 2 (G), *available at* http://www.worldofwarcraft.com/legal/eula.html. ("You agree that you will not, under any circumstances: . . . facilitate, create or maintain any unauthorized connection . . . , including without limitation (a) any connection to any unauthorized server that emulates, or attempts to emulate, the Service; and (b) any connection using programs or tools not expressly approved by Blizzard[.]")

[143] Mayer-Schönberger et al., *supra* note 5 at 1798.

anarchy ensue. If developers are "benevolent dictators," these efforts could be analogous to toppling that dictatorship and failing to rebuild a government.

4. A Coordinated Effort to Provide Regulatory Guidance Across Virtual Worlds may Provide a Basis for External Regulation, or Make External Regulation Unnecessary

Self-regulation of other internet protocols and applications already exist. The World Wide Web Consortium is an international standards organization founded in 1994. Tim Berners-Lee founded it "[t]o lead the World Wide Web to its full potential by developing protocols and guidelines that ensure long-term growth for the Web."[144] The Consortium has been responsible for standardizing graphical formats, Cascading Style Sheets, Hypertext Markup Language revisions, and Extensible Markup Language.[145] Although these have not been adopted and enforced by governmental regulators, those that would be regulated—web browser application developers, web developers, and others—employ the Consortium's standards. Therefore, it is effective self-regulation. Other mechanisms for self-regulation come from the Internet Engineering Task Force and the Internet Corporation for Assigned Names and Numbers.[146] The former develops "standards that allow the Internet to function as a global network[;]" the latter administers the domain name system.[147]

Mr. Caral summarizes arguments for self-regulation. Adapted to this topic: first, self-regulating developers know their industry and technical limitations; second, developers' accessible "in-house" expertise lowers the costs of regulation; third, the virtual-world developers being regulated know the developers who are regulating them and trust them more than outside regulators; fourth, developer self-regulation may be less formal and save costs; and fifth, the costs are allocated to the virtual world industry not the public.[148] Furthermore, self-regulation is encouraged by the government: "Even where collective action is necessary, governments should encourage industry *self-regulation and private-sector leadership* where possible . . ."[149]

The likely reason that the government is so willing to promote self-regulation for the Internet is because the government is only just getting acquainted with how to regulate it. The virtual world council can be the government's role model.[150] Better yet, if the council's self-regulation is effective, the government is willing to stay out entirely: "*Where* government intervention is *necessary, its role should be* to ensure competition, . . . and facilitate dispute resolution, *not to regulate*."[151]

Here, the virtual world market is such that self-regulation is feasible. Developers of virtual worlds are few, because of large barriers to entry.[152] Many projects in development never come to fruition due to these barriers. "The market of virtual world providers operates with the conscious parallelism of an oligopoly, instead of a truly competitive market. As a result, consumers often do not have meaningful choice when selecting between EULAs of virtual realms."[153]

Developers should self-regulate because keeping governmental regulatory schemes out of their industry retains their ability to change the world as they fit.[154] At the least, developers could constrain oversight to the standards that the virtual world council sets. Alternatively, instead of mere contractual obligations in EULAs, developers would also have to contend with regulatory obligations from external entities. If developers of virtual

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[144] World Wide Web Consortium, About the World Wide Web Consortium (W3C), http://www.w3.org/Consortium/ (last accessed April 6, 2009).

[145] Wide Web Consortium, About W3C: History, http://www.w3.org/Consortium/history (last accessed April 6, 2009).

[146] Jose MA. Emmanuel A. Caral, *Lessons from ICANN: Is Self-Regulation of the Internet Fundamentally Flawed?*, 12 INT'L. J.L. & INFO. TECH. 1, 1 (2004).

[147] *Id.* at 15–18.

[148] *Id.* at 5.

[149] *Id.* at 7–8 (*quoting* WILLIAM J. CLINTON & ALBERT GORE, JR., A FRAMEWORK FOR GLOBAL ELECTRONIC COMMERCE (1997), *available at* http://www.uazone.org/gis/ecomm.htm) (emphasis in original).

[150] *E.g. id.* at 9 (increasing centralization and governmental influence of United States regime).

[151] *Id.* at 8 (emphases added).

[152] Kunze, *supra* note 44 at ¶ 6; Lastowka et al., *supra* note 11 at 59 n.314 ("The well-known virtual-world design guru Gordon Walton recently made a top ten list of reasons not to create a virtual world . . . Walton's first reason was that today's virtual worlds can cost over $100 million to build." (internal citations omitted)); *compare* Rogers, *supra* note 79 at 420 ("As long as potential virtual-world inhabitants act rationally and the barriers to entry for developers of virtual worlds remain relatively low, EULAw (as Jankowich calls it), should be no more problematic than real law," *citing* EDWARD CASTRONOVA, SYNTHETIC WORLDS: THE BUSINESS AND CULTURE OF ONLINE GAMES 65–67 (2005) for the proposition that barriers to entry are low).

[153] Kunze, *supra* note 44 at ¶ 24.

[154] *Supra* Part II.C.

worlds prove capable to protect participants' rights and ensure competition between worlds,[155] such oversight may not be necessary.

Proper protection of participants' rights will require developers to invite participants to the bargaining table for their EULAs. Although this has not been done in virtual worlds, social networking sites on the internet such as Facebook have done so.[156] Persuading individual developers to collaborate with their users proves difficult. Developers hang their hat on the notion that it their virtual world is just a game and that it is just *our* game; if participants don't like that, they can leave. And right now, the market is sufficiently small and oligopolistic that this developer attitude works because participants lack a meaningful choice. As virtual worlds expand, however— and Professor Edward Castronova predicted 100 million participants by 2030[157]—the industry will need to change. EULA provisions will become a competitive advantage for virtual world developers to leverage, just as *Second Life* leveraged their intellectual property protection.

A standards-setting body of developers such as a virtual world council provides an impetus for change. This would pressure existing virtual-world developers to become compliant or lose participant trust.[158] Furthermore, a standard does not stifle competition. Instead, granting incentives that indicate to participants, for example, that this virtual world is compliant with the virtual world council's virtual property standards that protect your investment of time and energy promotes competition. It incentivizes developers that modify their EULA to support these rights and become compliant. Compliance with the virtual world council's possible virtual harassment standards also supports competition, by making participants feel that this virtual world is a safer place to develop their character than a different, non-compliant world.

5. Conclusion

The creation of standards-setting bodies that consist of developers of virtual worlds may provide a solution that avoids external regulation. If the alternative to providing rights in EULAs to participants is the government wading into the fray, developers may be pressured to protect their participants. When the government enters this arena, Napster-like results can occur to the industry, which could destroy the developer's oligopoly.

Additionally, once standards exist, participants and courts have an easier way to view the virtual world than through the byzantine provisions of the EULA. Standards provide a basis for objective comparison of potential virtual worlds to participate in, and a basis for the development of common law methods of adjudicating virtual world disputes.[159] The transaction costs to both participants and courts in interpreting virtual worlds are reduced by standardization.

Finally, developers are the most efficient party to task with the creation of such a council and the creation of standards. They have far and away the most knowledge of how this industry works. They also have the leverage and credibility to persuade developers to compete with each other to attain compliance with the published standards. Lastly, the developers themselves are profiting from the virtual worlds; as for the standards for virtual worlds, they should be bearing the cost of creating them and being bound by them.

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[155] CLINTON et al., *supra* note 148 at 8.

[156] *See* Press Release, Facebook, *supra* note 30.

[157] *See* Rogers, *supra* note 79 at 420 (*citing* CASTRONOVA, *supra* note 151 at 65–67).

[158] This is consistent with Judge Easterbrook's argument, which specifically mentions creating standards-setting organizations to facilitate participant decision-making. *See* Easterbrook, *supra* note 124 at 214–16.

[159] *See* Fairfield, *supra* note 120 at 1199.

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