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EULAw: The Complex Web of Corporate Rule-Making in Virtual Worlds

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I. INTRODUCTION: PARALLEL WORLDS, DIVERGENT LAWS

In the fantasy and science fiction works that inspire so many virtual worlds, the barriers between real and fantastic worlds are often porous. Alice simply fell into Wonderland, and Lucy entered Narnia as she climbed into the wardrobe while playing hide-and-seek.¹ Entry into virtual worlds seems to be equally accessible. Amid the news sites and blogs exist portals to computer-generated lands where one can take on a heroic guise and step into a new and marvelous society.

In fiction, however, there is often a price for entering into these fantasy worlds. As Alice discovers during her visit to Wonderland, the laws of commonplace reality change, sometimes bizarrely, in these fantasy worlds.² At other times the price is levied upon reentry to reality.

1. See LEWIS CARROLL, *ALICE'S ADVENTURES IN WONDERLAND & THROUGH THE LOOKING GLASS* (Signet Classic 2000) (1865) (1871); C.S. LEWIS, *THE LION, THE WITCH AND THE WARDROBE* (HarperCollins 1994) (1950).

2. See CARROLL, *supra* note 1, at 112. Encountering the rules of evidence in Wonderland, Alice engages in the following exchange:

At this moment the King, who had been for some time busily writing in his notebook, called out "Silence!" and read out from his book, "Rule Forty-two. *All persons more than a mile high to leave the court.*"

In English folklore, one who visited fairyland might spend a magical evening only to emerge and find decades or centuries had passed in the real world.³ In fact, so much time might have passed in the real world that the travel would cause one to crumble into dust as the cumulative years collapsed into one.⁴ The journeys to these magical locations were not only trips to a new lands but to different realities where the laws of humans and of physics might be equally inoperable. Albert Einstein's findings from his theory of special relativity, in which a traveler on a rocket ship experiences time passing at a slower rate than his earthbound peers, suggests a scientific basis for this myth.⁵ A similar price is being paid today by those who participate in massively multiplayer online role-playing games (MMOGs) or, more frequently, virtual worlds.

Virtual worlds are video games persistently played over the Internet among many people who assume new identities in this game world. These computer-generated environments allow players to interact with each other through computer-generated characters. In fact, some commentators perceive virtual worlds as precursors of new societies freed from geography or as revolutionary new forums for communication.⁶ Specifically, economist Edward Castronova outlined

Everybody looked at Alice.
"I'm not a mile high," said Alice.
"You are," said the King.
"Nearly two miles high," added the Queen.
"Well, I shan't go, at any rate," said Alice: "besides, that's not a regular rule: you invented it just now."
"It's the oldest rule in the book," said the King.
"Then it ought to be Number One," said Alice.
The King turned pale, and shut his notebook hastily.

Id.

3. See KATHARINE BRIGGS: A DICTIONARY OF FAIRIES: HOBGOBLINS, BROWNIES, BOGIES AND OTHER SUPERNATURAL CREATURES 399 (1976) (describing the stories of Ossian and others where hundreds of years pass outside of the mystical realm). For online users, shorter periods of time appear to pass for the traveler inside.

4. See *id.* at 399 (describing mystical travelers realm people falling into dust upon return to the real world); see also K.M. BRIGGS, THE FAIRIES IN TRADITIONAL LITERATURE 105 (1967) (stating "in Fairyland time passes at a very arbitrary rate").

5. See MICHIO KAKU, EINSTEIN'S COSMOS: HOW ALBERT EINSTEIN'S VISION TRANSFORMED OUR UNDERSTANDING OF SPACE AND TIME 79-80 (2004). Science fiction writers have explored this sense of the dislocating experiences of space travel and the disturbing gaps between different experiences of time. See, e.g., JOE HALDEMAN, THE FOREVER WAR (2003) (describing a soldier's experiences when time passes at different rates).

6. See generally Jack M. Balkin, *Virtual Liberty: Freedom To Design and Freedom To Play in Virtual Worlds*, 90 VA. L. REV. 2043, 2044 (2004); Edward Castronova, *Virtual Worlds: A First-Hand Account of Market and Society on the Cyberian Frontier* 39 (CESifo Working Paper Series No. 618, 2001), available at <http://papers.ssrn.com/abstract=294828>.

three reasons why economists and other social scientists have an interest in virtual worlds like Norrath, the setting of EverQuest:

One reason is that these places provide a fascinating and unique laboratory for research on human society. . . . The second and more significant is that [virtual worlds] may soon become one of the most important forums for human interaction, on a level with telephones. Moreover, in that role, they may induce widespread changes in the organization of Earth society.⁷

Virtual worlds are becoming increasingly popular; by January 2005, the number of “active subscriptions” to virtual worlds totaled more than 5,000,000, having grown from approximately 1,000,000 subscribers in January 2002.⁸

While the entry costs of participating in virtual worlds are clear, the actual cost of participation is significantly more expensive and difficult to calculate.⁹ Specifically, measurements of the actual cost of participation must include the loss of rights inherent in most virtual worlds. The regulatory costs of participation are often shrouded by their incorporation in complicated documents.¹⁰ A typical participant may have an “Alice-in-Wonderland-type experience” when confronted with the reality of the cost of virtual world participation.¹¹

7. Castronova, *supra* note 6, at 37.

8. See Bruce Sterling Woodcock, *Total MMOG Active Subscriptions*, July 2005, <http://www.mmogchart.com/chart4.html> (calculating total active virtual world subscribers); see also Nick Yee, *MMORPG Hours vs. TV Hours*, Jan. 11, 2005, <http://www.nickyee.com/daedalus/archives/000891.php> (describing how virtual world participation has displaced television watching among virtual world participants).

9. See, e.g., World of Warcraft, *Frequently Asked Questions*, <http://www.worldofwarcraft.com/info/faq> (describing need to purchase software and pay monthly fee to participate in World of Warcraft virtual world).

10. See Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets* 3 (Mass. Inst. Tech. Dep’t of Econ., Working Paper No. 05-18, 2005), available at <http://ssrn.com/abstract=728545> (describing how firms hide information from consumers in order to minimize the appearance of cost to consumers).

11. One obstacle to productive thought on virtual worlds is the widespread use of fantasy and science-fiction-like terms derived from the medium’s founding genres. Many commentators and virtual world designers use terms like “wizard,” “god,” “cyborg,” and even the commonly used “avatar.” See F. Gregory Lastowka & Daniel Hunter, *The Laws of Virtual Worlds*, 92 CAL. L. REV. 1, 54-55 (2004) (employing these terms). The use of this terminology is particularly strained when dealing with the issue of real world persons entering into real world contracts with real world sophisticated business entities. The use of fanciful terms can obscure the degree of real world rule-making. For example, the determination of a person’s rights in a character that she has created seem more likely to be resolved through law than the issues of confronting a cyborg or a wizard. Ironically, these fantasy terms are often used in articles claiming to support revolutionary new communities and communications. However, the usage of these terms stagnates attitudes towards virtual worlds. Even virtual world designers, immersed in fantastic worlds of dwarves and space ships, discuss the resulting impediment of true, virtual world potential created by the mire of science fiction and fantasy. See Wagner James Au, *Showdown in Cyberspace: Star Wars vs. The Sims*, SALON, July 9, 2002, <http://www.salon.com/tech/feature/>

Virtual worlds operate under their own systems of private laws which often deviate sharply from those of the physical world. Virtual worlds, existing only online, seek to “legally link” the online world and the physical world through the agreements that create private rules in the absence of effective jurisdiction by real world governments and the potential development of “self-regulatory structures on the net.”¹² Virtual worlds often establish severe restrictions on rights when a participant agrees to the end user license agreement (EULA) and other contractual documents. Professor Julie Cohen’s description of “Lochner in Cyberspace” becomes prophetic in the virtual world where private contracts routinely extend beyond real world law.¹³ The complexity of the agreements and their “click-wrap format” discourage a complete review of their terms. Click-wrap agreements are a common contractual format in software whereby agreements appear on-screen and the participant must either agree or disagree to the terms before advancing to the next screen. Click-wrap agreements are an online interactive version of the shrink-wrap license. Shrink-wrap licenses are frequently used for products like software, where a consumer is deemed to agree to the license when she removes the plastic shrink-wrap packaging from the product box.¹⁴ It is likely that many players are unaware of the contractual restrictions until they unknowingly breach one of the provisions. In light of the increasing prominence, popularity, and economics of virtual worlds, an evaluation and calculation of user participation costs is necessary.

A. *Methodology*

In this Article, I will examine the private systems of regulation governing virtual worlds that are typically contained in EULAs, terms of service (ToS), rules of conduct, posting policies, and naming policies (collectively, “governing agreements”). My analysis is based on a survey

2002/07/09/mmorpg. A more simplistic terminology could be used for drafting these contractual agreements. For example, players who work, trade, and engage in a wide variety of activities in virtual worlds could be referred to as “participants,” and the companies that design, administer, and govern virtual worlds could be referred to as “proprietors.” This usage would enhance the unique qualities of the virtual world. In both cases, these terms would capture the complex range of activities performed by each group without using exotic terminology.

12. See David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1370-76 (1996) (discussing the difficulties in real world jurisdictions).

13. See generally Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of “Rights Management”*, 97 MICH. L. REV. 462, 462-64 (1998).

14. See Ryan J. Casamiquela, *Contractual Assent and Enforceability in Cyberspace*, 17 BERKELEY TECH. L.J. 475, 477-80 (2002) (describing click-wrap agreements).

of the governing agreements of forty-eight virtual worlds. The results of this survey can be seen in the attached annexes.

A wide range of games and other sites exist that allow participants to interact in approximately real time. I focused my research on what are most commonly considered to be virtual worlds, MMOGs, because these games involve the issues of law, identity, complexity, persistence, economics, and finance that most closely replicate contemporary real world societal questions. Proprietors have responded to these complex and dynamic issues by enacting their own virtual world “legislation.” Although an interesting subject of legal scholarship, multiuser dungeons (MUDs) and other text-based multiple player games are not included within the scope of this article.¹⁵ As virtual worlds have the ability to draw relatively large communities¹⁶ and corporate ownership can influence the development of the regulations developed in virtual worlds,¹⁷ I have focused on the question of virtual world rulemaking.

In developing the list of virtual worlds investigated in this Article, I examined directories of virtual worlds¹⁸ and focused on those that are considered both open to the public in a final format and provide accessible governing agreements to nonsubscribers. I disregarded worlds in beta or other unfinished status on the grounds that such worlds were likely to have agreements that might not be representative of the final governing form. Additionally, my analysis could not include this enormous range of virtual worlds currently in development. Some virtual worlds have governing documents that are apparently available only with the purchase of the software, precluding prepurchase review of the documents.¹⁹

15. See generally Jennifer L. Mnookin, *Virtual(y) Law: The Emergence of Law in LambdaMOO*, 2 J. COMPUTER-MEDIATED COMM. (1996), <http://jcmc.indiana.edu/vol2/issue1/lambda.html>.

16. See Woodcock, *supra* note 8 (showing 12 virtual worlds with subscription populations of at least 120,000 as of June 2005).

17. See *infra* Annex A, at (1) (showing 93.75% of virtual worlds surveyed were operated by corporations or other business entities).

18. See, e.g., Multiplayer Online Games Directory, List Multiplayer Games by Genre, <http://www.mpogd.com/games/genre.asp?id=9> (last visited Apr. 16, 2006) (listing alphabetical directory of massive multiplayer role-playing games).

19. See, e.g., Anarchy Online News and Community, <http://www.aoforge.com/newbie1.php3> (last visited Apr. 16, 2006) (“When you run Anarchy Online, the first thing you see will be an End User License Agreement (EULA). This is the document that Funcom makes you agree to every time you run the game.”). I suggest that, before playing a game, the user take the time to read the entire agreement to learn the proprietor’s expectations of its users. Users should be particularly aware of prohibited actions, particularly because the EULA will not be accessible until the user “runs” the game. The issue of excluding virtual worlds, with governing agreements accessible only after purchase, is addressed below at *Accessibility and Complexity: Accessibility infra* Part II.B.

B. “You’re In Our World Now!”²⁰ *The Authority To Make Rules in Virtual Worlds*

A significant concern with virtual worlds stems from their system of governance. Virtual world proprietors have transformed the click-wrap license from an often-disregarded, transactional formality of software into a basis for regulating conduct. Proprietors construct rules with little or no regard for the negotiating powers of prospective entrants. New entrants must either agree to the terms written by owners or decline to participate. When existing participants find these rules unsatisfying, their only option is to quit.²¹

From the earliest period of virtual world development, the possibility of complex interactions have created governance issues.²² In her pioneering article on the text-based virtual world LambdaMOO, Professor Jennifer Mnookin examined the conflict over its participant-generated legal system. Professor Mnookin noted that “[t]he best metaphor turns out to be conceiving of LambdaMOO as a role-playing game. Analogizing LambdaMOO to a role-playing game ends up granting LambdaMOO denizens the most freedom to experiment, and indeed, the greatest amount of legal autonomy.”²³ At present, numerous virtual worlds, self-identified as role-playing games exist, but the question of how to order those spaces remains a powerful one.²⁴

As virtual worlds have developed, the agreements that govern them have lengthened to reflect the complexity of the interaction between participants and proprietors.²⁵ Tension permeates the governing

20. See Sony Online Entertainment Legal Notices, <http://sonyonline.com/corp/legal/index.jsp> (last visited Apr. 16, 2006) (stating that the EverQuest catchphrase “You’re in Our World Now!” is a registered trademark).

21. See James Grimmelmann, *Virtual Power Politics* 8 (Apr. 19, 2005), available at <http://ssrn.com/abstract=707301> (“[P]layers’ power over designers depends on their ability [to] go nuclear, to stop playing and stop paying. It’s a powerful threat, but costly for a player who has built up substantial in-game wealth or status, and each player can only quit once.”).

22. See Steven L. Kent, *Alternate Reality*, 3 GAMESPY.COM, Sept. 23, 2003, <http://archive.gamespy.com/amdmog/week1/index3.shtml> (describing problems with “player-killers who would gang up on newer players” in the pioneering virtual world Ultima Online).

23. See Mnookin, *supra* note 15 (“By emphasizing LambdaMOO’s game-like aspects, we emphasize LambdaMOO’s power to make rules for [it], unconstrained by the rules that operate outside [LambdaMOO’s] borders. In other words, recognizing LambdaMOO as a game, as a play-space, frees participants in LambdaMOO to play, to invent and reinvent both themselves and their institutional setting.”).

24. See, e.g., Asheron’s Call, Home Page, <http://ac.turbine.com> (last visited Apr. 16, 2006) (describing Asheron’s Call as an “online role-playing game”).

25. See, e.g., Star Wars Galaxies, Policies Index, http://www.starwarsgalaxies.station.sony.com/en_US/players/content.yml?page=Policies%20Index&resource=policies (last visited Apr. 16, 2006) (using eight governing agreements).

agreements because virtual worlds are controlled by authoritarian proprietors and are populated by crowds of participants who seek unscripted interaction. Just as the anonymity of online communities may encourage mischievous participant behavior, so too may the nearly absolute proprietary power encourage a tendency toward arbitrary rulemaking and exclusion.²⁶ Virtual world designer Raph Koster has observed that as a game designer,

[y]ou have to give players a sense of ownership in the game. This is what will make them stay—it is a “barrier to departure.” . . . If they can build their own buildings, build a character, own possessions, hold down a job, feel a sense of responsibility to something that *cannot* be removed from the game—then you have ownership.²⁷

Raph Koster noted that “[a] roleplay-mandated world is essentially going to have to be a fascist state.”²⁸ Other virtual world designers have expressed similar concerns.²⁹

Given the increasing costs of virtual world development, the high failure rates of new worlds, and the rising expectations of participants, developers incorporate significant risks into governing agreements.³⁰ This tension is exacerbated when the proprietor is not an academic researcher³¹ but a corporation with a duty to maximize shareholder value.³² Some commentators have suggested that virtual worlds are free to evolve, unrestrained by real world laws.³³ However, those same

26. See, e.g., BBS: THE DOCUMENTARY (2005) (describing the pleasure BBS sysops took in their power to ban people); see also Amy Jo Kim, *Killers Have More Fun*, WIRED, May 1998, available at <http://www.wired.com/wired/archive/6.05/ultima.html> (describing the temptation to become a harassing player-killer in the virtual world Ultima Online).

27. Raph Koster’s Home Page, The Laws of Online World Design, <http://www.raphkoster.com/gaming/laws.shtml> (last visited Apr. 16, 2006).

28. *Id.*

29. See Posting of Dave Rickey to Terra Nova, Fascism Is Fun, http://terranova.blogs.com/terra_nova/2003/11/index.html (Nov. 23, 2003) (questioning whether a more authoritarian, as opposed to democratic, system might be a better form of government in virtual worlds given the participant inability to create “democratic structures”).

30. See Daniel Terdiman, *Dealing with Great Expectations*, WIRED NEWS, Jan. 22, 2005, <http://www.wired.com/news/ebiz/0,1272,66362,00.html> (describing how participants demand high levels of features and services, even in successful virtual worlds); Daniel Terdiman, *No Will To Keep Uru Live Alive*, WIRED NEWS, Feb. 13, 2004, <http://www.wired.com/news/games/0,2101,62253.html> (describing failures of virtual worlds); Daniel Terdiman, *Online Games a Massive Pain*, WIRED NEWS, July 16, 2004, <http://www.wired.com/news/games/0,2101,64153,00.html> (describing difficulties in virtual world development).

31. See Mnookin, *supra* note 15 (noting that the early online community of LambdaMOO was founded by Pavel Curtis, a researcher at the Xerox PARK research center).

32. See *infra* Annex B, at (1) (listing corporate proprietors).

33. See Lastowka & Hunter, *supra* note 11, at 72 (arguing that virtual worlds need to develop their own norms and rule by evolution).

commentators acknowledge the degree to which virtual world lawmaking is determined by both the developers' control of code and governing agreements.³⁴ The power to construct the law of a virtual world could be the privilege to determine every aspect of that space.³⁵

The EULAs, TOSs, rules of conduct, posting policies, naming policies, and other contracts that govern virtual worlds are the products of owners and lawyers engaging in a centralized process of lawmaking through a form of nonnegotiated, infinitely modifiable, proprietor-friendly regulation that I call "EULAw." Developers of virtual worlds govern their players by nonnegotiable, often inaccessible, contracts. Much of the promise that virtual worlds will develop into influential communication forums³⁶ conflicts with the reality of EULAw. Similarly, the fantastic inspiration and spirit of specific virtual worlds sometimes ironically conflict with these governing agreements. For example, to enter the virtual world of Anarchy Online, a user must agree to abide by an extensive array of rules; included in this list is the antianarchistic admonition that "[y]ou will always follow the instructions of authorized personnel while in Anarchy Online."³⁷ The only implication of a lawless, anarchistic society in Anarchy Online is the difficulty a potential user encounters in trying to find the EULA, which appears to be only available to purchasers.³⁸ Similarly, the infernally named virtual world Helbreath the Heldenian prohibits participant actions, such as organizing into antireligious groups, among other behaviors.³⁹

EULAw represents an important crossover point between real world law and virtual world law. These agreements, governed by real world law, are the primary instrument of law employed by proprietors in the virtual world. While I have argued elsewhere that greater creativity and experimentation likely results from the participants' increased intellectual property rights,⁴⁰ it is important to consider the wide range of restrictions

34. See F. Gregory Lastowka & Dan Hunter, *Virtual Crimes*, 49 N.Y.L. SCH. L. REV. 293, 309 (2005).

35. See Posting of Ren Reynolds to Terra Nova, *Who's Rulz?*, http://www.terranovalogs.com/terra_nova/2005/02/whos_rulz.html (Feb. 24, 2005).

36. See Castronova, *supra* note 6, at 39 (describing the potential of virtual worlds to affect human interaction and communication).

37. Anarchy Online, *Rules of Conduct Within Anarchy Online*, <http://anarchy-online.com/content/corporate/rulesofconduct.html> (last visited Apr. 16, 2006).

38. See *generally* Anarchy Online, http://www.anarchy_online.com (last visited Apr. 17, 2006).

39. See Helbreath USA, *Conduct Rules*, at (9), <http://www.helbreathusa.com/rules.php> (last visited Apr. 17, 2006) ("You may not organize any guilds or groups that are based on, or espouse, any . . . anti-religious . . . or other hate-mongering philosophy.").

40. See Andrew E. Jankowich, *Property and Democracy in Virtual Worlds*, 11 B.U. J. SCI. & TECH. L., 173, 219 (2005).

EULAw imposes on virtual world participants. Not only are property rights limited, but a wide range of speech and behavior is also restricted.

In addition, EULAw attempts to regulate a number of different aspects of both law and gaming environments, including: gamer etiquette, game rules, privacy policies, business policies, and real world law of contracts and intellectual property. The extent of these restrictions suggests that any efforts to limit the impact of real world law must first recognize the way in which EULAw's use of contract law unavoidably shapes all aspects of virtual worlds.

In part, the effectiveness of proprietary enforcement of game rules has led some commentators to endorse EULAw agreements. Commentators, like Julian Dibbell, suggest that EULAs may be a necessary means of preserving game space in the face of outside problems.⁴¹ In fact, Dibbell compares EULAw to constitutionalism, suggesting that the "relation between the game companies and their paying 'citizens'" comes "close enough to blur the line between designing a game and framing a constitution."⁴² After attending an EverQuest player convention, Dibbell suggested that EULAs are "effectively renegotiated on a daily basis," because he witnessed dedicated participants complaining to proprietary representatives who were carefully taking notes on the participant concerns.⁴³ However, Dibbell ignores the absence of any possible negotiation for the average potential participant who is confronted with the choice of whether or not to accept governing agreement terms by clicking the "I accept" button. There is a vast difference between a proprietor being aware of participants' concerns and participants having the ability to negotiate their rights prior to their taking effect.

In some ways, virtual worlds represent some of the most sophisticated online communities because of the potential for interaction

41. See Julian Dibbell, *OWNED! Intellectual Property in the Age of eBayers, Gold Farmers, and Other Enemies of the Virtual State or, How I Learned To Stop Worrying and Love the End-User License Agreement* (Nov. 2003) (transcript available at <http://www.juliandibbell.com/texts/owned.html>).

42. See *id.*; see also Edward Castronova, *On Virtual Economies* (CESifo Working Paper Series No. 752, 2002), available at http://ssrn.com/abstract_id=338500 (describing "the political structure of every virtual world" as consisting of "a group of all-powerful executives surrounded by mobs of angry, harassing supplicants"). As this Article will suggest, most EULAw is far closer to a satire of the U.S. Constitution as EULA than a constitution. See Evan Eisenberg, *Important Changes to Your Citizenship Agreement*, SLATE, Mar. 25, 2005, <http://slate.msn.com/id/2115254>. U.S. constitutional rights would be different under a EULA-type agreement modification format. *Id.* An update to the Fourth Amendment using this format would read, "This amendment affects the Unreasonable Search and Seizure section of the Agreement. Under the new terms of this section, the right to unreasonable search and seizure shall not be abridged." *Id.*

43. See Dibbell, *supra* note 41, at 5.

and creativity.⁴⁴ As contemporary governing agreements develop from earlier virtual world models, EULaw agreements will continuously influence future online communities. Evidence of this influence is demonstrated by the fact that aspects of virtual world EULAs resemble the governing agreements of earlier technologies, such as Internet service providers.⁴⁵ Present-day virtual worlds thereby provide a model for an unsettling future of “walled” Internet communities governed by private law. Like a software company, a virtual world proprietor “consistently imposes restrictive mass-market click-wrap licenses on its customers, who never learned to expect anything more.”⁴⁶ This Article will help to demonstrate these restrictions.

C. Why Use EULaw?

While technology may be seen as a significant constraint on behavior in the digital world,⁴⁷ given the truly digital environments of virtual worlds, private contract law is actually the most significant limitation. Not all share this view. Professor Lawrence Lessig has argued that code is law in cyberspace.⁴⁸ However, if this were true, what need would EULaw serve? Proprietors could simply encode all restrictions.⁴⁹ One explanation for the dominance of governing agreements is the relative ease and cost-effectiveness of writing a document of rules compared to the effort involved in creating a complex behavior-controlling code. For example, James Grimmelman points out that code cannot adequately address participant manipulation of coding errors that endow the user with unexpected powers.⁵⁰ Additionally,

44. See, e.g., Dave Kosak, *Second Life (PC)*, GAMESPY.COM, Dec. 10, 2002, <http://archive.gamespy.com/previews/december02/secondlifepc/index.shtml> (discussing the range of creative options available in the game *Second Life*); see also Castronova, *supra* note 6, at 39 (discussing “shimmering virtual Walmarts [sic] in the sky”).

45. See Sandra Braman & Stephanie Lynch, *Advantage ISP: Terms of Service as Media Law*, in THINKING RIGHTS AND REGULATIONS: INSTITUTIONAL RESPONSES TO NEW COMMUNICATIONS TECHNOLOGIES 249, 256-57 (2003) (discussing the control functions undertaken by ISPs through contract including limitations of liability and transfer of intellectual property rights from users).

46. James Gibson, *Re-Reifying Data*, 80 NOTRE DAME L. REV. 163, 211 (2004).

47. See Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 509 (1999).

48. LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 6 (2000).

49. See Posting of Richard Bartle to Terra Nova, Law Is Code, http://terranoa.blogs.com/terr_nova/2004/08/law_is_code.html (Aug. 18, 2004) (discussing certain commands that cannot be encoded).

50. See Grimmelman, *supra* note 21, at 2.

experiments in technology, such as speech filters, have shown some of the difficulties in attempting to encode such restrictions.⁵¹

II. ACCESSIBILITY AND COMPLEXITY

A. *Accessibility and Complexity: The Gatekeepers of EULaw*

While EULaw agreements are widely considered restrictive, most of the specific knowledge about individual agreements is isolated to the various communities native to particular virtual worlds.⁵² Given the expense of participation in the typical virtual world,⁵³ most participants will be unlikely to participate simultaneously in multiple virtual worlds, thereby making the average user uninformed in his decisions and unaware of issues throughout the industry. Moreover, few participants are likely to have read the lengthy and obscure EULaw agreements. As Professors Sandra Braman and Stephanie Lynch said in regard to ISP TOS, the restrictions of rights through TOSs “occur beneath the radar in contracts unread and lawsuits scattered throughout topic-specific analyses.”⁵⁴ An analysis of EULaw must necessarily begin with the consideration of whether the average participant is able to access the governing agreement, and whether the average participant is able to comprehend the often complex document.

B. *Accessibility*

Accessibility of EULaw documents is an important consideration. Lack of access to documents or issues of comprehension of complex agreements may cause virtual world participants to ignore the terms of

51. See Posting of The Alpha Riot Grrrlz to Second Life Filter, Profanity Filter or Thought Filter?, <http://www.alphavilleherald.com/archives/000081.html> (Jan. 09, 2004) (describing a test of words blocked by the profanity filter in The Sims Online virtual world).

52. See, e.g., Star Wars Galaxies Official Forums, <http://forums.station.sony.com/swg> (last visited Apr. 17, 2006) (displaying list of postings discussing issues relating to the virtual world, Star Wars Galaxies); WoW General Discussion, <http://forums.worldofwarcraft.com/board.aspx?fn=wow-general> (last visited Apr. 17, 2006) (displaying list of postings discussing matters relating to the virtual world, World of Warcraft).

53. See SoftForAll.com, World of Warcraft, <http://www.softforall.com/store/P=B000067FDW.html> (last visited Apr. 17, 2006) (selling World of Warcraft software for \$49.99); World of Warcraft, Frequently Asked Questions, *supra* note 9 (“After the end of the free month included with the game, you will need a subscription in order to continue playing the game. You have three options, as you will see when you create your account: a month-to-month package at \$14.99 per month, a three-month plan at \$13.99 per month, or a six-month plan at \$12.99 per month.”).

54. See Braman & Lynch, *supra* note 45, at 249.

EULAw agreements as they are currently presented.⁵⁵ Accessibility raises the question of whether it is even possible for a potential participant to examine EULAw documents to make a considered choice before participating.⁵⁶ For a potential participant who might be inclined to judge a world based upon an examination of the governing agreement, his decision could be encumbered by the inability to locate the agreement. Some worlds' rules are apparently impossible to find without having bought the software.⁵⁷ The inability to access governing agreements prior to a purchase is not necessarily restricted to virtual world proprietors.⁵⁸ Proprietors are inclined to adopt a form of shrink-wrap licensing as opposed to posting governing agreements on the Internet for customer review prior to purchase.⁵⁹ As Professor James White stated, "[i]rrespective of the efficiency argument, I believe the law should insist that a reasonably diligent offeree at least be able to find the terms before he is bound."⁶⁰

Of the agreements surveyed, accessibility was mostly favorable: 70.83% of the virtual worlds had what I consider "easily accessible" documents.⁶¹ Generally, the proprietors who were large corporate

55. Historical homogeneity of contractual terms may also explain the complexity of governing agreements. The language in governing agreements is likely to change, however, as more proprietors increasingly experiment with participant rights and EULAw issues. *See, e.g.*, Second Life, Terms of Service, at 5.3, <http://secondlife.com/corporate/tos.php> (last visited Apr. 17, 2006) (granting property rights to participants in their content); *see also* SOE Plans Official Online Auction Site for EQII, GAMEDAILY BIZ, Apr. 20, 2005, http://biz.gamedaily.com/features.asp?article_id=9443§ion=feature&email= (describing Sony's plans for an in-game virtual property auction).

56. As a preliminary matter, however, my analysis of the accessibility issue is complicated by practical issues. Some virtual world governing agreements were completely inaccessible to nonsubscribers. Because I was unable to access these documents, I did not include these cites in my larger analysis. To include these cites would incorrectly suggest that these documents did not contain certain clauses or restrictions. However, this exclusion raises issues regarding the overall numerical accuracy of my accessibility data. The exclusion of some virtual worlds implies a possibly higher rate of accessibility.

57. *See, e.g.*, Anarchy Online News and Community, *supra* 19.

58. *See* Posting of Ed Foster to Ed Foster's Gripe Log, Settling with Secret Terms, <http://www.gripe2ed.com/scoop/story/2005/1/11/1939/04481> (Jan. 11, 2005, 01:39 PDT). Microsoft refused to provide a pre-purchase copy of a software license stating,

And, it so happens, in 2002 I went through the exercise of calling Microsoft—as a prospective customer, not a journalist—to ask that they send me the EULA for one of its products that was not to be found on their Web site. They ultimately refused to email, mail, or fax [the EULA] to me, saying it was their policy that customers could only see the EULA after purchasing the product.

Id.

59. *See id.* (describing how Microsoft refused to make a software license agreement available prior to purchase).

60. James White, *Autistic Contracts*, 45 WAYNE L. REV. 1693, 1721 (2000).

61. *See infra* Annex A, at (8).

developers and publishers, such as NC Interactive and Warner Brothers Interactive Entertainment, posted their governing agreements directly to their virtual world site. For example, Sony Online Entertainment conspicuously posts all of the EULAw documents for EverQuest in the Rules and Policies section of the EverQuest Home Page.⁶² This convenience, however, was often undermined in a variety of ways. Some of the virtual worlds that provided access had a large number of very complex documents⁶³ or provided the equivalent of an “obstructed view” by displaying their agreements in small textboxes.⁶⁴ Frequently, these text boxes show only several lines of the document at a time, causing difficulty in reading and scanning the different sections of the agreement. This issue of legality has concerned several judges. For example, in holding that consumers received notice of the license agreement, the court in *Pollstar v. Gigmania, Ltd.* noted that the agreement was provided by “small gray text on a gray background.”⁶⁵ These small text boxes do not facilitate printing; instead, they restrict a participant’s ability to print a copy for careful review or as a memorandum of contractual rights. While courts have disregarded the significance of such an impediment to printing,⁶⁶ the proprietary coding decisions regarding the presentation style of governing agreements do carry political implications.⁶⁷

Technological choices seem aimed at reducing the ability to access and review the EULA by making the process difficult and annoying. In these cases, code reduces the access to law. While vendors of software employing shrink-wrap licensing “can put the entire terms of a contract on the outside of a box only by using microscopic type, removing other information that buyers might find more useful (such as what the software does and on which computers it works), or both,” there is no such physical limitation on the Internet.⁶⁸ Proprietors of virtual worlds

62. See EverQuest Players, <http://eqlive.station.sony.com> (last visited Apr. 17, 2006) (displaying links to EULAw agreements under Rules and Policies).

63. See *id.* (showing ease of access for virtual worlds, including Lineage and Lineage II, facilitated by NC Interactive and The Matrix Online, operated by Warner Brothers).

64. See, e.g., Alliance Ascension, Terms of Service, <http://64.207.173.112> (last visited Apr. 17, 2006) (displaying the Terms of Service in an opened window that allows only eight lines of text to be read at one time).

65. 170 F. Supp. 2d 974, 981-82 (E.D. Cal. 2000).

66. *In re RealNetworks, Inc., Privacy Litigation*, No. 00 C 1366, 2000 WL 631341, at *3-4 (N.D. Ill. 2000).

67. See Lawrence Lessig, *Code and Constitution*, 27 CUMB. L. REV. 1, 9 (1997) (discussing how coding decisions become political decisions when code is a regulatory device).

68. *ProCD v. Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir. 1996); see Gabaix & Laibson, *supra* note 10, at 7 (“[I]n the modern economy, information dissemination costs are sometimes quite low, implying that gratuitous shrouding is needed to explain why many firms make it difficult to observe the prices of their add-ons.”).

maintain regular and sustained Internet contact with their customers. Some virtual worlds, such as EverQuest, display the license terms each time a participant enters the virtual world, giving the participant repeated opportunities to review its terms. This approach was approved by the United States Court of Appeals for the Seventh Circuit in *ProCD, Inc. v. Zeidenberg*.⁶⁹ To some extent, virtual world agreements that hide terms prior to purchase seek to import the most proprietor-friendly aspects of shrink-wrap agreements in the click-wrap form, even when the physical necessity for review and assent is no longer necessary.⁷⁰ While these virtual world agreements may be more accessible than the agreement in *Specht v. Netscape Communications Corp.*, there is a greater sense of the intentional obscuring of access to the EULA agreements similar to the concealing layout that led the *Specht* court to find that consumers had never assented to a license agreement.⁷¹

Given the fact that EULA agreements are complex and govern the rights of participants in these worlds, the current state of accessibility is inadequate. This situation is problematic given that a number of virtual worlds require the participant to be familiar with the terms of the governing agreements. Because of even greater concern, the participant is required to regularly check the document to be aware of any changes or modifications that the proprietor may make without notice.⁷² The combination of inaccessible documents and the proprietor's ability to modify documents without notice severely limits rights available to participants.

Compare this method of EULA to the open system of corporate filings that the Securities and Exchange Commission (SEC) requires of public companies. SEC documents are generally made publicly available on the Internet by a number of organizations, allowing potential shareholders the opportunity to review corporate charters and regular

69. See *ProCD*, 86 F.3d at 1452.

70. See GEORGE B. DELTA & JEFFREY H. MATSURA, LAW OF THE INTERNET 10-57 (2005) (comparing click-wrap agreements in which "a party manifests agreement to the contract terms offered by the other party by clicking an icon or button to indicate assent" with shrink-wrap agreements "which do not require any affirmative manifestation of assent").

71. See 306 F.3d 17, 35 n.18 (2d Cir. 2002).

72. The proprietor reserved the right to amend and modify agreements without notice in 39.58% of the virtual worlds studied. See *infra* Annex A, at (66); see also, e.g., *Astoria 3*, Terms, <http://www.astonia.com/terms.html> (last visited Apr. 17, 2006) ("Intent Software may revise this Agreement at anytime, and such revision shall be effective thirty days after posting of the revised Agreement on the Web Site. You agree to review the Agreement on the Web Site periodically to become aware of such revisions.").

filings.⁷³ In contrast, no centralized database of EULaw rules and agreements exists to provide comparison for potential participants. While I have argued that statutes of incorporation are premature as they will codify existing norms, the development of a database of EULaw that allows participants to compare and contrast their rights would be a positive step.⁷⁴

Unfortunately, smaller and open source worlds, which may be more inclined to experimentation in content than larger more mainstream corporate-run worlds, make it more difficult for a potential participant to consider his rights prior to signing up. For example, the home page of Daimonin, an open source virtual world, is welcoming. It invites users to “join [the Daimonin project] now”⁷⁵ but does not make the rights of potential participants easily apparent. However, the open-source nature of the project is clear, and the use of the GNU (an operating system compatible with Unix) General Public License⁷⁶ is comprehensible. Open-source worlds will need to make clear the rights of potential participants in order to become viable alternatives to proprietary virtual worlds. The focus on ownership of the underlying intellectual property with the collaborative nature of the project may make open-source proprietors less inclined to post restrictive rules than more authoritarian corporate proprietors.⁷⁷ Accessibility to governing rules is important if open-source worlds are to avoid chaotic disagreements when their populations expand beyond a dedicated core community.

C. Complexity

Accessibility alone is insufficient for the EULA to be useful to the potential participant. Understandability is also crucial. Continuing the analogy of the SEC, the average person may face a degree of difficulty in

73. See, e.g., 10KWizard: Subscription Options, <https://secure.10kwizard.com/subscribe.php?g> (last visited Apr. 17, 2006) (for subscription database-mining); Microsoft Investor Relations, SEC Filings, <http://www.microsoft.com/msft/sec.msp> (last visited Apr. 17, 2006) (for SEC filings from public company Web sites); U.S. Securities and Exchange Commission, Search the EDGAR Database, <http://www.sec.gov/edgar/searchedgar/webusers.htm> (last visited Apr. 17, 2006) (for SEC filings); Yahoo! Finance, SEC Filings News Archive, <http://biz.yahoo.com/reports/edgar.html> (last visited Apr. 17, 2006) (for daily SEC filings).

74. See Jankowich, *supra* note 40.

75. See Daimonin MMORPG, FREE Fantasy Online Multiplayer Game, <http://www.daimonin.net> (last visited Apr. 17, 2006).

76. See GNU General Public License, <http://www.gnu.org/copyleft/gpl.html> (last visited Apr. 28, 2006).

77. See Daniel Terdiman, *Gamers Eye Open Virtual Worlds*, WIRED NEWS, Dec. 2, 2004, <http://www.wired.com/news/games/0,2101,65865,00.html> (describing Professor Peter Ludlow's hopes for open-source virtual worlds).

comprehending the information being disclosed through easily accessible filings, even with initiatives by the SEC such as the “Plain English” rules.⁷⁸ While larger corporate proprietors, like Sony or Warner Brothers, are generally good about allowing participants relatively easy access to game documentation, these large corporate proprietors frequently burden their users with numerous documents. A benefit of this documentation model is that a participant can consult the most appropriate document (the Naming Policy for example) without having to read through others.⁷⁹ That said, the participant is asked to be familiar with an extensive array of documents of varying degrees of complexity. The difficulty of understanding the range of EULAs encountered is such that Professor Edward Felten has suggested creating a service that would rate EULAs with a single grade on an “A-to-F scale” to overcome the difficulty in understanding these documents.⁸⁰ Technology allows for increased abilities to review the EULA in combination with decreased complexity. For example, Creative Commons presents potential users with a plain English interpretation of its license choices as a supplement to the full license agreements, while noting that such summaries may not cover every aspect of the legal language of the full license.⁸¹

EULAw frequently depends on complex organizational structures. Although EULAs have become a shorthand term for the agreements that govern virtual worlds (and other software-based products), in reality there are often several interconnected documents that provide laws. For example, a potential participant in the virtual world EVE Online is encouraged to master the following documents: (1) the End User License Agreement, (2) the Terms of Service, (3) Forum Rules, (4) Chat Rules, (5) EVE Subscription Fees and Payment Options, (6) Web site Terms of Use Agreement, (7) EVE Online User and Character Name Policy, (8) EVE Online Reimbursement Policy, and (9) the Suspension

78. Regulations by the SEC passed in 1998 require all disclosure to be in “plain English.” See OFFICE OF INVESTOR EDUC. & ASSISTANCE, U.S. SEC. & EXCH. COMM’N, A PLAIN ENGLISH HANDBOOK: HOW TO CREATE CLEAR SEC DISCLOSURE DOCUMENTS (1998), available at <http://www.sec.gov/pdf/handbook.pdf> (describing how to prepare filings that conform to the SEC rules).

79. See, e.g., Naming Policy, Dark Age of Camelot Knowledgebase, <http://support.darkageofcamelot.com/kb/article.php?id=168> (last visited Apr. 17, 2006) (describing naming policy of Dark Age of Camelot); but see *id.* (listing fifteen Player Policies on same Web page).

80. Posting of Edward W. Felten to Freedom to Tinker, Taming EULAs, <http://www.freedom-to-tinker.com/?p=478> (last visited Apr. 17, 2006).

81. See, e.g., Creative Commons Licenses, <http://creativecommons.org/license/meet-the-licenses> (last visited Apr. 17, 2006) (summarizing available licenses for publishers while providing links to the full legal text of each license).

and Ban Policy.⁸² Then, there is the Legal System of EVE Online itself that must be considered as well as the game-play and interface to be mastered for satisfying participation.⁸³ Other significant virtual worlds such as World of Warcraft make use of a similar array of documents.⁸⁴ Dark Age of Camelot uses fifteen documents for this purpose.⁸⁵ While most virtual worlds do not have this number of agreements, most have several.⁸⁶ The median number of documents governing player rights in virtual worlds from the worlds studied in this survey is 3.60.⁸⁷ Again, the terms of the documents frequently allow the Proprietor to modify them without notice.⁸⁸

While understanding the interrelation between various agreements is a common part of legal training for young attorneys, it is likely to present a complex problem for the average user.⁸⁹ Most participants will be unaware of the web of regulations that govern their actions in various spheres of the virtual world. While there is something to be said for categorization so that players need not consult an enormous document in order to find what they need, this complexity can discourage a complete understanding of the EULA. In many cases, several documents cover similar territory in varying degrees of specificity. While the most specific document might be the most useful to the participant, the more abstract documents may give a better sense of the power of the proprietor. Documents use legal terms such as “incorporation by reference” to build the web of regulations governing player rights. Yet these terms, well understood by transactional lawyers, are unlikely to be widely understood by participants. The complexity of the documents, their number, and the

82. See EVE Online, Rules and Policies, <http://www.eve-online.com/pnp> (last visited Apr. 17, 2006) (listing these policies).

83. See EVE Online, Frequently Asked Questions, http://www.eve-online.com/faq/faq_05.asp (last visited Apr. 17, 2006) (describing the in-game legal system).

84. See, e.g., World of Warcraft Community Site, In-Game Support, <http://www.blizzard.com/support/wowgm/?id=agm01712p> (last visited Apr. 17, 2006) (describing ten in-game policy documents).

85. See Player Policies, Dark Age of Camelot Knowledgebase, <http://support.darkageofcamelot.com/kb/category.php?id=4> (last visited Apr. 17, 2006).

86. See *infra* Annex A, at (7).

87. See *id.*

88. See *id.* at (66) (demonstrating that 39.58% of the virtual worlds surveyed allowed the proprietor to modify agreements without notice).

89. Use of multiple documents posted on game and corporate Web sites is not only confusing for participants. For example, the proprietor NCSOFT had posted two different versions of the User Agreement for Lineage online: one version modified March 2005, another version last modified January 20, 2003. See NCSOFT: Lineage, User Agreements, <http://www.lineage.com/support/terms.html> (last visited Apr. 18, 2006) (displaying agreement last modified Jan. 20, 2003); PlayNC.com, User Agreement, http://www.plaync.com/help/eula_lineage.html (last visited Apr. 18, 2006) (displaying agreement last modified March 2005).

modification provisions create problems for a potential participant in trying to track her rights.

The complexity of regulation in the EULA increases the likelihood that participants may be disciplined for either reasons they do not understand or for reasons that obscure the true nature of the dispute. Much in the way that the extensive nature of traffic laws means that a driver is likely to be breaking the law and therefore subject to law enforcement attention at any time,⁹⁰ the extensive web of regulation that governs virtual worlds is likely to provide proprietors with a reason to remove a participant at any time. This is to some extent what Professor Peter Ludlow claims happened to him when he was expelled from The Sims Online.⁹¹ While he was expelled from The Sims virtual world for advertising his Weblog about The Sims within the virtual world in violation of The Sims EULA agreements, he suggests that this was just an excuse used by the world proprietors to punish him for writing about a scandal within the virtual world.⁹² Professor Ludlow's suspicion that The Sims proprietor was able to use other violations suggests the power of proprietors to remove participants from virtual worlds like The Sims Online.⁹³ Regardless of the exact nature of the Ludlow dispute, the danger of the situation he describes, in which proprietors can punish participants they disapprove of by using esoteric rules, seems plausible after a review of the range of regulation available in some worlds.⁹⁴ The interconnected and complex documents governing virtual worlds suggest that virtual worlds with an intense level of regulation will be unable to evolve into important communication venues.⁹⁵ The effect is even more

90. See, e.g., Bill Dedman, *Seeing Race Bias, Judge Tosses Evidence*, BOSTON GLOBE (Sept. 18, 2003), available at http://www.boston.com/globe/metro/packages/tickets/091803_folo.shtml (describing how police used little-known Massachusetts law that prohibits driving in the left lane "except when passing or preparing for a left turn" as the basis for a traffic stop).

91. See Hiawatha Bray, *Justice Has Its Price in Sim World*, BOSTON GLOBE, Jan. 14, 2004, available at http://www.boston.com/news/globe/living/articles/2004/01/14/justice_has_its_price_in_sim_world (discussing Professor Ludlow's claim that his violation of a hypertext link policy between the virtual world of The Sims Online and the open Internet was a pretext used to punish him for reporting on scandalous behavior within the virtual world of The Sims Online); see also Eric Goldman, *Online Gaming and Free Speech Showdown at the Virtual Corral*, INFORMIT.COM, Aug. 12, 2005, <http://informit.com/articles/article.asp?P=405720>.

92. See Farhad Manjoo, *Raking Muck in The Sims Online*, SALON, Dec. 12, 2003, http://www.salon.com/tech/feature/2003/12/12/sims_online_newspaper/index_np.html (last visited Apr. 27, 2006) (discussing Ludlow's expulsion and his suspicions regarding the Proprietors of The Sims Online).

93. See *id.*

94. See, e.g., *infra* Annex A, at (70) (calculating that 75.00% of the virtual worlds surveyed use EULA agreements that allow proprietors to terminate participants at the proprietor's discretion); see also Many Types of Ambiguity: Broad Terms *infra* Part V.A.

95. See Castronova, *supra* note 6, at 39; see also Balkin, *supra* note 6, at 2044.

chilling when one considers how much regulation is directed at participant speech, as discussed *infra* Part IV.

D. Angst over Interpretation and Information

The power of virtual world proprietors to modify the EULAw agreements at will (and often without notice)⁹⁶ suggests that it is difficult for the average participant to be aware of changes to the documents or interpretations of them. A problem with private rulemaking to this degree is that the process of elaboration and clarification familiar under the common law through court interpretation of statutes⁹⁷ is not apparent in EULAw, and interpretation of EULAw is more likely to be and appear arbitrary. While various chat forums might provide a natural place for participants to congregate to discuss rule changes and interpretations, the usefulness of these forums for that purpose can be cast into doubt when one considers that proprietors are running the forums as well. For example, the Forum Rules for EVE Online state: “Warnings and bans are not to be discussed on the forum. Such matters shall remain private between the CCP and the user. . . . Likewise, discussions regarding moderator actions are not permitted on the forum.”⁹⁸ Of the virtual worlds surveyed, 8.33% used similar restrictions.⁹⁹ While there may be privacy considerations for maintaining the confidentiality of warnings and bans, such a policy also preserves proprietor decision-making in virtual worlds from accusations of inconsistency or arbitrariness. A sense of mysterious power (akin to the wizard power often referred to with game proprietors)¹⁰⁰ is preserved because judgments cannot be compared and the violators who are banned effectively disappear. The EVE Forum Rules also state: “Your forum account is linked to your game account. If you are suspended or banned from the game, you will not be able to post. If you are suspended from the message boards, your game account will be reviewed and you may be banned from the game, as well.”¹⁰¹

96. See *infra* Annex A, at (65) (calculating frequency that the virtual worlds surveyed use agreements allowing modification at will); *id.* at (66) (calculating frequency that the virtual worlds surveyed use agreements allowing modification without notice).

97. See, e.g., *McPherson v. Buick Motor Co.*, 111 N.E. 1050, 1050-54 (N.Y. 1916) (providing a prototypical example of the common law approach in which Justice Cardozo carefully explores influences and precedents in changing liability rules).

98. EVE Online, Rules & Policies, <http://www.eve-online.com/pnp/forumrules.asp> (last visited Apr. 27, 2006).

99. See *infra* Annex A, at (31).

100. See Lastowka & Hunter, *supra* note 11, at 54-55.

101. EVE Online, Rules & Policies, *supra* note 98.

III. IDENTITY

A. *Identity and Anonymity*

Upon locating and analyzing the EULAw documents, it quickly becomes apparent that the question of identity in virtual worlds is an essential, but vexed, issue. Virtual worlds are intended to be sites where participants can immerse themselves in fantastic or unusual environments and situations under the guise of a new and sometimes fanciful identity. The game designer Richard Bartle says, “[The] celebration of identity is the fundamental, critical, absolutely core point of virtual worlds.”¹⁰² One can argue that virtual worlds exist primarily to provide new and easily adopted identities. Yet, the ease of identity creation is a source of anxiety for virtual worlds. This is evidenced in the results of this survey of EULAw agreements, showing numerous clauses intended to force participants to reveal their real world identity and maintain their new virtual identity within the world.¹⁰³

Identity is one of the prevailing concerns throughout EULAw. Professors F. Gregory Lastowka and Daniel Hunter have argued that exit from virtual worlds is not a viable option since it requires a participant to abandon the community the participant has joined and the identity the participant has developed.¹⁰⁴ This analysis does not question the role of Terms of Service in shaping identities from the outset. Several provisions directly govern identity. Of the virtual worlds surveyed, 66.67% require the participant to provide true identification information to the proprietor, and 87.50% of the virtual worlds surveyed prohibit participants from pretending to be associated with the proprietor.¹⁰⁵

More significantly, other provisions shape identity less directly.¹⁰⁶ Governing provisions require participants to be truthful to proprietors, not to share game accounts (which would cause participants’ identities to become more diffuse), and not to use software programs to play the game

102. RICHARD BARTLE, *DESIGNING VIRTUAL WORLDS* 159 (2003).

103. *See infra* Annex A, at (18) (showing 33.33% of virtual worlds surveyed prohibit the use of inappropriate names); *id.* at (19) (showing 70.83% of virtual worlds surveyed prohibit the use of offensive names); *see also id.* at (13) (showing 66.67% of virtual worlds surveyed require true information to be provided to proprietors); *id.* at (14) (showing 87.50% of virtual worlds surveyed prohibit participants from imitating or pretending to be associated with proprietors).

104. *See* Lastowka & Hunter, *supra* note 11, at 62 (describing concerns with virtual world exit).

105. *See infra* Annex A, at (13)-(14).

106. *See id.* at (13)-(14), (18)-(19) (providing examples of identity-restricting provisions of EULAw and their frequency).

(which ensures all players are humans).¹⁰⁷ Other regulations prohibit corporations and other business entities from holding accounts, with 22.92% of virtual worlds surveyed using such restrictions.¹⁰⁸ For example, Dark Age of Camelot prohibits business associations of all types from establishing an account.¹⁰⁹ Even more expansively, the EVE Online EULA states:

Accounts may not be used for business purposes. Access to the System and playing EVE™ is intended for your personal entertainment, enjoyment and recreation, and not for corporate, business, commercial or income-seeking activities. Business entities and anyone who is acting for or on behalf of a business or for business purposes may not establish an Account, access the System or play EVE™. Accessing the System or using the Game for commercial, business or income-seeking purposes is strictly prohibited.¹¹⁰

Other restrictions control identity-related matters such as naming¹¹¹ and, more broadly, speech.¹¹²

All of these restrictions attempt to use EULAw to fix an identity on participants who have likely entered the virtual world for the fun of taking on a new identity. Professor Susan Crawford finds this situation dire, noting that EULAw enforceability means “the law of identity online is private, contractual law. The use of force online—the removal of identity—has been handed over to private parties.”¹¹³ Professor Crawford suggests various alternate solutions such as an international body governing online identity and the rise of guild or group power.¹¹⁴ The initial desire among participants to seek new online identities in virtual

107. *See id.* at (13) (calculating that 66.67% of the virtual worlds surveyed use agreements that stipulate providing truthful personal information to proprietors); *see also id.* at (9) (calculating that 45.83% of the virtual worlds surveyed prohibit sharing of accounts); *id.* at (50) (calculating that 85.42% of the virtual worlds surveyed prohibit the use of outside software to play or affect the virtual world). Proprietors arguably might also be eager to restrict use of programs that reduce the time-consuming and lucrative ladder of achievement that operates in most games.

108. *See id.* at (12).

109. Dark Age of Camelot, End User Access and License Agreement, at 1.B, <http://support.darkageofcamelot.com/kb/article.php?id=072> (last visited Apr. 27, 2006).

110. EVE Online, Rules & Policies, End User License Agreement, at 2.A, <http://www.eve-online.com/pnp/eula.asp> (last visited Apr. 27, 2006).

111. *See infra* Part III.B.

112. *See infra* Part IV.

113. Susan Crawford, *Who's in Charge of Who I Am?: Identity and Law Online*, 1 N.Y.L. SCH. L. REV. 211, 221 (2004).

114. *See id.* at 217-18 (suggesting that online identity in the future may be so important that an international body may be necessary to solve participant-proprietors disputes that threaten those identities); *see also id.* at 228-29 (suggesting that the formation of groups online may be a counter-force to proprietor termination power).

worlds suggests that despite the restrictions, participants are already inclined to view identity as fluid and unlikely to abide by the restrictions. Part of the difficulty in enforcing identity restrictions can be seen with the rise of outside influence challenging the identification of regulations, such as GamePal that rents high-level characters to play in a variety of virtual worlds.¹¹⁵

These identity provisions are likely to reduce the possibilities for social experimentation. Because the threat of punishment is severe, secret, and potentially arbitrary,¹¹⁶ participants are likely to overcompensate in seeking to remain within the guidelines of behavior set by proprietors. As we will see, the guidelines governing speech and behavior in virtual worlds are very extensive,¹¹⁷ thus, participants are likely to moderate their behavior in virtual worlds extensively in order to avoid the issue of infringing behavior. Consequently, it is likely that many identities created by participants will be strongly shaped by Terms of Service restrictions, perhaps more so than by the group interaction that Professor Crawford describes.¹¹⁸ This raises the question of the validity and robustness of identities in virtual worlds.

Identity provisions of many EULAw agreements require the actions and identities of participants to be transparent to proprietors while allowing proprietors a degree of opacity by prohibiting participants from discussing proprietors' actions.¹¹⁹ Participants suffer from a lack of information about proprietors and their prior decisions, but as documented above, proprietors can feel confident that they can have a grasp of who their customers are. Participants, however, can subvert this knowledge by attempting to maintain what Professor Tal N. Zarsky terms "pseudonymity," in which a virtual identity, like the ones taken on by participants in virtual worlds, is used as an identity mask.¹²⁰ Companies and individuals that trade in accounts or that rent accounts are examples

115. See GamePal, Internet Gaming Services, Rentals, <http://www.gamepal.com/rentals.php> (last visited Apr. 27, 2006) (describing the process for renting various game accounts).

116. See *infra* Part V.B.

117. See *infra* Part IV; see also *infra* Annex A, at (56) (showing that 25.00% of virtual worlds surveyed prohibited participants from using the virtual worlds for anything beyond what EULAw specifically permits).

118. See Crawford, *supra* note 113, at 213-15.

119. See, e.g., EVE Online, Rules & Policies, *supra* note 98 (discussing prohibition on discussion of punitive warnings and bans by proprietors); see also Tal N. Zarsky, *Thinking Outside the Box: Considering Transparency, Anonymity, and Pseudonymity as Overall Solutions to the Problems of Information Privacy in the Internet Society*, 58 U. MIAMI L. REV. 991, 995-1004 (discussing use of the terms transparency and opacity in terms of privacy and identity).

120. See Zarsky, *supra* note 119, at 1030 (defining "pseudonymity").

of the possibilities for pseudonymity in virtual worlds that exceed opportunities elsewhere.¹²¹

The ability to achieve pseudonymity in virtual world settings can therefore be considered fairly strong under EULAw in comparison to code. The penalty for violating the EULAw transparency requirements is likely to be limited to expulsion. While expulsion might be disruptive to some aspects of identity,¹²² especially with the possibilities for identity fraud and the development of a fairly robust market for accounts and characters,¹²³ expulsion is not the equivalent of banishment. A desire to maintain some degree of knowledge of its consumers' identities may be another reason companies, like Sony, seek to bring character auctions under control. In addition, some companies, while generally prohibiting other virtual trading, allow internal mechanisms for trading accounts, perhaps seeking to control an inevitable process.¹²⁴ In this type of exchange, participant transfer of characters is likely to result in proprietors collecting more information. In a regime of legitimate character transfers, participants are likely to be more forthcoming with their personal information to proprietors in order to protect their ownership of the characters. Sony's decision could be an attempt to implement an architectural or code-based solution to a place where EULAw fails. Whether the EULAw solution that threatens termination of the architectural model is preferable in terms of freedom depends on consequences to participants.

B. Naming Restrictions

Many of the concerns about identity are mirrored in restrictions on character names. Of the virtual worlds surveyed, 25.00% had naming

121. See, e.g., GamePal, Internet Gaming Services, <http://www.gamepal.com> (last visited Apr. 27, 2006) (offering a variety of services including trading and renting virtual property); IGE.com, <http://www.ige.com> (last visited Apr. 27, 2006) (operating a secure network of buying and selling sites for massively multiplayer online games (MMOGs)).

122. See, e.g., Crawford, *supra* note 113, at 221 (discussing concerns with fragile protection of identity in virtual worlds); Lastowka & Hunter, *supra* note 11, at 62 (describing identity issues related to virtual world exit).

123. Aleks Krotoksi, *Virtual Trade Gets Real*, GUARDIAN UNLIMITED (London), June 16, 2005, available at <http://technology.guardian.co.uk/online/story/0,3605,1506928,00.html> (describing the growth of trade in virtual property).

124. See, e.g., Dark Age of Camelot, End User Access and License Agreement, *supra* note 109, at 1.E (stating that “[y]ou shall be permitted to transfer once to another person eligible to obtain an Account your right to access and use your Account (but not items, characters and attributes of characters separate from the Account)” on a series of conditions); Sims Online Stratics, The Sims Online User Agreement, <http://sims.stratics.com/content/official/ua.php> (last visited Apr. 27, 2006) (describing account transfer procedure).

policies, while 70.83% had some sort of restriction on names.¹²⁵ Naming policies are aimed at preventing participants from creating offensive names of all sorts, including racist and obscene names,¹²⁶ and inappropriate names, such as “Bill Clinton” in a fantasy genre world.¹²⁷ The EverQuest Naming Policy, for example, prohibits “[n]on-fantasy oriented names from popular media” and “[c]ommon words and phrases that would not be found in the place and time setting of the game.”¹²⁸ While some of these provisions are relatively acceptable, there is a tendency to overreach. This is indicative of the lack of bargaining power in EULaw agreements, where proprietors enact rules that seek to manage increasingly minor problems, creating a web of EULaw regulation that limits flexibility. For example, the Code of Conduct of the virtual world Shadowbane states:

You shall not choose a name that is specifically designed so that your gaming character becomes hard to contact in-game by Ubisoft, Wolfpack Studios or other players. This includes creating names containing the same character repeatedly, or use of nonalphanumeric characters. This also includes character names made up of only vowels or consonants or containing characters that could be mistaken for other characters such as using an uppercase ‘i’ in place of a lowercase ‘L.’¹²⁹

C. Restrictions on Use

Many proprietors shape their identity by restricting how customers can use their service. A number of proprietors explicitly prohibit businesses from acquiring accounts.¹³⁰ Others restrict the use of commercial speech by prohibiting participants from communicating business pitches or advertising to other participants.¹³¹ Others use broadly written clauses to preserve maximum flexibility or include provisions that only allow participants to use the virtual world for gaming

125. See *infra* Annex A, at (15) (calculating naming policies clauses); *id.* at (19) (calculating frequency of prohibition on offensive names).

126. See *id.* at (16) (calculating that 43.75% of the virtual worlds surveyed used prohibitions on racist names); *id.* at (17) (calculating that 47.92% of the virtual worlds surveyed used prohibitions on obscene or sexual names).

127. See *id.* at (18) (calculating that 33.33% of the virtual worlds surveyed used prohibitions on inappropriate names).

128. EQLive, Name Change Service, Character Naming Policy, at 5, 6, http://store.station.sony.com/eg_char_renames (last visited Apr. 27, 2006).

129. Shadowbane Code of Conduct, at 10.X, http://care.ubi.com/support/ubisoft.cfg/php.exe/enduser/std_adp.php?p_sid=t61lnVDg&p_lva=&p_fagid=1 (last visited Apr. 27, 2006).

130. See *infra* Annex A, at (12) (calculating that 22.92% of the virtual worlds surveyed prohibit businesses from holding accounts).

131. See *id.* at (26) (calculating that 79.17% of the virtual worlds surveyed prohibit commercial speech by participants).

purposes.¹³² Clearly, legitimate reasons can be found behind many of these restrictions, but they are frequently extensive and overbroad. The unilateral nature of EULaw means that restrictions are not likely to be responsive to participant concerns and, hence, are likely to encourage stasis and restrict any sort of evolution. For example, restrictions on commercial speech or restrictions on sales of virtual property may discourage potential participants from joining a virtual world. These discouraged participants may have joined a virtual world to profit or reduce expenses while participating in an expensive medium,¹³³ and they may have been beneficial to the environment. Some experimentation is taking place in virtual worlds where the possibilities of in-world commerce are no longer restricted to proprietors, such as in the virtual worlds *There* and *Second Life*, with consequent expansion of content.¹³⁴

In addition, many worlds restrict how participants may interact with virtual worlds. The requirement of drudge work in order to reach a more enjoyable level of the game leads many participants to use software programs to perform for them the tedious repetitive tasks necessary for advancement.¹³⁵ Many virtual worlds prohibit this form of interaction.¹³⁶ Yet such prohibitions seem puzzling and perverse. Automation is a routine solution to repetitive tasks in the real world, and it is no surprise that technologically adept participants would adopt it in virtual worlds as well. Similarly, proprietors do not seek to otherwise even the playing field among participants by restricting the power of a participant's computer or other hardware. Yet proprietors treat the use of software to participate not as a sign that their worlds are flawed but as a way in which participants are acting outside the bounds of their identities. Such cases suggest the ways in which participants' abilities to control their identities are limited.

132. See *id.* at (70) (calculating that 75.00% of the virtual worlds surveyed allow participants to be terminated at proprietor discretion); *id.* at (56) (calculating that 27.08% of the virtual worlds surveyed restrict participants to gaming behavior).

133. See NCSOFT, *Lineage*, <http://www.lineage.com/account> (last visited Apr. 27, 2006) (identifying monthly charge of \$15.00).

134. See Betsy Book, *Virtual World Business Brands: Entrepreneurship and Identity in Massively Multiplayer Online Gaming Environments* (June 2005), available at <http://ssrn.com/abstract=736823> (describing in-world businesses that produce virtual world fashion and aircraft).

135. See Kim, *supra* note 26 ("There's no shortage of realism in this game—the trouble is, many of the nonviolent activities in *UO* are realistic to the point of numbingly lifelike boredom: If you choose to be a tailor, you can make a passable living at it, but only after untold hours of repetitive sewing.").

136. See *infra* Annex A, at (50) (calculating that 85.42% of the virtual worlds surveyed restrict the use of such software).

D. The Limits of Identity: Role-Playing as a Defense

Proprietors restrict identity by limiting the degree to which participants can blame their online identities for EULaw violations. Proprietors, such as Meridian 59 in its Rules of Play, appear tired of this defense, stating: “Please save us all time and avoid using the tired reason of ‘I was role-playing’ when accused of violating the rules.”¹³⁷ Perhaps part of the problem is that this defense would be too viable if allowed for the many offenses covered by EULAs, particularly because many restrictions in EULaw go far beyond constitutional bounds by not allowing free speech.¹³⁸ EULaw agreements governing player speech present an interesting problem in this regard. In order to maintain a sense of community, they regulate potentially offensive speech but in doing so must guide their users further from “authenticity” (if such a term can be used in this genre). Role-playing would seem to be a perfectly adequate defense to the use of profanity by a character playing a medieval warrior for example. Indeed, by not allowing this defense while endorsing the extensive series of speech regulations contained in EULAs, many virtual worlds seem determined to present a particularly static and artificially constrained virtual world. Virtual worlds tend to create a “Disneyfied” worldview while serving a predominantly adult customer base.¹³⁹ Some virtual worlds attempt to meet this difficulty by allowing less constrained speech in certain areas. For example, Second Life provides zones that allow freer speech¹⁴⁰ and FaithH [sic] does not restrict speech as substantially as other virtual worlds,¹⁴¹ but these are exceptions.

137. Meridian 59 Official Web Site, End User License Agreement, <http://billing.neardeathstudios.com/M59-RulesOfPlay-01.shtml> (last visited Apr. 27, 2006).

138. See, e.g., Asheron’s Call, Code of Conduct for Asheron’s Call, <http://turbine.fuzeqna.com/asheronscall/consumer/kbdetail.asp?kbid=305> (prohibiting participants from using “vulgar content” online).

139. See Nick Yee, *Gender and Distribution*, DAEDALUS PROJECT, Jan. 1, 2003, <http://www.nickyee.com/daedalus/archives/000194.php> (showing the vast majority of participants in virtual worlds are over eighteen).

140. See Second Life, Community Standards, <http://secondlife.com/corporate/cs.php> (last visited Apr. 27, 2006) (“All areas of Second Life, including the www.secondlife.com Web site and the Second Life Forums, adhere to the same Community Standards. Locations within Second Life are noted as Safe or Unsafe and rated Mature (M) or non-Mature (PG), and behavior must conform to the local ratings. Any unrated area of Second Life or the Second Life Web site should be considered non-Mature (PG).”).

141. See DivineQuest.net, FaithH User Agreement, <http://www.divinequest.net/faith/?pg=useragreement> (last visited Apr. 27, 2006) (describing the presence of “adult language” on the site).

IV. SPEECH RESTRICTIONS

Speech in virtual worlds is widely restricted through the prohibition of vague or broad undefined terms, such as banning “offensive” or “vulgar” speech.¹⁴² For example, of the agreements surveyed, 64.58% prohibited “foul” or “vulgar” speech and 72.92% prohibited “offensive” or “inappropriate” speech.¹⁴³ By using broad terms like “vulgar” or “offensive,” EULaw frequently conveys a strong uncertainty over what types of speech are permitted. While many of these agreements also refer specifically to more precise categories of speech, the agreements commonly employ these catch-all terms. As Professors Braman and Lynch noted in regard to ISPs, the norm for communication in virtual worlds involves the “abandonment of constitutional protections”¹⁴⁴ that are otherwise taken for granted. For example, in a test of the speech filter in The Sims Online virtual world, one word that was prohibited was “Osama.”¹⁴⁵

A. *Speech Restrictions: Controversial Speech*

Of particular concern to proprietors, based on a review of their EULaw agreements, is the potential for “controversial” speech. Restrictions are common for obscene speech, racist speech, and other forms of controversial speech.¹⁴⁶ Restrictions on speech seek to eliminate potentially controversial content. As Professors Braman and Lynch noted in regard to the regulatory practices of ISPs, while such restrictions “may be defended as responsible management, they often cross the line into manipulative control of content and applications of types long rejected in the larger communicative world.”¹⁴⁷ A similar dynamic is even more strongly at work in virtual worlds. While the wider Internet is not the

142. See *infra* Annex A, at (25) (calculating the frequency of provisions prohibiting foul and vulgar speech); *id.* at (27) (calculating frequency of provisions prohibiting offensive speech).

143. See *id.* at (25), (27).

144. See Braman & Lynch, *supra* note 45, at 257.

145. See The Alpha Riot Grrrlz, *supra* note 51.

146. Compare *id.* (listing the types of words restricted from use in The Sims Online), with Raph Koster’s Home Page, Declaring the Rights of Players, <http://www.legendmud.org/raph/gaming/playerrights.html> (last visited Apr. 27, 2006) (declaring, in a thought-experiment intended to demonstrate the variance between real world and virtual world speech, that one right virtual world participants should have would be that “[n]o one shall be disquieted on account of his opinions, provided their manifestation does not disturb the public order established by the code of conduct”).

147. See Braman & Lynch, *supra* note 45, at 253.

ensor-proof network as it has sometimes been described,¹⁴⁸ the availability of controversial speech and expression suggests a greater degree of relative freedom in this decentralized environment.¹⁴⁹

The emphasis on inoffensive speech within virtual worlds is extended in a number of instances, as many virtual world agreements acknowledge the global nature of the Internet. Some agreements move beyond questions of offensive speech to cover what could be considered questions of politics. For example, World of Warcraft's Harassment Policy warns against language that "promotes national hatred."¹⁵⁰ Similar restrictions in some virtual worlds restrict religious commentary.¹⁵¹ Excessive restrictions combined with concerns about appealing to children leads to restrictions on speech. For example, the guidelines of The Matrix Online, based on *The Matrix* series of movies,¹⁵² ban the discussion of any illegal substance that "includes but is not limited to . . . illegal drugs."¹⁵³ As is typical of these restrictions, there is a somewhat ironic effect when considered in light of the generally rebellious and hallucinatory atmosphere of The Matrix world.¹⁵⁴ In addition, participants are frequently prohibited from actions that the proprietor would consider harassment or abuse.¹⁵⁵ Again, given the number of virtual worlds based in a medieval fantasy world¹⁵⁶ in which violence is a regular occurrence, there is something ironic about this level of sensitivity. In effect, many of these worlds promise adventure but try to

148. See, e.g., *Microsoft Censors Chinese Blogs*, WIRED NEWS, June 13, 2005, <http://www.wired.com/news/culture/0,1284,67842,00.html> (describing how Microsoft assists the Chinese government in censoring online publications).

149. See, e.g., *Fleshbot, Pure Filth*, <http://www.fleshbot.com> (last visited Apr. 27, 2006) (providing multiple daily postings on Web sites and issues relating to heterosexual and homosexual pornography).

150. World of Warcraft Community Site, In-Game Support, Harassment Policy, <http://www.blizzard.com/support/wowgm/?id=agm01315p> (last visited Apr. 27, 2006).

151. See The Realm Online, Customer Code of Conduct, http://www.realmserver.com/support_Legal_CodeConduct.shtml (last visited Apr. 27, 2006) (stating that "[y]ou may not use any . . . religious . . . language" in the Non-Vulgarity Clause); see also *supra* Part III.B (describing restrictions on characters with religious names).

152. THE MATRIX (Warner Studios 1999); THE MATRIX RELOADED (Warner Studios 2003); THE MATRIX REVOLUTIONS (Warner Studios 2003).

153. See The Matrix Online, Forums Rules and Guidelines, at 6, <http://mxoboards.station.sony.com/matrix/board/message?board.id=announcements&message.id=2> (last visited Apr. 27, 2006).

154. See Kent Williams, *The Matrix Reloaded*, ISTHMUS: THEDAILYPAGE.COM, <http://www.thedailypage.com/going-out/movies/reviews/movieReview.php?intReviewID=550> (last visited Apr. 27, 2006) (describing the alternate realities depicted in *The Matrix* movies).

155. See *infra* Annex A, at (22) (showing that 89.58% of the virtual worlds surveyed have EULAw restrictions on harassing and abusive speech).

156. See *id.* at (5) (showing that 62.50% of the virtual worlds surveyed were of the fantasy genre).

manage through EULAw every aspect of life to ensure that there is little possibility for hurt feelings.¹⁵⁷

The potential for virtual worlds becoming significant forums for communication, as some commentators have discussed,¹⁵⁸ seems highly unlikely with such extensive restrictions on speech. The level of restriction seems to approach that of the oft-criticized speech codes of universities.¹⁵⁹ Speech restrictions of this level are unlikely to allow for the creation of significant but taboo-violating creations.¹⁶⁰ In addition, overly controlling behavior to deter unattractive actions may limit the importance of proprietary virtual worlds. Objectionable identities in a virtual space may be a necessary release denied in the real world.¹⁶¹ Such a relief valve is unlikely to be fully available in EULAw-determined virtual worlds.¹⁶²

B. *Speech Restrictions: Web Site and Chat Rules*

Additional EULAw agreements govern forums related to virtual worlds such as proprietor-run Web sites and chat forums. Speech regulation by EULAw extends to these more ancillary areas that are accessed by the participant when the participant is not playing a character. As we have seen, games like EVE Online monitor and regulate the communications of participants at chat forums that are maintained by proprietors and devoted to the virtual world.¹⁶³ The chilling effect on speech in these forums under this sort of regulation

157. See Asheron's Call, Home Page, *supra* note 24 (describing Asheron's Call as a virtual world "where thousands of players inhabit a beautiful 3D fantasy world to make friends and seek out perilous adventure").

158. See Castronova, *supra* note 6, at 39.

159. See Mark Harper, *Student Activist Wins Free Speech Battle*, DAYTONA BEACH NEWS J. ONLINE, June 23, 2005, <http://www.thefire.org/pdfs/f6a4a7ef61f68519972d6291af65a37b.pdf> (describing how universities create free-speech zones limited to "usually small and out-of-the-way areas of campus").

160. See Erica Wagner, *The Outsiders*, TIMES ONLINE, Apr. 16, 2005, <http://www.timesonline.co.uk/article/0,,923-1569403,00.html> (describing discussing innovative but controversial authors such as Georges Bataille and Kathy Acker).

161. See Michael Young, *Wide World of Sports*, REASON, Apr. 2005, at 61, 61-62 (stating in regard to soccer fandom that "the world's most popular sport is also a monument to role playing, with fans adopting multiple identities through their clubs" and that "[t]he stadium, like many a subculture, is frequently an outlet for the forbidden, for what group members can share collectively without outside intrusion").

162. See Edward Castronova, *Theory of the Avatar* 33 (CESifo Working Paper Series, No. 863, 2003), available at <http://ssrn.com/abstract=385103> ("[T]he opportunity to have different bodies at different times allows easy experimentation with a variety of social roles—warrior, dancer, mentor, prostitute—and if variety is the spice of life, an expansion of these opportunities also must raise well-being").

163. See *supra* notes 98-99 and accompanying text.

regime is clear. Use of the Web site, the typical gateway to a virtual world, is also often governed by regulatory agreements like the Web site's own Terms of Service in addition to EULaw agreements governing the actual virtual worlds.¹⁶⁴ This situation adds yet another layer of regulation governing participants. While agreements governing the Web site do not explicitly modify the other agreements to which a participant consented when joining the virtual world, such policies nevertheless serve as redundant or additive measures of regulation. For example, the EVE Online Web site Terms of Service restricts communication to the forum and serves as a gatekeeper to the Web site itself, asserting the right to prohibit hyperlinks past the front page.¹⁶⁵ Separate terms of service for the Web site itself are most frequently used by large corporate proprietors that may employ the site for a central point of access to several games. For example, Sony (which administers EverQuest, EverQuest II, Star Wars Galaxies, and Planetside) uses such a centralized Web site where they also provide access to other games.¹⁶⁶

*C. Speech Restrictions: 99 Problems You Can't Talk About:
Discussion of Bugs*

Many virtual worlds, 39.58% of the worlds surveyed here, prohibit any discussion of errors in the computer code of the worlds because such bugs can provide participants with unexpected abilities or opportunities.¹⁶⁷ Both the complexity of the code and the decision making involved in constructing virtual worlds makes bugs likely to occur and may allow users to exploit a recurring issue.¹⁶⁸ The general prohibition on discussing bugs is understandable from a management perspective but presents a number of issues. While proprietors do not wish every programming error to become a source of disruption in their game, there are concerns about this prohibition. While banning public

164. See *infra* Annex A, at (32) (showing 12.50% of the virtual worlds surveyed employ a separate Web site regulation policy); see also, e.g., Sony Online Entertainment, Terms of Service, <http://www.sonyonline.com/tos/tos.jsp> (last visited Apr. 27, 2006).

165. EVE Online, Web Site Terms of Use, at 3.1, 6.1, <http://www.eve-online.com/pnp/termsfuse.asp> (last visited Apr. 27, 2006) (describing restrictions on use of the Web site).

166. See Welcome to Station.com, <http://www.station.sony.com/en> (last visited Apr. 27, 2006) (providing information on a range of Sony games).

167. See *infra* Annex A, at (29) (calculating frequency of provisions prohibiting public discussion of bugs); see also Grimmelman, *supra* note 21, at 1-2 (discussing bugs and exploits).

168. See RICHARD BARTLE, PITFALLS OF VIRTUAL PROPERTY 11 (2004), available at <http://www.themis-group.com/uploads/Pitfalls%20of%20Virtual%20Property.pdf> (“[M]ost bugs don’t cause crashes or hangs at all, they’re judgment calls: when you make a change to a virtual world it will sometimes have unforeseen side-effects, some of which you will deem ‘good’ and some of which you will deem ‘bad.’”).

comment on bugs is intended to prevent wide abuse of errors in the virtual world that participants could use to their benefit, it also limits participants' freedom to discuss problems with the service they have purchased. EULaw agreements frequently require participants to refrain from exploiting bugs, require participants to report bugs to the proprietors, and prohibit any discussion of these bugs.¹⁶⁹ To some degree, this is a reflection of the competitive level system employed in many virtual worlds in which participants are encouraged to earn gradual improvements of their in-world status over time. Short cuts to improved status, such as the exploitation of bugs, are discouraged as a violation of game norms, but short cuts to status also represent lost revenue to proprietors. In contrast, in a noncompetitive game, such as *Second Life*, EULaw agreements do not contain such admonitions, allowing for freer discussion and a better sense of the value of the service.¹⁷⁰ One difficulty with the extensive and particular prohibitions in EULaw is that such restrictions codify norms that would otherwise evolve.¹⁷¹

The fear of bugs and exploits helps to create an antagonistic relationship between proprietors and participants. Professor Castronova has described the political relationship of participants to proprietors as being one of "mobs of . . . supplicants."¹⁷² The reluctance of proprietors to cooperate more fully with participants comes through in the bug provisions. The complexity of virtual worlds makes it unlikely that proprietors will be able to produce bug-free work, however, the elements of secrecy forced onto participants in banning discussions of bugs prevents full recognition by consumers of the quality of the service for which they are paying. In addition, lack of discussion may reduce the security and integrity of the virtual world by limiting any discussion of problems. For example, the security expert Bruce Schneier distinguishes between true security and the interest that software companies have in secrecy in an effort to avoid the negative publicity associated with faults.¹⁷³

169. See *infra* Annex A, at (29) (showing that 39.58% of the virtual worlds surveyed prohibit the discussion of bugs and exploits).

170. See *generally* *Second Life*, Terms of Service, *supra* note 55.

171. See Mark A. Lemley, *The Law and Economics of Internet Norms*, 73 CHI.-KENT L. REV. 1257, 1267, 1272 (1998).

172. See Castronova, *supra* note 6, at 33.

173. See Bruce Schneier, *The Non-Security of Secrecy*, SCHNEIER.COM., Oct. 2004, <http://www.schneier.com/essay-056.html>.

D. Speech: Restrictions on Protest

James Grimmelmann suggests that “true disobedience is impossible in a software-controlled space” because proprietors can always use code-based solutions to eliminate disobedience, making civil disobedience in a virtual world “doubly-virtual civil disobedience.”¹⁷⁴ The issue of the “hard-wiring” of politics has a long history on virtual worlds.¹⁷⁵ Yet, as Grimmelmann acknowledges, participants in virtual worlds do hold “propaganda events, designed, much like real world protests, to send a signal that many players care about an issue.”¹⁷⁶ While restrictions on political displays may be hard-wired by the creator, it is not clear that these protests are actually completely ineffective. At the very least, a number of proprietors fear the disruptive influence of such protests. Perhaps they recognize that encoding prevention of mass or individual protest actions would be too difficult. Certainly some proprietors find them sufficiently significant that they forbid them as part of their governing agreements. For example, 64.58% of the virtual worlds surveyed used agreements broadly prohibiting participants from disruptive behavior.¹⁷⁷ In addition, 8.33% of the virtual worlds specifically restrict comments on the moderation of the forums or in-world protesting.¹⁷⁸ Such restrictions could seem like efficient management tools, but they are also particularly chilling devices. Because forum comments are so easily deleted, commentary on the moderation of the forums would help to alert other participants as to issues within the forum. Absent this possibility, commentary is inevitably outsourced to unrelated sites and forums, which has a distancing effect from proprietors. This is unfortunate because, as Grimmelmann states, “any software policy proposal is meaningless unless conveyed to the designers.”¹⁷⁹ While these clauses are also directed at anarchic or simply immature behavior, these restrictions would prohibit actions that would disrupt the normal functioning of a virtual world as would a march or sit-in in the real world. Several proprietors specifically address the issue of protests and prohibit them.¹⁸⁰

174. Grimmelmann, *supra* note 21, at 8.

175. Mnookin, *supra* note 15 (“[P]olitics in LambdaMOO is implemented through technology and political conceptions can be embedded within the technological constructions of the virtual environment. In other words, ideas about politics can be, to a certain extent, hard-wired into society via technology.”).

176. Grimmelmann, *supra* note 21, at 8.

177. *See infra* Annex A, at (55).

178. *See id.* at (31).

179. *See* Grimmelmann, *supra* note 21, at 8.

180. *See supra* note 178 and accompanying text.

For example, Star Wars Galaxies uses disruption restrictions as a means of regulating protest.¹⁸¹ In the Community Standards Policy for Star Wars Galaxies, Sony states that disruption of the game includes “[o]rganizing, holding, or participating in protests held in high traffic areas (such as busy Starports or other areas where many players normally gather).”¹⁸² Of course, such areas are the ones where protest would be most visible and effective.

A similar lack of openness exists with regard to the punishment structure in virtual worlds. While the punishment threat in virtual worlds is severe, with proprietors empowered to erase the existence of the participant from within the virtual world, few proprietors provide a clear sense of the judicial or punitive process involved.¹⁸³ In addition, a number of proprietors restrict the discussion of interactions between proprietors and participants.¹⁸⁴ For example, the virtual world EVE Online’s Terms of Service states: “[Y]ou may not publish private communications from CCP, Siminn, their agents or representatives or EVE Online volunteers without authorization.”¹⁸⁵ In addition, while a number of virtual worlds provide forums for participants to discuss aspects of the game, some restrict any comment or criticism on the actions of the moderators, the participant representative.¹⁸⁶ Ragnarok Online considers it beyond the pale for a participant to make a “sarcastic joke” about the proprietor or its staff.¹⁸⁷ These restrictions make it difficult for participants to get a clear sense of the governance and punishment system within virtual worlds, lessening the deterrent effect of the systems and making it difficult for internal reform movements to develop. Indeed, many of these restrictions would make reform activities a violation of EULAw leading to expulsion.

181. See Star Wars Galaxies, Policies Community Standards, at 3, <http://starwarsgalaxies.station.sony.com/content.jsp?page=Policies%20Community%20Standards> (last visited Apr. 27, 2006).

182. *Id.*

183. See *infra* Annex A, at (67) (calculating that 29.17% of virtual worlds surveyed provided some explanation of judicial or punitive process).

184. See, e.g., EVE Online, Terms of Service, at 17, <http://www.eve-online.com/pnp/terms.asp> (last visited Apr. 27, 2006).

185. *Id.*

186. See *supra* Part IV.D.

187. Ragnarok Online, Rules and Regulations, <http://iro.ragnarokonline.com/support/operationrule.asp> (last visited Apr. 27, 2006).

E. Power over Speech: The Virtual Panopticon

Constant observation, the transparent society where all information is available and no secrets exist,¹⁸⁸ is the situation for participants in virtual worlds. Of the virtual worlds surveyed, 66.67% use EULAw agreements stipulating that participants' content will be monitored.¹⁸⁹ This feature, in combination with the power to delete content,¹⁹⁰ creates an online society unlikely to engage in any speech likely to endanger its continued participation. Proprietors frequently use profanity filters in an attempt to prevent prohibited content, but the inefficiency of such programs requires monitoring of content as well.¹⁹¹ In effect, participants are vastly less free and private in these virtual worlds. To make inoffensive speech a priority, proprietors are forced to create at least the threat of constant observation to deter potential offenders.

F. Speech Restrictions: Erasure and the Deletion of Speech

One problem with EULAw is not just its tendency to chill speech but its ability to silence it and eliminate it entirely. Most virtual world agreements surveyed (70.83%) included clauses in their EULAw agreements stipulating that proprietors had the right to delete participant content for any reason.¹⁹² For example, the End User License Agreement for NCSOft's Guild Wars states: "You understand and agree that NC Interactive has the right, but not the obligation, to remove any content (including yours) in whole or in part at any time for any reason or no reason, with or without notice and with no liability of any kind."¹⁹³ Others suggest that deletion of content rests on more limited grounds, but use such broadly written clauses that they achieve the same effect. For example, the End User License Agreement for Asheron's Call states that participants' communications or accounts can be deleted if the participants' communications "restrict or inhibit any other user from using and enjoying Asheron's Call."¹⁹⁴ Writing that may be considered to "restrict another player's enjoyment" is a sufficiently ambiguous description so that it could be used as an excuse to censor, punish, or

188. See Zarsky, *supra* note 119, at 995-96 (describing the idea of a transparent society).

189. See *infra* Annex A, at (33).

190. See *infra* Part IV.F.

191. See The Alpha Riot Grrrlz, *supra* note 51.

192. See *infra* Annex A, at (34).

193. See Guild Wars, User Agreement, at 6(a), <http://www.guildwars.com/legal/user-agreement.html> (last visited Apr. 27, 2006) (emphasis omitted).

194. See Asheron's Call, End User License Agreement, at 6(f), <http://www.fuzeqna.com/asheronscall/consumer/kbdetail.asp?kbid=1091> (last visited Apr. 27, 2006).

remove a participant at the will of the proprietor. Restrictions of this type will clearly have a chilling effect. From the outset, participants who read the EULAw documents are aware that their speech will be monitored and, if controversial, will likely be eliminated. This is particularly significant because, as Professors Jack Balkin and Jennifer Mnookin have noted, it is very difficult to distinguish at this point between speech and action in virtual worlds.¹⁹⁵ Therefore, there is a great risk that beneficial speech will be mistaken for controversial speech and subsequently restricted, considering the swiftness and completeness of elimination. The difficulty in dividing action from speech in virtual worlds makes the restrictions on speech imposed in most EULAs particularly notable and worthy of further investigation.

Complete control over speech, combined with the frequently unlimited power of proprietors to remove virtual persons by eliminating their accounts¹⁹⁶ is troubling, for this means that virtual existence is determinedly ephemeral. This is a frequent criticism of digital culture, but the problems seem to reach its greatest point here. Although computer files may seem easily deleted, they are more resilient than many people consider.¹⁹⁷ Web pages may appear ephemeral, but there are efforts to catalogue and record them.¹⁹⁸ In addition, the distributed nature of digital culture also suggests that copies of information may exist distributed throughout the network even after it has been deleted from certain sites. In contrast, because authority is frequently centralized in virtual worlds, the decision by proprietors to delete characters or speech can truly eliminate its existence.

195. See Balkin, *supra* note 6, at 2089; Mnookin, *supra* note 15. Mnookin comments on the implications of interplayer disputes in LambdaMOO, stating: “This dispute, and the many other speech-related disputes that have come about on LambdaMOO, illustrates the difficulty of separating the categories of speech and action with the MOO.” *Id.*

196. See *supra* Part VB.

197. See Daniel Engber, *Can You Ever Really Erase a Computer File?*, SLATE, June 29, 2005, <http://www.slate.com/id/2121745> (describing the difficulties in erasing computer files from computer hard drives).

198. See *Internet Archive*, <http://www.archive.org> (last visited Apr. 27, 2006) (describing its purpose as “building a digital library of Internet sites and other cultural artifacts in digital form”).

G. Whose Content?: Speech and Action as Property

While Sony has recently made news¹⁹⁹ and controversy²⁰⁰ by planning to develop Station Exchange (their own auction site to facilitate sales of virtual property), most proprietors are reluctant to acknowledge property rights among participants. In some ways, this seems to reflect the misapprehension that copyright must be monitored with the same scrupulousness and constancy as trademark to prevent loss of protection. The result of this misapprehension is that intellectual property fears influence proprietors and, by extension, the available actions in the proprietors' games.²⁰¹

Provisions dealing with intellectual property are another prominent feature of EULaw. From the outset of participation, 66.67% of virtual worlds surveyed make clear that participants have no right of sale or transfer in the account they open to play in virtual worlds.²⁰² In addition, 33.33% of the virtual worlds surveyed have EULaw provisions that claim the entire world as their intellectual property, making little or no reference to the possibility that any content, such as dialogue typed in by a participant, could be the copyrighted work of the participant.²⁰³ The disregard for any sort of participant rights even in participants' own writing seems imprudent and overreaching. For example, the proprietor of Dark Ages states flatly: "Kru Interactive is the owner of Kru Interactive Games and the Client Software and the copyrights, trade secrets, patents and other intellectual property rights in the Client Software. Kru Interactive owns all characters, objects, creatures and rights to change said entities at will."²⁰⁴ Expansive claims like this neglect to consider the rights that American participants, for example, might claim in their writings posted and displayed on the Dark Ages Web site.

199. See Daniel Terdiman, *Sony Gets Real on Virtual Goods*, WIRED NEWS, Apr. 20, 2005, <http://www.wired.com/news/print/0,1294,67280,00.html> (describing the announcement).

200. See Ellie Gibson, *Mythic Slams Sony's EverQuest II Auction Site*, GAMESINDUSTRY.BIZ, Apr. 25, 2005, http://gamesindustry.biz/content_page.php?section_name=new&aid=8223 (describing the dismay with which virtual world proprietor Mythic Entertainment regards Sony's decision).

201. See Katie Dean, *Music Muffled in Star Wars Game*, WIRED NEWS, June 6, 2005, <http://www.wired.com/news/digiwood/0,1412,67720,00.html> (describing how fears of copyright violations led proprietors to make it impossible for participants in Star Wars Galaxies who identify themselves as musicians to actually make and play their own music).

202. See *infra* Annex A, at (11).

203. See *id.* at (36).

204. Dark Ages, Terms of Service and Licensing Agreement, <http://www.darkages.com/download/agree-article.html> (last visited Apr. 27, 2006).

More prudently, most world proprietors take a more measured approach. Of the worlds surveyed, 72.92% employ EULAw provisions that claim copyright in the parts of the world that are not created by participants.²⁰⁵ For example, Lineage II's User Agreement states: "You acknowledge that NC Interactive and Content Providers have rights in their respective Content under copyright and other applicable laws, and that you accept full responsibility and liability for your use of any Content in violation of any such rights."²⁰⁶ Such provisions are typical of the provisions employed in the majority of virtual worlds.

Participants are frequently required to transfer some rights in their copyrightable content, such as their communications, to proprietors. A number of proprietors, 14.58% of the virtual worlds surveyed, require a complete assignment of all participant rights in their content.²⁰⁷ Provisions like this effectively restrict participants from using their own creations after their participation in the virtual world to the larger detriment of the public good.²⁰⁸ More frequently, the agreements require participants to license their intellectual property rights to the proprietor, as was the case in 56.25% of the virtual worlds surveyed.²⁰⁹

Yet even these less restrictive license clauses frequently suffer from overreaching components. The licenses typically call for a perpetual term, without the possibility of any need for payment to the participant, and allow the proprietor to reproduce the work, creating unlimited derivative works.²¹⁰ Clearly, some sort of license is required because the medium of virtual worlds would cause proprietors to repeatedly infringe

205. See *infra* Annex A, at (37).

206. PLAYNC.COM, Lineage II, User Agreement, at 6(b), http://www.plaync.com/help/eula_lineage2.html (last visited Apr. 27, 2006) (detailing member rights in content and requiring license of member-uploaded content).

207. See *infra* Annex A, at (38).

208. See J.H. Reichman & Jonathan A. Franklin, *Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information*, 147 U. PA. L. REV. 875, 881 (1999) ("It does not necessarily follow, however, that entrepreneurs should have equal autonomy to restrict use of the unbundled information in their possession as raw materials of science and education or as inputs into the production of value-adding or second-generation information goods.").

209. See *infra* Annex A, at (39).

210. See, e.g., PlayNC.com, City of Heroes, User Agreement, at 6(c), http://www.plaync.com/help/eula_coh.html (last visited Apr. 28, 2006) ("To the extent that NC Interactive cannot claim exclusive rights in Member Content by operation of law, you hereby grant . . . to NC Interactive and its related Game Content Providers a nonexclusive, universal, perpetual, irrevocable, royalty-free, sublicensable right to exercise all rights of any kind or nature associated with such Member Content and all ancillary and subsidiary rights thereto, in any languages and media now known or not currently known.").

numerous copyright protections.²¹¹ However, the perpetual term of these licenses is objectionable. If a participant created a commercially profitable work then tried to exploit it, the proprietor, already likely to be more established and have greater access to capital, could immediately compete with the participant by offering an almost identical product under its license.²¹² Agreements requiring assignment are even more egregious, requiring participants to forfeit any rights to a creation as a privilege of entry.²¹³

While proprietors do need some sort of protection through license, they can accomplish this with a less demanding requirement. It would be preferable to use a license that was limited to the term of a participant's presence in the virtual world or one that limited the license only to the necessity of the virtual worlds' continuity as, for example, if a participant had carved a significant inscription on a monument whose absence would affect the world. The virtual world Second Life uses a more limited license like this for participant creations.²¹⁴

While Lastowka and Hunter convincingly suggest that virtual property can be classified as property under several analyses,²¹⁵ the issue of transfer of this species of property is more controversial, particularly among proprietors. Sales of virtual property are widely prohibited, with 56.25% of the virtual worlds surveyed prohibiting sales of virtual property outside of their world.²¹⁶ Despite these prohibitions, 95.83% of the virtual worlds surveyed operated under some type of property-based economy with in-world trading of property and currency systems.²¹⁷ Proprietors are forced to use EULAw restrictions to enact these restrictions, but they are contradicted by the in-market economies and the pay-for-play requirements of the worlds.²¹⁸ In addition, claims of

211. See, e.g., Copyright Act, 17 U.S.C. § 106(1) (2000) (right of copyright holder to reproduce work listed); *id.* § 106(5) (right of copyright holder to publicly display work listed).

212. See Jankowich, *supra* note 40 and accompanying text (describing a similar scenario).

213. See *infra* Annex A, at (38) (calculating frequency of provisions requiring participants to assign rights in content to proprietors).

214. See Second Life, Terms of Service, *supra* note 55.

215. See Lastowka & Hunter, *supra* note 11, at 49.

216. See *infra* Annex A, at (44).

217. See *id.* at (35).

218. See Tom Chick, *MMOs: Building Whole Societies*, GAMESPY.COM, Oct. 24, 2003, <http://archive.gamespy.com/amdmmog/week5/index2.shtml> ("Most MMOs have developer specified economies, which are carefully controlled."); see also EverQuest Online Adventures, Accounts and Billing, <http://everquestonlineadventures.station.sony.com/content.vm?page=Accounts%20and%20Billing> (last visited Apr. 28, 2006) (describing monthly fees to play EverQuest, in addition to the required purchase of software).

copyright infringement as a basis for virtual property sales suffer from the absence of copying and the lack of any transfer from proprietors.²¹⁹

One way to solve the difficulty in determining absolute ownership over virtual assets²²⁰ would be to discourage proprietors from asserting a strong right to control participant use of virtual assets while they participated in the virtual world. While ultimate ownership could remain unquestioned in the hands of proprietors, at least for certain items, participants equally could not be penalized for use of their own or derivative rights.²²¹ This could be covered in the license and would add an element of reciprocity sorely needed in these documents.

H. Mass Creativity: Derivative Works and Fan Creations

While many proprietors restrict participant property rights,²²² a number of proprietors are recognizing the importance of participant derivative works in the decentralized communities of virtual worlds where significant portions of the environment are the products of participants.²²³ EULAs have begun to address derivative worlds like fan fiction.²²⁴ This is particularly interesting because many of the virtual worlds are fantasy based (62.50% of those surveyed)²²⁵ and often represent works that draw heavily on fantasy authors like J.R.R.

219. See Posting of Dan Hunter to Terra Nova, One Lawsuit To Rule Them All, http://terranova.blogs.com/terra_nova/2004/12/one_lawsuit_to_html (Dec. 18, 2004) (describing Blizzard Entertainment cease and desist letters); see also Ren Reynolds, *Hands Off MY Avatar! Issues with Claims of Virtual Property* (2003), available at <http://www.ren-reynolds.com/downloads/HandsOffMYAvatar.htm> (last visited Apr. 28, 2006) (discussing difficulties in fitting virtual property into intellectual property classifications).

220. See Molly Stephens, Note, *Sales of In-Game Assets: An Illustration of the Continuing Failure of Intellectual Property Law To Protect Digital Content Creations*, 80 TEX. L. REV. 1513, 1534 (2002) (describing difficulties of clearly establishing ownership of digital items); see also Reynolds, *supra* note 219; BARTLE, *supra* note 168 (describing property issues).

221. See Mark A. Lemley, *Property, Intellectual Property, and Free Riding* (Stan. L. & Econ., Working Paper No. 291, 2004), available at <http://ssrn.com/abstract=582602> (“The result is a legal regime for intellectual property that increasingly looks like the law of real property, or more properly an idealized construct of that law, one in which courts seek out and punish virtually any use of an intellectual property by another.”); see also Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENVTL. L.J. 651, 654 (1997) (arguing for expansion of fair use to allow for fan fiction).

222. See *supra* notes 200-221 and accompanying text.

223. See *infra* Annex A, at (43).

224. See Nicholas J. Gervassis, *In Search of the Value of Online Electronic Personae: Commercial MMORPGs and the Terms of Participation in Virtual Communities*, J. INFO. L. & TECH. (2004), http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2004_3/gervassis. Fan fiction is a literary form in which characters from existing works are used to create new works. See Wikipedia, Fan Fiction, http://en.wikipedia.org/wiki/Fan_fiction (last visited Apr. 28, 2006) (defining and describing fan fiction).

225. See *infra* Annex B, at (5) (listing the genres of virtual worlds).

Tolkien.²²⁶ Fan creations are of interest because of the degree to which participant creations are essential to virtual worlds. Participants' dialogue and interactions create the unscripted interaction that is one of the selling points of virtual worlds, and in some worlds participants create virtual items.²²⁷ While participants play a substantial role in-world, EULAw agreements suggest that proprietors are reluctant to surrender their control. For example, 18.75% of virtual worlds surveyed specifically allowed participants the limited right to create derivative works.²²⁸ Derivative works that the EULAw agreements allow must be noncommercial. The enforcement of such derivative rights clauses can be seen as a situation where intellectual property restrictions are used to control participant speech outside of virtual worlds.²²⁹

The right to create derivative works is likely to be particularly significant in virtual worlds. The importance of grass-roots development is increasingly recognized.²³⁰ In many other media, technology is allowing "amateurs" to develop professional-quality work that equals, and sometimes surpasses, that of professionals.²³¹ Console video games have been employed to create movies within games, a form known as machinima.²³²

Virtual worlds unite many of the software and technological assets and are already dependent on consumer participation and creation. That

226. See T.L. Taylor, "Whose Game Is This Anyway?": *Negotiating Corporate Ownership in a Virtual World* 236-37 (2002), available at <http://www.digra.org/dl/db/05164.58571> (criticizing EverQuest for using Tolkien's work while restricting participants' derivative work ("In a world populated by orcs and halflings (each of which are the explicit property of the Tolkien estate) and filled with images and storylines deeply rooted in various fantasy traditions, one can't help but wonder how it is EQ squares such a progressive practice of cultural authorship with their otherwise narrow claims of intellectual property. One might also consider how EQ's conventions of leveling, 'rolling' for base statistics for characters, and other mechanics exist at this point as common game tropes deployed by a wide variety of games." (footnotes omitted))).

227. See Cory Ondrejka, *Escaping the Gilded Cage: User Created Content and Building the Metaverse*, 49 N.Y.L. SCH. L. REV. 81, 90-92 (2004) (describing creation processes in the virtual world Second Life as well as distinguishing the more developer-controlled crafting process).

228. See *supra* note 223 and accompanying text.

229. See Taylor, *supra* note 226, at 234-36 (discussing actions taken because of off-site fan fiction).

230. See generally Eric Von Hippel, *DEMOCRATIZING INNOVATION* (2005).

231. See Clive Thompson, *May the Force Be with You, and You, and You . . .*, SLATE, Apr. 29, 2005, <http://slate.msn.com/id/2117760> (describing how software programs and Internet distribution allow production of *Star Wars* fan movies, which are allowed by director George Lucas who "has always encouraged *Star Wars*-inspired fan movies, so long as the wannabe auteurs didn't try to make a profit").

232. See generally Academy of Machinima Arts and Sciences, <http://www.machinima.org> (last visited Apr. 28, 2006) (collecting and promoting machinima, a form of film using utilizing videogame technology, via this Web site).

would seem to make them ideal places for fan fiction to flourish and transform the worlds; yet these are also frequently proprietary worlds.²³³ Many of the fears that Professor Rebecca Tushnet described for fan fiction in the Internet age seem to be appropriate to virtual worlds as well.²³⁴ Professor Tushnet says,

Most fan authors are nonlawyers of limited means, and are at the mercy of their Internet service providers, who, fearing liability as accessories to copyright infringement, will shut down an account or Web site in response to an informal complaint from a copyright owner. Therefore, copyright owners will find it simple to enforce a vision of copyright law that extends to every mention of their property.²³⁵

In fact, this is even more likely to be true in virtual worlds. In addition to the ISPs, virtual world participants also must face scrutiny from their virtual world proprietor who can not only complain to an ISP but also terminate the participant's virtual life.

Professor Tushnet has argued for legal protection for fan fiction as a form of fair use, but this argument is even more appropriate to virtual worlds because of their dependence on the creative activities of participants to populate these worlds. Because of the communal nature of the world, many of the derivative works are likely to incorporate the work of participants as well as proprietors. The relation between participant and proprietor might better be characterized as a symbiosis.²³⁶ In addition, while works popular with fan fiction creators, like *Star Trek* or *Star Wars*, do have a particular narrative which the character owners might be reluctant to see taken in controversial directions,²³⁷ virtual worlds are far less dependent on a particular narrative. Many virtual worlds are basically dependent on (and perhaps embodiments of) the idea discussed in *Lewis Galoob Toys Inc. v. Nintendo of America, Inc.* that "technology often advances by improvement."²³⁸ Their implicit recognition of this principle argues for the increased ability of participants to create derivative works. It also suggests the harm in the

233. See *infra* Annex B, at (1) (listing names of proprietors of virtual worlds surveyed).

234. See Tushnet, *supra* note 221, at 653 (suggesting that the Internet enables easier monitoring of fan fiction leading to increased enforcement and intimidation).

235. *Id.* (footnote omitted).

236. See Jankowich, *supra* note 40.

237. See Tushnet, *supra* note 221, at 674 ("[T]he most likely reason corporations have attacked fan fiction is almost certainly a desire to control how their characters are portrayed.").

238. 964 F.2d 965, 969 (9th Cir. 1992); see Tushnet, *supra* note 221, at 669-70.

EULAw agreements that seek to restrict such derivative works.²³⁹ The decentralized nature of virtual worlds also suggests that proprietors would have less interest in controlling the rights over particular characters than over well-known characters, like Batman.²⁴⁰ Unlike the situation in *Micro Star v. Formgen, Inc.*, the proprietors encourage and depend on the content and content modifications of their participant customers.²⁴¹ Given the complexity of virtual worlds, and the difficulty in keeping up with the large number of customers,²⁴² virtual worlds may benefit by encouraging participant creations and allowing “people to create a world which will be thousands of times more compelling than we could create ourselves.”²⁴³

V. DISCIPLINING BEHAVIOR

A. *Many Types of Ambiguity: Broad Terms*

Many of the most powerful restrictions on behavior and protest in EULAw agreements are written so broadly that proprietors can silence almost any type of discussion that could reflect badly on the virtual worlds. As a result, no protection exists for protest or any other speech that fails to reflect a positive image. EULAw’s greatest inhibiting power comes in the form of broadly written clauses whose interpretation is left open to the proprietors. Content restrictions also suffer from broad restrictions in which proprietors use undefined terms like “vulgarity” which chill speech because participants, not knowing the boundaries of what is allowed, err on the side of caution. Of the virtual worlds surveyed, 66.67% employ EULAw agreements with clauses that prohibit content using broad terms such as vulgarity.²⁴⁴ For example Asheron’s Call’s EULA states that “[your] content shall not . . . restrict or inhibit any other user from using and enjoying Asheron’s Call.”²⁴⁵ Even sites that describe themselves as being for mature audiences use these broad terms.

239. See, e.g., Faction Earth, Terms of Service, <http://www.factionearth.com/tos.shtml> (last visited Apr. 28, 2006) (requiring agreement of participant not to “create derivative works from . . . the Game or Services”).

240. See Tushnet, *supra* note 221, at 675.

241. See 154 F.3d 1107 (9th Cir. 1998).

242. See Terdiman, *Online Games a Massive Pain*, *supra* note 30 (describing difficulties in establishing virtual worlds).

243. Aleks Krotoski, *Second Life and the Virtual Property Boom*, GUARDIAN UNLIMITED, June 14, 2005, http://blogs.guardian.co.uk/games/archives/2005/06/14/second_life_and_the_virtual_property_boom.html.

244. See *infra* Annex A, at (25) (calculating frequency of provisions prohibiting vulgarity or foul language among the EULAw of the virtual worlds surveyed).

245. Asheron’s Call, End User License Agreement, *supra* note 194.

Second Life, whose policies are among the least restrictive, reserves broad restrictions on content. For example, in its Terms of Service, Linden Research, Inc. (Linden), the proprietor of Second Life, reserves the right to determine that “[c]ontent as determined by Linden at its sole discretion that is . . . vulgar [or] obscene” is prohibited.²⁴⁶ Provisions like this conflict with the idea stated in the Community Standards that “Second Life is an adult community” and that different areas of Second Life have Mature or other ratings.²⁴⁷ The game network Skotos takes a similar tack using a rating of “Mature” but still restricting content under a variety of headings such as being “harmful,” “vulgar,” “obscene,” or “objectionable.”²⁴⁸ Other games reserve the ability to prohibit content despite claiming to be a virtual world for mature participants. For example, Puzzle Pirates prohibits content that is “vulgar” or “objectionable” despite being a mature site.²⁴⁹ While claiming that the site is intended for mature participants and disclaiming responsibility for offending participants, the proprietor reserves the right to monitor and remove lawful content for reasons of offensiveness and vulgarity which are sufficiently vague as to provide greater freedom.

Another broadly written term that is employed by some proprietors is a prohibition on actions that contravene the “spirit of the game.” This clause allows them to protect themselves from unexpected or unenumerated actions by participants but can serve as a catch-all clause to outlaw any type of behavior. For example, Yohoho! Puzzle Pirates prohibits any “behavior that is contrary to the ‘spirit of the game’ as defined by Three Rings[, the Proprietor of this virtual world,] in its sole discretion.”²⁵⁰ Broadly written terms like this give an incredible amount of discretion to proprietors and are clear indications of the lack of negotiation in EULaw allowing proprietors to rid themselves of

246. Second Life, Terms of Service, *supra* note 55, at 5.1(iv).

247. Second Life, Community Standards, *supra* note 140, at 5.

248. See Skotos, Terms of Service, at 6(c), 6(i), 7(e), <http://www.skotos.net/help/TOS.html> (last visited Apr. 28, 2006).

249. See Yohoho! Puzzle Pirates, Three Rings Terms of Service, at 6.3, 7.4, <http://www.puzzlepirates.com/about/tos.html> (last visited Apr. 28, 2006) (“Three Rings has adopted a ‘MATURE’ rating, and parts of the Site, Services and/or Games contain adult or mature content that some users may consider offensive, indecent or objectionable. While Three Rings has established a list of restrictions (section 5) [sic] and may in some instances choose to monitor and take action upon inappropriate gameplay, chat or links to the Services, it is possible that at any time there may be language or other material accessible on or through the Site, Services or Games that may be offensive or objectionable to some users.”).

250. *Id.* at 6.14; see also Dark Age of Camelot, Full Rules of Conduct, Prohibited Conduct, at 16, <http://support.darkageofcamelot.com/kb/article.php?id=073> (last visited Apr. 28, 2006). A participant is prohibited from “engag[ing] in any behaviour that is contrary to the ‘spirit of the game’ as defined by Mythic in its sole discretion.” *Id.*

participants whom they find objectionable in any way. For example, in the World of Warcraft Terms of Use 3.C(v), it states that participants may not do “[a]nything that Blizzard Entertainment considers contrary to the ‘essence’ of World of Warcraft.”²⁵¹ Clauses such as this can discourage experimental or potentially disruptive actions by participants, such as legitimate protests. This is particularly true when a prohibition on violating the “essence” of the game, as in the passage from the World of Warcraft Terms of Use above, is considered in connection with a passage from the same document, stating, for instance, that “Blizzard Entertainment may, in its sole and absolute discretion, take whatever action it deems necessary to preserve the integrity of World of Warcraft.”²⁵²

B. *Discipline and Punish*

One of the interesting things observed in a survey of EULAs is the wide latitude reserved by proprietors to rid themselves of participants. The power of termination is one of the most expansive powers in virtual worlds.²⁵³ The vast majority, 75.00%, of the EULAs surveyed allowed the proprietor to delete a player account at the proprietor’s discretion.²⁵⁴ Some proprietors claim a clearly unlimited right to delete participants. For example, the Asheron’s Call EULA states that “[w]e reserve the right to terminate your license to the Software and your access to Asheron’s Call at any time, without notice, for any reason whatsoever.”²⁵⁵ While some proprietors reserve the right to delete a player account at any time, more frequently proprietors put a more legalistic gloss on what is essentially the same power. Proprietors are able to achieve this same effect by predicating termination on the violation of a governing agreement but making the proprietor the sole arbiter of whether such a violation has occurred. For example, the virtual world Lineage reserves the right in their User Agreement to terminate a player account for inappropriate activities as determined in their sole discretion.²⁵⁶ In

251. World of Warcraft, Terms of Use, at 3.C(v), <http://www.worldofwarcraft.com/legal/termsofuse.html> (last visited Apr. 28, 2006).

252. *See id.*

253. Such powers are common in online communities. Professor Crawford has noted the issue of online services reserving in the terms of service the right to dismiss users for any reason. *See* Crawford, *supra* note 113, at 219-20.

254. *See infra* Annex A, at (70) (calculating frequency with which virtual worlds surveyed reserve the right to delete participant content).

255. *See* Asheron’s Call, End User License Agreement, *supra* note 194.

256. *See, e.g.*, Lineage, User Agreement, at 14(a), <http://www.lineage.com/support/terms.html> (last visited Apr. 28, 2006) (“We may terminate this Agreement (including your Software license and your Account) immediately and without notice . . . or upon gameplay, chat or any

addition, the proprietor's ability to find a violation is assisted by the frequent use of broadly written descriptions of what qualifies as a violation.²⁵⁷ The use of ambiguous and broad provisions in virtual worlds is a potent tool for proprietors because of their expansive power to terminate participant accounts. While this right is frequently tied to the violation of a EULAw provision, the expansive nature and broadness of EULAw provisions coupled with the provision that the proprietor is the final arbiter of violations makes these termination provisions virtually limitless.²⁵⁸ For example, the User Agreement for the recently established virtual world City of Heroes states:

NC Interactive reserves the right to suspend or terminate this Agreement (including your Software license and your Account) immediately and without notice if you breach this Agreement . . . or upon game play, chat or any player activity whatsoever which is, in our sole discretion, inappropriate and/or in violation of the spirit of City of Heroes as described in the Rules of Conduct.²⁵⁹

Effectively, these references to the violations of the EULA or for inappropriate actions do not restrict the proprietor significantly. Because proprietors have the sole discretion to determine whether a violation has occurred, the proprietor's decision making is effectively unlimited. While proprietors might argue that this gives them necessary flexibility for dealing with complex world building, this seems unpersuasive.

C. *The Ever-Changing EULAw: The Power of Modification*

EULAw is easily modified by proprietors in comparison to real world lawmaking. If a new problem presents itself through participant action that the proprietor cannot abide, then the EULAw can be modified and posted online almost immediately. Many EULAs allow proprietors to modify EULAw without even giving notice to participants (39.58% of those surveyed in this study).²⁶⁰ Others provide an automated notice at the next logon.²⁶¹ Given the ease with which proprietors may modify the

player activity whatsoever which is, in our sole discretion, inappropriate and/or in violation of the spirit of Lineage as described in the Rules of Conduct.”).

257. *See, e.g., infra* Annex A, at (27) (calculating that 72.92% of the virtual worlds surveyed make the use of inappropriate or offensive language a violation of EULAw agreements).

258. *See id.* at (70) (calculating that 75.00% of virtual worlds surveyed use provisions in EULAw agreements that allow termination of participants at proprietor discretion).

259. PlayNC.com, City of Heroes, User Agreement, *supra* note 210, at 14.

260. *See infra* Annex A, at (66).

261. *See, e.g.,* EverQuest II, User Agreement and Software License, at 3, http://eq2players.station.sony.com/en/support_article.vm?label=EQIIEULA (last visited Apr. 28, 2006) (“We may amend this Agreement at any time in our sole discretion. Amendments shall be communicated to

EULaw at will there is little practical reason for proprietors to reserve such power to themselves. Proprietors' power to delete consumer accounts at will reserves to them unlimited power which can chill any action of which they do not approve. Standards of violation like "inappropriateness" are sufficiently vague as to provide little effective analysis. In addition, proprietors have the power to remove player content at will, effectively preventing any discussion within a game.

One of the most powerful clauses for proprietors in EULaw is their ability to keep changing the documents. Extreme flexibility for proprietors is evidenced in a significant number of the agreements surveyed. Of the agreements surveyed in this study, 75.00% reserved to proprietors the right to modify the agreements at their discretion²⁶² and 39.58% allowed proprietors to modify documents without notice to the participants who are the other less powerful party.²⁶³ When the documents were capable of being modified without notice, agreements specified that the participant was obliged to check the agreement online occasionally for changes. While some proprietors list the modified clauses, others require the participant to review the agreements regularly in an effort to familiarize themselves with any changes. For example, the User Agreement of City of Heroes requires participants to "agree to check this Agreement and the Rules of Content periodically so you will be familiar with their content as amended or modified from time to time."²⁶⁴ This suggests the question of how a participant might determine what changes have been made beyond the date of the original agreement without an extremely close reading. Changes are not highlighted in any way for the participant. Instead, this device seems designed to encourage participants to be responsible for their role under EULaw while discouraging them from being aware of the extent of those responsibilities.

D. Apocalypse Anytime: Termination of the Conditional Virtual World

The most powerful tool of modification that proprietors reserve to themselves is the right to end the world. Such provisions cast a pall over the community of virtual worlds, creating a sense of uncertainty about identity in these worlds exceeding questions of exit. Perhaps what is

you at the time you log into your Account. Such amendments shall be effective whenever we make the notification available for your review.").

262. See *infra* Annex A, at (65).

263. See *id.* at (66).

264. PlayNC.com, City of Heroes, User Agreement, *supra* note 210, at 1(b).

most surprising, though, is that only 41.67% of the virtual worlds surveyed do stipulate that right.²⁶⁵ Perhaps this is an outgrowth of the feeling suggested by Professor Balkin that game designers consider it their right to terminate their creations at any time.²⁶⁶ In other words, proprietors believe this power is implied without explicitly stating it. Or perhaps proprietors feel that the more prevalent agreement modification and account termination provisions are sufficient to create this outcome. However, such contractual assurances may not adequately encompass the passions of the communities they have created and the attachment of participants to those communities.²⁶⁷

VI. THE BLAND METAVERSE

A. *The Bland Metaverse: Concentration of Ownership*

Of the games examined, 37.50% have the same owners as at least one other game surveyed.²⁶⁸ This suggests a difficulty for a participant considering exit as a means of removing herself from a disagreeable governance structure in a virtual world. If ownership concentration increases, it will be less likely that effective change to EULAw will be possible through participant exit. If ownership of virtual worlds becomes more concentrated then there is the prospect that the governing documents will grow increasingly similar. This is particularly likely given the clauses proprietors frequently include in these agreements, allowing them to be updated without notice.²⁶⁹ Inconsistencies between virtual worlds and owners will be removed, reducing the possibility of an arbitrage of liberty between worlds.

Participants are left with the option of seeking alternatives to “traditional” proprietor governed virtual worlds. At this point, open-source worlds seem promising but far more experimental than practical.²⁷⁰ Plenty of text-based worlds do exist which require less

265. *Infra* Annex A, at (72) (calculating frequency of provisions allowing proprietor to terminate the virtual world).

266. *See* Balkin *supra* note 6, at 2070.

267. *See* Greg Kumparak, *Classic MMOG Raised from the Dead by Past Players*, SLASHDOT GAMES, June 21, 2005, <http://games.slashdot.org/article.pl?sid=05/06/21/0133233&from=rss> (describing the successful efforts of a group of players to re-establish the virtual world Castle Infinity after its proprietors decided to discontinue it).

268. *See infra* Annex A, at (2) (calculating overlap of virtual world ownership).

269. *See supra* notes 263-264 and accompanying text.

270. *See* Terdiman, *supra* note 77 (discussing early developments toward open-source virtual worlds).

investment.²⁷¹ Games like Second Life offer some examples of experimentation with their openings for participant ownership of intellectual property.²⁷² In addition, the impact of out-of-world trading is starting to have an impact on large proprietors like Sony, which recently started its own virtual property trading site.²⁷³

B. The Bland Metaverse: Homogeneity of Terms

The problem of homogeneity of terms in virtual worlds is a significant one. Exit will be meaningless if the choice is merely to go to an identical world. Several years ago, Professors Braman and Lynch noted a problem with the potential for ISP users when confronted with unappealing license terms, noting that increasing standardization among user agreements and TOSs among ISPs limits the ability of users to use market exit.²⁷⁴ A similar concern exists with the EULAw of virtual worlds. Professor Nicholas J. Gervassis notes that one problem with free exit or termination is that relatively few companies may dominate the population of virtual world proprietors creating the potential for limitations of choice.²⁷⁵ My survey of virtual world EULAw agreements seems to bear out these concerns.²⁷⁶

Of the 72 categories of provision surveyed in a statistical manner, 39, or 54.17%, were found in percentages equal to or higher than 50%. This suggests that virtual worlds as they exist today are relatively homogeneous in their current form and that market exit is unlikely to make a substantial impact on participation experience. In this sense, participants could be said to be “rationally ignorant”²⁷⁷ of the provisions of EULAw. If there is little choice in EULAw provisions from one virtual world to another then there is little point in scrutinizing complex legal agreements for variations from world to world. Better perhaps to base decisions on other factors. One problem with this approach is that it reduces the incentive for proprietors to vary provisions and for the creation of newer worlds. This is likely to change. While rational ignorance may be a reasonable approach to the license provisions for

271. See *Multiplayer Online Games Directory*, <http://mpogd.com/games/interface.asp?id=5&first=0> (last visited Apr. 28, 2006) (listing over 1000 text-based multiplayer online games in a variety of approaches).

272. See Second Life, Terms of Service, *supra* note 55, at 5.3.

273. See Vladimir Cole, *Hands on with Sony Station Exchange: Bring on the Real Money Trade*, JOYSTIQ, May 18, 2005, <http://www.joystiq.com/entry/1234000827043808>.

274. See Braman & Lynch *supra* note 45, at 254.

275. See Gervassis, *supra* note 224.

276. See, e.g., *infra* Annex A, at (2) (calculating overlap of virtual world ownership).

277. See Felten, *supra* note 80.

TurboTax 2004, a disposable, limited-use, and inexpensive software product,²⁷⁸ the long-term participations in perpetual virtual worlds are likely to create increasing difficulties.²⁷⁹ In addition, experimentation by new and established proprietors will present variations that demonstrate problems with other EULAw.²⁸⁰

C. The Bland Metaverse: Jurisdiction

Increasingly of interest in the global forum of the Internet, forum selection and choice of law clauses are frequently employed to determine which real world law affects virtual world EULAw agreements. Of the virtual worlds surveyed, 87.50% employed forum selection and choice of law clauses to govern jurisdiction in the event of a legal dispute.²⁸¹ The analysis of these agreements suggests several points. California is likely to be an increasingly important forum for disputes relating to virtual worlds, and California law is likely to have a disproportionate impact on such cases because of the number of agreements that stipulate California law. In the agreements surveyed, 37.50% of them had forum selection clauses stipulating California law.²⁸² In addition, if only the U.S. jurisdictions are included, this percentage rises to 54.55%.²⁸³ This suggests another implication, that in addition to the increasing significance of California law in virtual world agreements, there is the disturbing prospect of increasing homogeneity.

One possible counter to homogeneity is that virtual worlds are becoming appropriately global in scope. Of the virtual worlds surveyed, 18.75% had forum selection clauses citing jurisdictions from outside the United States.²⁸⁴ Virtual world agreements surveyed included jurisdictions such as Singapore, Iceland, and the United Kingdom.²⁸⁵ While this poses problems for participants, it does offer some counter to the homogeneity of jurisdiction.

278. See TurboTax, <http://www.turbotax.com> (last visited Oct. 31, 2005) (describing annual income tax software).

279. See Ragnarok Online, Suspended Accounts, <http://iro.ragnarokonline.com/support/blockboardlist.asp> (last visited Apr. 28, 2006) (listing suspended and banned accounts).

280. See Second Life, Terms of Service, *supra* note 55, at 5.3 (describing participant rights to content); see also Cole, *supra* note 273 (describing major proprietor-sponsored auction site).

281. See *infra* Annex A, at (74). It is likely that the absence of such clauses in the remainder that do not specify them is probably due to oversight rather than a decision to avoid using them. See *id.*

282. See *infra* Annex B, at (75) (listing jurisdictions specified in forum selection and choice of law provisions among virtual worlds surveyed).

283. See *id.*

284. See *id.*

285. See *id.*

VII. CONCLUSION

A. *Conclusion: Responses to EULAw*

Professor Balkin has warned that commoditization of virtual worlds will spur lawsuits that will have an adverse affect on these online communities.²⁸⁶ However, as this Article has demonstrated, there is a wide range of concerns for participants in virtual worlds. The absence of a robust legal system in a complex environment like a virtual world inhabited by people with very limited rights will lead those people to search for environments where they have greater power such as in real world law.²⁸⁷ The most prominent virtual world lawsuit in the United States to date was controversial but inconclusive.²⁸⁸ At this point, Asian gamers are at the forefront of complaints against proprietors. Certainly, Asia has provided a number of dramatic events that might have drawn attention to virtual world issues.²⁸⁹ For example, South Korea has investigated consumer complaints over virtual worlds, including looking into EULA terms.²⁹⁰ Rights available to European participants may make this jurisdiction another source of challenges to EULAw.²⁹¹ Professor Balkin has suggested that virtual worlds in the United States will face a similar degree of scrutiny from U.S. regulators in the future²⁹² and public policy arguments are likely to be increasingly persuasive.²⁹³ Proprietors have attempted to use EULAw to prevent such actions in the United States. Limitations of liability clauses are common²⁹⁴ and several

286. See Balkin, *supra* note 6, at 2072 (arguing that commoditization will increase the presence of law in virtual worlds).

287. See Jankowich, *supra* note 40.

288. See David Becker, *Game Exchange Suit Goes to Court*, C|NET NEWS.COM, Feb. 7, 2002, http://news.com.com/Game+exchange+dispute+goes+to+court/2100-1040_3-832347.html (describing the lawsuit); see also Julian Dibbell, *Serfing the Web*, WIRED, Jan. 2003, available at <http://www.juliandibbell.com/texts/blacksnow.html> (last visited Apr. 28, 2006) (describing how various other legal problems of the plaintiffs led them to stop paying their lawyers' bills, leading to the lawsuit being dropped).

289. See, e.g., *Online Gamer Killed for Selling Cyber Sword*, ABC ONLINE, Mar. 30, 2005, <http://www.abc.net.au/news/newsitems/200503/s1334618.htm> (describing the murderous dispute between two Chinese participants in Legend of Mir 3 over the sale of a virtual sword).

290. See Posting of Dan Hunter to Terra Nova, Korean Consumer Protection, http://terranova.blogs.com/terra_noa/2004/02/korean_consumer.html (Jan. 8, 2005).

291. See Gervassis, *supra* note 224 (discussing the application of the 1993 EC Directive on Unfair Terms in Consumer Contracts to EULAs).

292. See Balkin, *supra* note 6, at 2072.

293. See Casamiquela, *supra* note 14, at 495 (arguing that courts should make increased use of the unconscionability doctrine in dealing with online license agreements).

294. See *infra* Annex A, at (59) (showing that 91.67% of agreements surveyed used limitation of liability clauses).

proprieters try to limit the remedies available to participants to quitting.²⁹⁵ If virtual worlds seek to avoid the impact of regulators, they should allow increased involvement by participants. While this Article demonstrates a number of concerns prompted by EULaw provisions, in some ways the decisions of proprietors to employ EULaw rather than code-based restrictions is promising for participants because of this regulatory threat.²⁹⁶ This suggests that proprietors should move more of their restrictions into the code. But for participants, the use of EULaw actually might be a benefit because of the public policy appeal.²⁹⁷

B. Conclusion: The Governments Participants Deserve?

The uncertainty, modification rights, and homogeneity of virtual world EULaw suggests a restrictive future for virtual worlds. Evolution and development is likely to be significantly restricted by these clauses. Homogeneity suggests that experimentation is slow to take place. Homogeneity of terms is also likely to reduce the value of exit.²⁹⁸ Because so many terms are written so broadly,²⁹⁹ participants are unlikely to have a clear sense of their rights. In addition, the power of unilateral modification means that proprietors can quickly prohibit new behavior that they dislike. Finally, because the termination right of proprietors is so efficient when they can effectively erase any in-world trace of a violating participant, the threat is sufficient to inhibit any participant who values participation. Well-intentioned clauses, like ones intended to promote congenial atmospheres, such as speech codes, risk the creation of amusement park atmospheres where virtual killing can take place in a gated online community carefully protected from profanity and controversy.

This Article has demonstrated the one-sidedness of EULaw agreements that are transforming click-wrap agreements from an

295. See *id.* at (73) (calculating that 16.67% of the EULaw agreements surveyed specifically limit remedies to quitting).

296. See Gibson, *supra* note 46, at 197 (“Contractual agreements resemble architectural measures in that individuals may use both to render excludable otherwise nonexcludable goods, and neither method requires a preexisting, statutory entitlement in that information. Because contracts ultimately depend on an exercise of state power for their enforcement, however, they are subject to policies designed to promote the public interest in a way that architectural measures are not.” (footnotes omitted)).

297. See *id.* at 198 (“[A]rchitectural protections threaten to allow database developers to control access to and use of their products with not regard for whether this control serves the public interest They would encounter no constitutional impediment, because their actions would be completely private.”).

298. See Gervassis, *supra* note 224.

299. See *supra* notes 244-253 and accompanying text.

expansive form of software license into a form of government. As this evolution continues, it is important for us to realize that these virtual world governments through EULAw will serve as a precedent for future online communities. As the terms of EULAw agreements become increasingly homogeneous and expansive, online communities will develop that are lacking in speech and behavior rights. Reactions to these agreements will come from participants, from government, and from competitors. Increased awareness and comparison of the extent of proprietor powers is necessary for participants to make informed choices. Databases and comparative charts of EULAw provisions should be provided by proprietors, whether as a result of industry initiative, requirement, or outside group pressure. Participants already react measurably in certain areas like property sales and are likely to challenge other restrictions. If these agreements become the subject of lawsuits and government regulation, the agreements are unlikely to be enforced to their full extent. Government action, however, may freeze the growth of this developing industry. To avoid this while still possible, proprietors should acknowledge that the reflexive unilateralism of EULAw is not sustainable. Some proprietors have begun to react to outside influences and to provide greater freedom in areas like virtual property trade. Other areas, like speech and behavior, are also the subject of over extensive restrictions by proprietors. Rather than wait for the inevitable reactions from participants and government, proprietors should acknowledge the reciprocal nature of virtual worlds to a greater extent in these EULAw agreements.

ANNEX A: SUMMARY OF SURVEY RESULTS

Categories		Averages
(1)	Proprietor Name	See Annex B
(2)	Same Proprietor as Another Virtual World?	37.50%
(3)	Fee Charged?	83.33%
(4)	Part Free	14.58%
(5)	Virtual World Genre	See Annex B
(6)	Complexity	83.33%
(7)	Number of Regulating Documents	3.60
(8)	Documents Easily Accessible	70.83%
(9)	Account: Shared Access to Account Prohibited	43.75%
(10)	Account Regulation: Only One Account per Person Allowed	12.50%
(11)	Account: Prohibition on Sale/Transfer/License Account/Stipulation that Participant Does Not Own Account	66.67%
(12)	Account: Corporations or Business Entities Prohibited from Having Account	22.92%
(13)	Identity: Required To Provide True Info to Proprietor	66.67%
(14)	Identity: May Not Pretend To Be Proprietor Figure	87.50%
(15)	Identity: Naming Policy	25.00%
(16)	Identity: Prohibition on Racist Names Banned	43.75%
(17)	Identity: Prohibition on Sexual/Obscene Names	45.83%
(18)	Identity: Prohibition on Inappropriate Names	33.33%
(19)	Identity: Prohibition on Offensive Names	70.83%
(20)	Identity: Prohibition on Names that Refer to Real People or IP	50.00%
(21)	Identity: Prohibition on Names that Refer to Proprietor or Its Employees	27.08%
(22)	Participant Speech: Participant May Not Threaten/Abuse Others	89.58%
(23)	Participant Speech: Prohibition on Racially or Ethnically Offensive Speech	81.25%
(24)	Participant Speech: Prohibition on Sexual or Obscene Speech	77.08%
(25)	Participant Speech: Prohibition on Foul or Vulgar Language (Swearing)	64.58%
(26)	Participant Speech: Prohibition on Commercial Speech (e.g., Spam)	79.17%
(27)	Participant Speech: Prohibition on Offensive or Inappropriate Speech	72.92%

	Categories	Averages
(28)	Participant Speech: Participant Required To Report Any Bugs	56.25%
(29)	Participant Speech: Participant Prohibited from Discussing Bugs with Other Participants	39.58%
(30)	Participant Speech: Forum/Chat Area/Participant Comments Speech Policy (e.g., Prohibiting Obscenity, Racism, Offensiveness)	25.00%
(31)	Participant Speech: Prohibition on Commenting on Forum Moderation or Organizing Protests	8.33%
(32)	Participant Speech: Separate Web Site Regulation Policy	12.50%
(33)	Participant Speech: Proprietor Right To Monitor Content	66.67%
(34)	Participant Speech: Proprietor Right To Delete Content	70.83%
(35)	Property: Property-Based Economy	95.83%
(36)	Property: Proprietor Claims All Property in Virtual World	33.33%
(37)	Property: Proprietor Claims IP Rights in Virtual World (Characters, Software, etc. (Not Participant Content))	72.92%
(38)	Property: Participant Required To Assign any IP Rights to Proprietor	14.58%
(39)	Property: Participant Required To License any IP Rights to Proprietor	56.25%
(40)	Property: Proprietor Owes No Compensation to Participants for IP	58.33%
(41)	Property: Proprietor May Produce Derivative Works with Participant IP	60.42%
(42)	Property: Participant Prohibited from Creating Derivative Works	66.67%
(43)	Property: Participant May Produce Noncommercial Derivative Works/Fan Fiction	18.75%
(44)	Property: Participant May Not Sell Virtual Property	56.25%
(45)	Property: Participant May Not Modify Proprietor Software/IP	79.17%
(46)	Property: Participant May Not Sell/Transfer Software	47.92%
(47)	Property: No Reverse Engineering/Disassembling Software	77.08%
(48)	Limits on Participant Behavior: Must Obey Proprietor Employees	39.58%
(49)	Limits on Participant Behavior: Participant May Not Exploit Bugs/Glitches	66.67%
(50)	Limits on Participant Behavior: Participant May Not Use Third Party Software To Effect Virtual World	85.42%

Categories		Averages
(51)	Limits on Participant Behavior: Participant May Not Associate Based on Racial/Gender Prejudice	41.67%
(52)	Limits on Participant Behavior: Must Obey Virtual World Behavior Norms (e.g., No Griefing, No Killing, No Ninjalooting)	25.00%
(53)	Limits on Participant Behavior: May Not Defraud Other Participants (Within Virtual World)	35.42%
(54)	Limits on Participant Behavior: May Not Violate Any Law While Accessing Virtual World	68.75%
(55)	Limits on Participant Behavior: Disruption or Interference Prohibited	64.58%
(56)	Limits on Participant Behavior: May Not Use Virtual World for Activities Other than Those Permitted in Virtual World	27.08%
(57)	Limits on Participant Behavior: May Not Transmit Illegal Materials (e.g., Child Pornography, Copyrighted Content, Software, Insider Info) in Virtual World	75.00%
(58)	Limits on Participant Behavior: May Not Play on Unauthorized Servers or Create Server Emulators	70.83%
(59)	Liability: Proprietor Liability Arising Out of Virtual World/Software/Account Limited	91.67%
(60)	Liability: No Proprietor Liability for Interruptions of Service	79.17%
(61)	Liability: Participant Indemnifies Proprietor for Participant Breach of Agreement or Use of Software	72.92%
(62)	Privacy: Privacy Policy?	54.17%
(63)	Privacy: Proprietor May Use Participant Info for Other Than Service-Related Purposes	25.00%
(64)	Privacy: Proprietor May Share/Sell Participant Info	20.83%
(65)	Participant Rights: Proprietor May Amend/Modify Agreements at Will	75.00%
(66)	Participant Rights: Proprietor May Amend/Modify Agreements Without Notice	39.58%
(67)	Participant Rights: Punishment/Due Process Detailed	29.17%
(68)	Participant Rights: Role-playing Specifically Excluded as Defense to Violations	18.75%
(69)	Participant Rights: Appeal Described	10.42%
(70)	Participant Rights: Participant Termination at Proprietor Discretion (e.g., Inappropriate Activity)	75.00%
(71)	Participant Rights: Virtual World May Be Modified by Proprietor (e.g., Balance)	39.58%

Categories		Averages
(72)	Participant Rights: Virtual World May Be Terminated at Will	41.67%
(73)	Participant Rights: In Dispute, Participant Remedy Limited to Quitting Virtual World	22.92%
(74)	Participant Rights: Jurisdiction Specified?	87.50%
(75)	Jurisdiction	See Annex B

ANNEX B: SELECT FULL SURVEY RESULTS

Virtual World Title	(1) Proprietor Name	(5) Virtual World Genre	(75) Jurisdiction
Alliance Ascension	Shadow Light Media LLC	SciFi	N/A
Asheron's Call	Turbine Entertainment Software Corp.	Fantasy	Massachusetts
Asheron's Call 2	Turbine Entertainment Software Corp.	Fantasy	Massachusetts
Astonia III	Intent Software	Fantasy	Germany
Blade Mistress	Blade Mistress Online	Fantasy	Texas
City of Heroes	NC Interactive	Comics	Texas
City of Villains	NC Interactive	Comics	Texas
Dark Age of Camelot	Mythic Entertainment	Fantasy	Virginia
Dark Ages	Kru Interactive	Fantasy	California
El Kardian	Pan Asia Gaming Network	Fantasy	Singapore
Endless Ages	X-SRC Corp.	SciFi	Florida
EVE Online	CCPhf	SciFi	Iceland
Everquest	Sony	Fantasy	California
Everquest 2	Sony	Fantasy	California
Faction Earth	Phoenix 7 Software	SciFi	Pennsylvania
Faith	Dragon Claw Studio	Fantasy	N/A
Final Fantasy XI	Square Enix, Inc.	SciFi	California
Guild Wars	NC Interactive	Fantasy	Texas
Habbo Hotel	Sulake Labs	Virtual Society	California
Helbreath: The Heldenian	iEntertainment Network	Fantasy	North Carolina
Horizons: Empire of Istaria	Artifact Entertainment	Fantasy	New York
Hostile Space	Interadventure, Inc.	SciFi	Vermont
Jumpgate	NetDevil	SciFi	California
Lands of Hope Online	Daniel Paul	Fantasy	N/A
Legend of Mir 3	Quality Virtual Worlds Ltd.	Fantasy	United Kingdom
Lineage	NC Interactive	Fantasy	Texas
Lineage II	NC Interactive	Fantasy	Texas
Meridian 59	Near Death Studios, Inc./Skotos	Fantasy	California
Myth of Soma	Game Network SpA	Fantasy	English
Nexus: The Kingdom of the Winds	Kru Interactive	Fantasy	California
Project Entropia	MindArk PE AB	SciFi	Sweden

Virtual World Title	(1) Proprietor Name	(5) Virtual World Genre	(75) Jurisdiction
Ragnarok Online	Gravity Interactive LLC	Fantasy	South Korea
The Realm Online	Norseman Virtual Worlds LLC	Fantasy	Michigan
Rubies of Eventide	Mnemosyne LLC	Fantasy	N/A
Runescape	Jagex Ltd.	SciFi	English
Runescape Classic	Jagex Ltd.	Fantasy	English
Second Life	Linden Research, Inc.	Virtual Society	California
Shadowbane	Ubisoft	Fantasy	California
Star Wars Galaxies	Sony	SciFi	California
There	There.com	Virtual Society	California
The Sims Online	Electronic Arts	Virtual Society	California
Tibia	CipSoft GmbH	Fantasy	N/A
Ultima Online	Electronic Arts	Fantasy	California
VZones	Stratagem Corp.	Virtual Society	California
World of Warcraft	Blizzard Entertainment	Fantasy	California
Xenimus	E.J. Thayer	Fantasy	N/A
Yohoho! Puzzle Pirates	Three Rings Designs, Inc.	Fantasy	California
Z-Opolis	PersistentWorldz/Skotos	Virtual Society	California