

Governing Virtual Worlds: Interration 2.0

Yen-Shyang Tseng*

I. INTRODUCTION

Several years ago, Professor Edward Castronova noted that “[t]he virtual worlds now emerging on the Internet manifest themselves with two faces: one invoking fantasy and play, the other merely extending day-to-day existence into a more entertaining circumstance.”¹ Although virtual worlds may be developed for more specific purposes such as academics, military training, and medical treatment,² this Note discusses the two broad types of virtual worlds that Professor Castronova has noted: game worlds such as World of Warcraft (created for entertainment) and open worlds such as Second Life (created to simulate real life).³ However, newer game worlds have begun shifting away from the traditional virtual world models.⁴ The result is, in fact, three types of worlds: pure game worlds, open worlds, and hybrid worlds—those that fall somewhere in between the first two.

* J.D. (2011), Washington University School of Law. I would like to thank Kate Lewis and Adam Brooke for their comments and advice on previous drafts of this Note, as well as Talisman, the Poring Group, and friends of Purple Poring for all of the fun experiences in virtual worlds throughout the years.

1. Edward Castronova, *The Right to Play*, 49 N.Y.L. SCH. L. REV. 185, 185 (2004).

2. See Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043, 2092 (2004) (noting the possibility of virtual worlds “designed primarily for educational purposes, medical diagnosis, therapy, testing social and economic rules, or military simulations”).

3. See Castronova, *supra* note 1, at 201–02 (discussing closed worlds and open worlds, and characteristics of each). Castronova’s use of “closed worlds” is what this Note refers to as “pure game worlds.”

4. While traditional virtual world models typically involve subscription fees and a ban on real money trade of virtual assets, some recent game worlds now adopt microtransaction models, and others have actively encouraged real money trade of virtual assets. See *infra* Part II.C.

Currently, the rules governing virtual worlds are established by end user license agreements (EULAs).⁵ These EULAs governing virtual worlds have been in place for years, and their roots go back even further to the early ages of computer software and online website licenses.⁶ However, virtual worlds are inherently different from computer software and online websites, and their EULAs have been the subject of scrutiny in recent years.⁷ As real-world law steps in to look at these EULAs, two major issues arise. First, different virtual worlds are created for different purposes, and applying the same rules to all of them would lead to disaster. Second, if EULAs eventually become disfavored as a means of governing virtual worlds, other laws establishing the rights and duties of providers and players must be implemented.⁸

This Note builds upon the idea of intertation that Professor Castronova introduced in 2004.⁹ In its basic form, intertation allows the government to regulate virtual worlds optimally by distinguishing between open worlds and game worlds, and by applying different sets of rules to each type of virtual world. The original proposal, however, is now incomplete in light of recent changes in virtual worlds and the development of hybrid worlds. This Note builds on the basic idea of intertation in terms of what protections and rights game worlds and open worlds should have, and also proposes adding a new category of intertations—those of hybrid worlds.

5. Other names are often used for these agreements, such as Terms of Service (TOS), Terms of Agreement (TOA), or End User Access and License Agreement (EUALA). See, e.g., *Warp Portal User Agreement*, WARP PORTAL, <http://warpportal.com/policy/useragreement.html> (last updated June 23, 2010) (using “TOA”); *Warhammer Online End User Access and License Agreement*, § 6, WARHAMMER ONLINE, http://help.warhammeronline.com/app/answers/detail/a_id/772 (last visited Apr. 9, 2011) (using “EUALA”). For purposes of this Note, the use of EULA or TOS describes any of these types of agreements.

6. See *infra* Part II.D, for a brief discussion of the history, forms, and enforceability of computer software and online website licenses.

7. The major case involving the enforceability of a virtual world EULA is *Bragg v. Linden Research, Inc.* See *infra* Part II.E, for the discussion regarding this case.

8. Even if EULAs are upheld by the courts, a statutory solution is still desirable, as it can potentially remedy many issues that scholars and players alike have faced with current EULAs. In addition, it would signal that our government has noted the importance of virtual worlds to our society and is now paying more attention to this area.

9. See Castronova, *supra* note 1, at 200–07 (discussing his proposal of intertation).

Part II of this Note examines the background of virtual worlds, what they are, and why they are important. It also examines EULAs, the *Bragg v. Linden Research, Inc.* case, and two major concepts important to the question of governance of virtual worlds: the magic circle and interration. Part III first analyzes the current status of virtual world EULAs, and then explains that game worlds, open worlds, and hybrid worlds must be distinguished from each other when we consider applying real-world laws to virtual worlds. Part IV offers a new proposal—an updated version of interration, taking into account pure game worlds, open worlds, and hybrid worlds.

II. HISTORY

A. *What Is a Virtual World?*

A virtual world is an online, interactive world in which players create an avatar, used to co-inhabit simultaneously and interact with other players' avatars.¹⁰ Depending on the world, the player can perform a large variety of actions with their avatar, ranging from basic functions such as running, jumping, and speaking with other players, to creating and trading virtual items for virtual currency, to adventuring together and battling dragons and gods for loot and glory, or to simply battle each other.¹¹

In a typical single-player video game, the game world stops when the player shuts down the computer for the night and resumes only when the player begins playing the game again the next day.¹² Virtual worlds, on the other hand, are persistent and exist entirely

10. An avatar is the physical representation of the player in the virtual world. See Edward Castronova, *Theory of the Avatar* (CESifo, Working Paper No. 863, 2003), available at http://papers.ssm.com/sol3/papers.cfm?abstract_id=385103. When a player first logs into a virtual world, they must create their avatar. This avatar's appearance can be customized to varying degrees depending on the game. See F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CALIF. L. REV. 1, 6 (2004). Avatars are often referred to as "characters" or "toons" by players. See *Player Character*, WOWWIKI, http://www.wowwiki.com/Player_character (last visited July 23, 2010) (noting that synonyms for "character" include, inter alia, "avatar" and "toon").

11. See Lastowka & Hunter, *supra* note 10, at 6–7, 26–29.

12. See *id.* at 5 (“[In] non-networked computer games . . . everything revolves around you and nothing happens when you are not present.”).

independent of the player's presence.¹³ Even when the player is not logged in, the virtual world continues to exist and evolve in real time around the actions of the other players who are logged in.¹⁴ In addition, items within virtual worlds have real life characteristics: a sword can be owned by one player and used to attack another player.¹⁵ Virtual worlds thus behave much like the real world. Every day, millions of players establish friendships, form social organizations, amass and trade virtual assets and currency, and embark on epic adventures.¹⁶

B. The Importance of Virtual Worlds

Virtual worlds are becoming increasingly important due to their growing popularity, economic consequences, and importance to their users. In 2001, EverQuest, the most popular massively multiplayer online role-playing game (MMORPG)¹⁷ in North America at the time, had fewer than half a million subscribers.¹⁸ Today, World of

13. See Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047, 1054 (2005) (describing persistence); see also Lastowka & Hunter, *supra* note 10, at 5–6 (describing persistence in the context of *The Sims Online*); Erez Reuveni, *On Virtual Worlds: Copyright and Contract Law at the Dawn of the Virtual Age*, 82 IND. L.J. 261, 265 (2007).

14. See Jason T. Kunze, Comment, *Regulating Virtual Worlds Optimally: The Model End User License Agreement*, 7 NW. J. TECH. & INTELL. PROP. 102, 105 (2008).

15. These items are described as rivalrous and interconnected. See Fairfield, *supra* note 13, at 1053–55 (characterizing virtual property as rivalrous, persistent, and interconnected code that mimics real world characteristics). Rivalrous means that if one character has and controls a sword, others cannot control that same sword and must obtain their own. Interconnected means that other players can interact with the items even if they do not have it; for example, swords can be used to attack other players. See *id.* at 1054 (describing these traits using real-life examples).

16. See Lastowka & Hunter, *supra* note 10, at 6–7.

17. MMORPGs are a subset of massively multiplayer online games, or MMOGs. See *Massively Multiplayer Online Game*, WOWWIKI, http://www.wowwiki.com/Massively_multiplayer_online_game (last visited Apr. 9, 2011). MMOGs encompass all virtual worlds, including worlds like Second Life that are created to closely resemble life in the real world and have no background storyline or leveling progression. See *id.*; see also *infra* note 37 and accompanying text. MMORPGs, on the other hand, “typically involve taking the character on quests or through battles to raise the experience of the character, which in turn raises the character’s abilities and allows it to take on more challenging quests and win more difficult battles.” Kunze, *supra* note 14, at 105 n.20.

18. See Edward Castronova, *Virtual Worlds: A First-Hand Account of Market and Society on the Cyberian Frontier* 2–3 (CESifo, Working Paper No. 618, 2001), available at <http://ssrn.com/abstract=294828>. The virtual world Lineage had a significantly larger overall subscription base in 2001, but the vast majority of players were in Asia. See Press Release, NCsoft, Lineage

Warcraft has more than eleven million subscribers worldwide.¹⁹ More than three hundred virtual worlds now exist with varying degrees of popularity,²⁰ and more are being developed every year.²¹ As the number of virtual worlds and their users continues to increase, the economic consequences associated with virtual worlds become greater. In addition to the simple subscription fees that many virtual worlds charge,²² the trade of real world currency for virtual game assets has also received much attention.²³

In addition, virtual worlds are becoming very important to their users. The average MMORPG player spends more than twenty hours a week playing the game,²⁴ and “[m]any players in fact characterize their game play as a second job.”²⁵ In World of Warcraft and many other game worlds, players have formed raiding guilds.²⁶ These

II Launches Commercial Service in Korea October 1 (Sept. 18, 2003), http://www.ncsoft.net/global/board/view.aspx?BID=MC_press&BC=&SYear=&SType=&Sword=&PNO=3&BNO=10.

19. See Press Release, Blizzard Entertainment, World of Warcraft Subscriber Base Reaches 11.5 Million Worldwide (Dec. 23, 2008), <http://us.blizzard.com/en-us/company/press/pressreleases.html?081121>. The press release also provides a definition of “subscriber,” which largely includes only active players. See *id.*

20. While not all of these use the traditional MMORPG model, they are all virtual worlds. See *MMORG Gamelist—All Listed Games*, MMORPG, <http://www.mmorpg.com/gamelist.cfm> (last visited Apr. 9, 2011) (providing a list of over 350 games).

21. For example, NCsoft’s Aion was released in September 2009. See Press Release, NCsoft, NCsoft’s Aion Soars as Year’s Biggest MMO Launch (Sept. 22, 2009), <http://us.ncsoft.com/en/news/press-releases/aion-launch.html>. Square Enix’s Final Fantasy XIV was released in September 2010. See *Game Information*, FINAL FANTASY XIV, http://na.finalfantasyxiv.co#/about/game_info (last visited Apr. 9, 2011). Blizzard Entertainment has begun development on another MMORPG independent from World of Warcraft. See Larry Everett, *New Blizzard MMO Project is Confirmed to be Titan*, MASSIVELY (Dec. 16, 2010), <http://massively.joystiq.com/2010/12/16/new-blizzard-mmo-project-is-confirmed-to-be-titan>.

22. For example, World of Warcraft charges a monthly fee of \$12.99 for a six-month plan, \$13.99 for a three-month plan, and \$14.99 for a month-to-month plan. *Subscription Options*, WORLD OF WARCRAFT, http://us.blizzard.com/support/article.xml?locale=en_US&articleid=21450 (last visited Apr. 15, 2011).

23. Estimates of annual real-money trade of virtual items (“RMT”) are now at five billion dollars worldwide. See Claire Cain Miller & Brad Stone, *Virtual Goods Start Bringing Real Paydays*, N.Y. TIMES, Nov. 7, 2009, at A1, available at <http://www.nytimes.com/2009/11/07/technology/internet/07/virtual.html>.

24. See Nick Yee, *The Labor of Fun: How Video Games Blur the Boundaries of Work and Play*, 1 GAMES & CULTURE 68, 69 (2006) (estimating that an average MMORPG player spends twenty-two hours a week playing the game).

25. *Id.*

26. See, e.g., TALISMAN WOW, <http://www.talisman-wow.com> (last visited Apr. 9, 2011) (a raiding guild).

guilds regularly meet several days a week, for several hours at a time, to accomplish major in-game feats, such as slaying bosses that require large groups of players to work together.²⁷

In Second Life, an open world, people use avatars to create their own content and businesses, and some have profited in the real world from such creations. Anshe Chung, the first Second Life avatar with a net worth of over \$1 million (U.S.), founded a company which now employs more than eighty people full time.²⁸ To protect their interests in such virtual content, some Second Life residents have brought lawsuits to protect the content that they created online.²⁹

C. Game Worlds, Open Worlds, and Hybrid Worlds

There are different kinds of virtual worlds, and game worlds are distinguishable from open worlds. Currently, the primary example of an open world is Second Life,³⁰ and the primary example of a game

27. See Florona, *Applicant Information*, TALISMAN WOW (July 2, 2010, 4:10 PM), <http://www.talisman-wow.com/forums/showthread.php?t=6186> (“Talisman currently raids from 6pm to 10pm Server Time (MST), Tues through Thursday.”); see also Florona, *Guild Philosophy*, TALISMAN WOW (July 2, 2010, 4:12 PM), <http://www.talisman-wow.com/forums/showthread.php?t=6188> (“[W]e require diligent and high attendance from our ‘raid team’ members. Realize that you have 25-30 players relying on you to show up. Please do not let them down.”). Bosses in World of Warcraft often include the villains of major storylines, such as the Lich King. See *Lich King* (Icecrown Citadel Tactics), WOWWIKI, http://www.wowwiki.com/Lich_King (Icecrown_Citadel_tactics) (last visited Apr. 15, 2011) (describing the Lich King encounter at the end of Icecrown Citadel).

28. See *Introduction*, ANSHE CHUNG STUDIOS, <http://acs.anshechung.com> (last visited Apr. 9, 2011) (“In 2006 Anshe Chung became the first avatar with a net worth exceeding 1 million US\$.”). Anshe Chung Studios has since expanded to provide services in other virtual worlds such as IMVU, Entropia Universe and Frenzoo, along with its continued business in Second Life. See ANSHEX, <http://www.anshex.com> (last visited Apr. 9, 2011).

29. See *Complaint at 2*, EROS, LLC v. LINDEN RESEARCH, INC., No. 09-4269 (N.D. Cal. Sept. 15, 2009) (suing Linden for, among other claims, copyright and trademark infringement of their products); *Amended Complaint of Trademark Infringement and Dilution, Contributory Infringement and Dilution, Tortious Interference, Fraud at 13–16*, MINSKY v. LINDEN RESEARCH, INC., No. 08-CV-819 (N.D.N.Y. Aug. 14, 2008) (suing Linden for trademark infringement and dilution, among other claims); *Complaint at 1-2*, EROS, LLC v. SIMON, No. 07 CV 4447 (E.D.N.Y. Oct. 24, 2007) (alleging copyright and trademark infringement against a Second Life user who allegedly duplicated thousands of copies of the plaintiffs’ products); *First Amended Complaint—Injunctive Relief Sought and Demand for Jury Trial at 1*, EROS, LLC v. LEATHERWOOD, No. 8:07-CV-01158 (M.D. Fla. Oct. 24, 2007) (alleging copyright and trademark infringement).

30. Examples of other open worlds include, but are not limited to, Active Worlds, Kaneva, There, and vSide. See BENJAMIN TYSON DURANSKE, *VIRTUAL LAW: NAVIGATING THE*

world is World of Warcraft.³¹ In game worlds, a new avatar typically begins at “level one” with few abilities, equipped with basic weapons and armor.³² The player’s objective in game worlds is often to increase the level of her avatar by slaying enemies and completing quests.³³ For example, a level one human in World of Warcraft begins her adventure beside quest-giving non-player characters (NPCs)³⁴ and level one wolves and kobolds. Slaying and looting creatures like these wolves and kobolds are the objectives of the first several quests.³⁵ Once a player reaches the maximum level in World of Warcraft, she then typically chooses between player versus player combat (PvP), raiding, and creating alternate avatars to play.³⁶

LEGAL LANDSCAPE OF VIRTUAL WORLDS 263–65 (2008).

31. Other popular game worlds include, but are not limited to, EverQuest, EverQuest II, Aion, Final Fantasy XI, Lineage, Lineage II, Warhammer Online, Ragnarok Online, Ultima Online, Age of Conan, and Guild Wars. More game worlds are being developed every year. *See supra* note 21.

32. *See* Lastowka & Hunter, *supra* note 10, at 26 (describing the “level 1” avatar in EverQuest as “penniless, carr[ying] a flimsy weapon, and lack[ing] any significant skills or abilities”).

33. *See* Level, WOWWIKI, <http://www.wowwiki.com/Level> (last visited Apr. 15, 2011) (“[Levels are] a way the game categorizes [] overall effectiveness, power, usefulness, strength, and challenge.”); *Chapter II: How to Play*, WORLD OF WARCRAFT, <http://us.battle.net/wow/en/game/guide/how-to-play> (last visited Apr. 15, 2011) (“Your new character starts out with a few class abilities and you can learn many more over the course of your career. . . . As characters grows [sic] stronger, they earn talents points.”). Although the leveling system is the most common, a few games employ alternate methods of progression within the game. *See, e.g.,* *Ultima Online: Playguide: Skills*, ULTIMA ONLINE, <http://www.uoherald.com/node/147> (last visited Apr. 15, 2011) (describing Ultima Online’s skill system).

34. A NPC is an avatar within the game that is not controlled by a player, but rather by its programmed function. *See* NPC, WOWWIKI, <http://www.wowwiki.com/NPC> (last visited Apr. 15, 2011). The function of the specific NPC described is to offer a quest to the player; completing these quests often yields rewards in the form of experience and loot.

35. These creatures are often referred to as “mobs” in these games, which is short for “mobile object.” *See* Mob, WOWWIKI, <http://www.wowwiki.com/Mob> (last visited Apr. 9, 2011). In MMORPGs, a mob typically exists solely for the purpose of being killed. *See id.*

36. PvP is combat between players, rather than combat between players and scripted mobs. *See* Player vs. Player, WOWWIKI, <http://www.wowwiki.com/Pvp> (last visited Apr. 9, 2011) (“Player vs. Player . . . denotes combat between players of any kind such as: Dueling . . . Battlegrounds . . . Arena PvP System . . . Random PvP . . . World PvP . . . [and] PvP Zones.”). *See supra* notes 26–27 and accompanying text, for the discussion regarding raiding guilds. An “alternate character” or “alt” is an avatar that a player typically spends less time and effort on than their main avatar. *See* Alt, WOWWIKI, <http://www.wowwiki.com/Alt> (last visited Apr. 9, 2011). Players create alts for different reasons, one of which is to try a different gameplay experience by playing a different race or class. *See id.*

On the other hand, Second Life has no such objective in and of itself.³⁷ Although a new avatar also begins with very few possessions, there are no level systems or quests to complete. Instead, the world provides built-in tools, which the users can use to create their own content, events, and stories.³⁸ Ownership is another difference between Second Life and MMORPGs such as World of Warcraft: Second Life users have intellectual property rights to the content that they create in the world.³⁹ As a result of these differences, Second Life is not regarded as a MMORPG.⁴⁰

Traditionally, game worlds have prohibited trading real money for virtual assets.⁴¹ However, some MMORPGs have begun to shift away from these bans as well as from the traditional business model of subscription fees.⁴² Other MMORPGs have moved towards a

37. See Cory Ondrejka, *Escaping the Gilded Cage: User Created Content and Building the Metaverse*, 49 N.Y.L. SCH. L. REV. 81, 81–87 (2004) (discussing Neal Stephenson’s concept of the Metaverse, an “online environment that was a real place to its users, one where they interacted using the real world as a metaphor and socialized, conducted business, and were entertained” and explaining that “Second Life . . . is taking the first steps on the path to the Metaverse”).

38. See Paul Riley, Note, *Litigating Second Life Land Disputes: A Consumer Protection Approach*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 877, 887–88 (2009) (stating that “[c]reativity and ownership are the two greatest differences between Second Life and traditional MMORPGs,” and describing the ability of Second Life users to create objects within the world). In fact, “[w]ell over 99% of the objects in Second Life are user created . . .” Ondrejka, *supra* note 37, at 87.

39. See *Terms of Service*, SECOND LIFE, <http://secondlife.com/corporate/tos.php> (last updated Dec. 15, 2010) (“You retain any and all intellectual Property Rights you already hold under applicable law in content you upload, publish, and submit to or through the servers, websites, and other areas of the service . . .”).

40. See Kristen Kalning, *If Second Life Isn’t a Game, What Is It?*, MSNBC (Mar. 12, 2007), http://www.msnbc.msn.com/id/17538999/ns/technology_and_science-games/.

41. The World of Warcraft Terms of Use provide that:

Blizzard does not recognize any purported transfers of virtual property executed outside of the Game, or the purported sale, gift or trade in the “real world” of anything that appears or originates in the Game. Accordingly, you may not sell in-game items or currency for “real” money, or exchange those items or currency for value outside of the Game.

World of Warcraft Terms of Use Agreement, WORLD OF WARCRAFT, http://us.blizzard.com/en-us/company/legal/wow_tou.html (last updated Dec. 9, 2010).

42. For example, Sony expressly allows real money trade of virtual assets in some of their games. Users can participate on the Live Gamer Exchange, a website similar to eBay that allows users to list sales and auctions of virtual assets in these games. See LIVE GAMER, <http://www.livegamer.com> (last visited Apr. 9, 2011). This service was previously offered by the Sony Station Exchange, but Live Gamer now manages and operates the sale and trade of virtual

microtransaction business model.⁴³ Under this business model, it is free to play the game without a monthly fee, but a player can purchase in-game currency or items which are more powerful than those obtained otherwise.⁴⁴ Although these hybrid worlds do not deviate from the traditional game structure of levels and storylines, they allow, and even encourage, the real money trade of virtual assets, unlike traditional pure game worlds.⁴⁵

D. The End User License Agreement

Software licenses have been used in computer software transactions since at least the early 1980s.⁴⁶ Software licenses protect the intellectual property rights of the software developer and limit developer liability in the case of software bugs.⁴⁷ The software

items on The Vox and The Bazaar servers on EverQuest II, as well as all servers for Vanguard: Saga of Heroes. See STATION EXCHANGE, <http://stationexchange.station.sony.com/livegamer.vm> (last visited Apr. 9, 2011). Much like eBay, the Live Gamer Exchange provides users with a safe medium in which they can trade real money for virtual assets, although unlike eBay they do charge a transaction fee once the virtual item is purchased. See *Live Gamer, Inc. Terms of Service*, LIVE GAMER, 2–6, http://www.livegamer.com/terms_service.pdf (last updated Dec. 9, 2008).

43. Examples of games that operate on the microtransaction business model include Gaia and Maplestory. See Nima Pourshasbs & Laura Brown, *Industry Insights: Success Stories in the Micro-Transaction Business*, INDUS. GAMERS (Aug. 3, 2009), <http://www.industrygamers.com/galleries/industry-insights-success-stories-in-the-micro-transaction-business> (providing examples of virtual worlds operating under a microtransaction model, with a description of how users can play and how the provider generates revenue). Ragnarok Online adopts a model in which, in addition to the Kafra Shop microtransaction store, a player can adopt to play on a free server or become a premium subscriber and obtain many benefits from playing on a premium server. See *Premium Services*, RAGNAROK ONLINE, <http://www.playragnarok.com/gameguide/premiumservice.aspx> (last visited Oct. 10, 2010).

44. See Pourshasbs & Brown, *supra* note 43.

45. See *id.*

46. See Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1241 n.5 (1995) (“[Shrinkwrap licenses] were a feature of the licensing landscape by the early 1980s.”).

47. By licensing rather than transferring ownership of the software, the developer can limit use of the software that copyright law may otherwise allow under fair use or the first sale doctrine. Absent the license agreement, the first sale doctrine would allow a user to install the software on their computer and then resell their copy of the software to someone else. See 17 U.S.C. § 107 (2006) (fair use); 17 U.S.C. § 109 (2006) (first sale); see also Rebecca K. Lively, *Microsoft Windows Vista: The Beginning or the End of End-User License Agreements as We Know Them?*, 39 ST. MARY’S L.J. 339, 345–46 (2007) (discussing how concerns about protecting intellectual property gave rise to EULAs and how EULAs can also limit liability arising from bugs in the software); Lydia Pallas Loren, *Slaying the Leather-Winged Demons in*

license thus sets forth such rights and limitations of the user and the software developer. These license agreements have historically taken one of several forms: shrinkwrap, browsewrap, and clickwrap licenses.⁴⁸ Generally speaking, courts have tended to enforce all of these forms of licenses,⁴⁹ even though the licenses may unilaterally impose one-sided terms with little to no room for negotiation.⁵⁰

the Night: Reforming Copyright Owner Contracting with Clickwrap Misuse, 30 OHIO N.U. L. REV. 495, 498 (2004) (discussing the use of EULAs to limit the fair use doctrine and the first sale doctrine of copyright law).

48. A shrinkwrap license typically involves the notice of a license agreement on the packaging and a presentation of the license on some document within the package. See *Register.com Inc. v. Verio, Inc.*, 356 F.3d 393 (2d Cir. 2004) (discussing the notice, presentation, and prohibition aspects of a shrinkwrap license, as well as examples of what might constitute acceptance); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996) (noting that some vendors utilize licenses that “become effective as soon as the customer tears the wrapping from the package”); Lemley, *supra* note 46, at 1241 (pointing out that shrinkwrap licenses can be wrapped along with the computer disk, “printed on the outside of boxes containing software, . . . included somewhere within the box, or . . . shrinkwrapped with the owner’s manual accompanying the software”). In browsewrap licenses, there is often a notice regarding the terms of the license on the website, with a link to the full license provided to the user. The use of the website itself typically constitutes agreement to the terms of the license. See *Pollstar v. Gigmania Ltd.*, 170 F. Supp. 2d 974, 981 (E.D. Cal. 2000) (describing a browsewrap license as part of a website and that users assent to the license when they visit the website); *Cairo, Inc. v. Crossmedia Servs., Inc.*, No. C04-04825JW, 2005 WL 756610, at *2 (N.D. Cal. Apr. 1, 2005) (describing the browsewrap license of the website, which involves the notice and link to the Terms of Use). And finally, in clickwrap licenses, a user is typically forced to click “I agree” or “Accept” to the license terms before being allowed to proceed. See *Recursion Software, Inc. v. Interactive Intelligence, Inc.*, 425 F. Supp. 2d 756, 781 (N.D. Tex. 2006) (discussing clickwrap license where the user could only download the software by answering “yes” to a question asking whether the user accepted the terms of the license agreement).

49. See, e.g., *Davidson & Assocs. v. Jung*, 422 F.3d 630, 638–39 (8th Cir. 2005) (upholding click wrap license); *ProCD*, 86 F.3d at 1448–49 (upholding shrinkwrap license); *Pollstar*, 170 F. Supp. 2d at 982 (upholding browsewrap license); see also Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 459–60 & nn.2–4 (2006) (finding that every court to consider clickwrap licenses has found them enforceable and listing numerous cases in which various license agreements were upheld); Lively, *supra* note 47, at 350 (finding that courts have generally sided with software developers regarding the EULA since the *ProCD* case in 1996). Courts have found issues as to whether users assented to the license agreements, however. See *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17 (2d Cir. 2002).

50. See Lively, *supra* note 47, at 351 (“[C]ritics have argued that the rights of consumers are continually limited in favor of the rights of software developers and distributors.”); Jamie Kayser, Comment, *The New New-World: Virtual Property and the End User License Agreement*, 27 LOY. L.A. ENT. L. REV. 59, 63 (2006) (discussing that the terms in the EULA reflect the “asymmetrical balance of bargaining power” between developers and end-users); Kunze, *supra* note 14, at 107 (“The first problem with the typical virtual world license

So far, all virtual world EULAs have been in the form of clickwrap licenses. To log into a virtual world, players are required to click on and agree to the EULA.⁵¹ Most virtual worlds require clicking “accept” either on every login, when the EULA has been changed, or upon installation of the software.⁵²

The EULA for a virtual world establishes the rights and duties of the provider and user, and also effectively establishes laws that will govern the world.⁵³ Although virtual worlds are governed by their respective EULAs, the specific provisions contained within each one vary amongst the different virtual worlds depending on the aim of the provider.⁵⁴ However, most include some basic provisions.⁵⁵ Provisions included typically discuss rights regarding intellectual property, virtual property, privacy, account transfer, account termination, dispute resolution, choice of law and forum, liability, warranties, and behavioral guidelines.⁵⁶

Three particular provisions often contained in virtual world EULAs are especially interesting when discussing the application of real world laws to virtual worlds. The first of these provisions discusses the rights the user has in virtual property, which is typically designed to prevent real money trade of virtual currency and assets.⁵⁷ Expressly prohibiting such real money trade forms a barrier between

agreement is the developer gets unilateral, unchecked, godlike power, while the customer has few or no rights.”).

51. For example, the World of Warcraft EULA states: “All use of the Game Client is subject to this License Agreement and to the Terms of Use agreement, both of which you must accept before you can use your Account to play the Game.” *World of Warcraft End User License Agreement*, BLIZZARD ENT., http://us.blizzard.com/en-us/company/legal/wow_eula.html (last updated Oct. 29, 2010).

52. See DURANSKE, *supra* note 30, at 118.

53. See Joshua A.T. Fairfield, *Anti-Social Contracts: The Contractual Governance of Virtual Worlds*, 53 MCGILL L.J. 427, 436 (2008) (“Virtual-world EULAs do not merely contain the price and use restrictions that one might expect in a software license. Rather, EULAs attempt to create background, default rules of social behaviour.”).

54. Second Life’s intellectual property provision provides the perfect example: to foster creativity and innovation, they were the first to give users the intellectual property rights to the content they create. See *supra* note 39 and accompanying text. MMORPGs do not provide users with these same rights. See, e.g., *World of Warcraft End User License Agreement*, *supra* note 51.

55. See DURANSKE, *supra* note 30, at 118.

56. See *id.*

57. Blizzard, for example, does not allow real money trade of virtual items and currency in World of Warcraft. See *World of Warcraft Terms of Use Agreement*, *supra* note 41.

real world assets and virtual assets.⁵⁸ The second provision of note discusses intellectual property rights in the content within the game. MMORPGs typically retain ownership of all content that appears within the game, thus protecting their intellectual property rights to such content.⁵⁹ Second Life was the first to offer intellectual property rights to their users for the content that they create in the world, in an effort to encourage user creativity.⁶⁰ Finally, the dispute resolution provision is interesting because arbitration clauses in virtual world EULAs have been challenged several times in the past decade, particularly in *Bragg v. Linden Research, Inc.*⁶¹

E. Bragg v. Linden Research, Inc. and Its Consequences

In *Bragg v. Linden Research, Inc.*, the Eastern District of Pennsylvania struck down as unconscionable the arbitration provision in the Second Life TOS.⁶² Marc Bragg, the plaintiff, discovered a glitch in the Second Life land auction system, which he allegedly exploited to purchase land at much lower costs than usual.⁶³ In response, Linden froze Bragg's account, "effectively confiscating all of the virtual property and currency that he maintained on his account

58. Virtual world providers that prohibit real money trade of virtual assets have banned players engaging in such activity. *See, e.g.*, Patrick Caldwell, *Blizzard Bans 59,000 WOW Accounts*, GAMESPOT (July 26, 2006, 4:56 PM), <http://www.gamespot.com/pc/rpg/worldofwarcraft/news.html?sid=6154708> (discussing Blizzard banning 59,000 World of Warcraft accounts and removing more than 22 million gold); Patrick Caldwell, *Square Enix Bans More FFXI Accounts*, GAMESPOT (July 24, 2006, 5:03 PM), <http://www.gamespot.com/news/6154572.html> (discussing Square Enix banning more than two thousand Final Fantasy XI accounts). The concept of separating the virtual economy from the real world economy is part of the basis of the magic circle concept, discussed *infra* Part II.F.

59. *See, e.g.*, *World of Warcraft Terms of Use Agreement*, *supra* note 41 ("All rights and title in and to the Service (including . . . [a large list of content such as characters, stories, artwork, and audio-visual effects]) are owned by Blizzard or its licensors.").

60. *See Terms of Service*, *supra* note 39, § 7.1. Other open worlds have begun to give such rights to the user as well. *See, e.g.*, *IMVU, Inc. Internet Web Site Terms of Use*, IMVU, http://www.imvu.com/catalog/web_info.php?section=Info&topic=terms_of_service (last visited Apr. 9, 2011).

61. 487 F. Supp. 2d 593 (E.D. Pa. 2007).

62. *Id.* at 611.

63. *Id.* at 596–97. Bragg had originally purchased numerous parcels of land in Second Life, but it was apparently not until he acquired a parcel of land named "Taessot" for \$300 that any disputes arose. *Id.* at 597.

with Second Life.”⁶⁴ Bragg sued Linden, who then moved to compel arbitration in accordance with the Second life TOS.⁶⁵ The court refused to enforce the arbitration provision, finding that it was unconscionable upon examination of several factors.⁶⁶

The *Bragg* case was notable because it was an opportunity for a court to decide on the status of virtual property.⁶⁷ Although the case was settled without deciding on this point, the *Bragg* decision has spawned much discussion regarding the enforceability of virtual world EULAs.⁶⁸ Although some commentators believe that the Second Life TOS and other EULAs are likely to be upheld in the

64. *Id.*

65. *Id.* At the time, the Second Life TOS included the following language:

Any dispute or claim arising out of or in connection with this Agreement or the performance, breach or termination thereof, shall be finally settled by binding arbitration in San Francisco, California under the Rules of Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with said rules. . . . Notwithstanding the foregoing, either party may apply to any court of competent jurisdiction for injunctive relief or enforcement of this arbitration provision without breach of this arbitration provision.

Id. at 604 (quoting Second Life Terms of Service, § 13). This provision has since been modified. *See infra* note 71.

66. To challenge a contract based on unconscionability, both procedural and substantive unconscionability must be shown. *Bragg*, 487 F. Supp. 2d at 605. Procedural unconscionability can be satisfied by showing oppression due to unequal bargaining positions or surprise through hidden terms. *Id.* Substantive unconscionability can be satisfied by showing harsh or one-sided results that “shock the conscience.” *Id.* The Court found that the arbitration provision was procedurally unconscionable because Linden had superior bargaining power, the TOS was presented on a take it or leave it basis, there were no market alternatives to Second Life, and because the element of surprise existed. *Id.* at 606. The arbitration provision was found substantively unconscionable because of the combination of a lack of mutuality, high costs of arbitration, the forum selection, and the confidentiality provision. *Id.* at 609–10.

67. *See* DURANSKE, *supra* note 30, at 123 (“The *Bragg* case was closely watched by attorneys who practice in this emerging field because it was hoped that the case would clarify the status of virtual property.”). In a currently ongoing case, the attorney who represented Marc Bragg is now representing other plaintiffs in a suit against Linden Lab that effectively aims to answer the questions that the *Bragg* court left open. *See* Complaint—Class Action for Damages and Injunctive Relief, *Evans v. Linden Research, Inc.*, No. 10-1679 (E.D. Pa. Apr. 15, 2010). This case has since been transferred to the Northern District of California. *Evans v. Linden Research, Inc.*, No. 10-1679 (E. D. Pa. Feb. 11, 2011).

68. *See* Joshua A.T. Fairfield, *The God Paradox*, 89 B.U. L. REV. 1017, 1048 (2009) (discussing *Bragg* as an example of a virtual world provider having too much power); Kunze, *supra* note 14, at 112–18 (suggesting a “Model EULA” to make them more bilateral and to promote better experiences for users); Riley, *supra* note 38, at 900–07 (discussing *Bragg*, its consequences, and whether the TOS will be held unconscionable in the future).

foreseeable future,⁶⁹ others have asserted that they may not be enforced because they are one-sided, are not optimal, or are not enough by themselves and must be supplemented by other sources of law.⁷⁰ Nonetheless, all providers still currently govern their virtual worlds by use of EULAs. Following *Bragg*, Linden Lab amended the Second Life arbitration clause.⁷¹ This new clause was again challenged by a Second life user.⁷² On February 3, 2011, the Eastern District of Pennsylvania—the same court and in fact, the same judge that heard the *Bragg* case—found that the amended arbitration clause was *not* unconscionable.⁷³

F. The Magic Circle

The concept of the magic circle was first articulated in 1938 by Johan Huizinga.⁷⁴ The magic circle divides “play spaces” and reality; it is a barrier between the virtual world and the real world.⁷⁵ Within the magic circle, life is governed by a special set of rules unique to

69. See Reuveni, *supra* note 13, at 290 (“EULAs are likely valid as a matter of contract law and enforceable against a virtual-world participant who assents to the EULA by clicking ‘OK’ upon loading the game.”); Allen Chein, Note, *A Practical Look at Virtual Property*, 80 ST. JOHN’S L. REV. 1059, 1090 (2006) (“For the time being, . . . it is likely that the EULAs will remain firmly in place.”).

70. See Fairfield, *supra* note 53, at 436 (arguing that contract law cannot properly govern torts and property, and thus EULAs in virtual worlds are not enough by themselves to govern the world); Andrew Jankowich, *EULAw: The Complex Web of Corporate Rule-Making in Virtual Worlds*, 8 TUL. J. TECH. & INTELL. PROP. 1, 53 (2006) (“If these agreements become the subject of lawsuits and government regulation, the agreements are unlikely to be enforced to their full extent.”); Kunze, *supra* note 14, at 103–04 (arguing that current EULAs are suboptimal and offering suggestions to make them better agreements).

71. See *Second Life Terms of Service*, *supra* note 39, § 12 (the new arbitration clause); Robin Linden, *A Change to the Terms of Service*, SECOND LIFE BLOGS (Sept. 18, 2007, 6:07 PM), <http://blogs.secondlife.com/community/features/blog/2007/09/18/a-change-to-the-terms-of-service> (discussing the change to the Second Life TOS).

72. *Evans v. Linden Research, Inc.*, No. 10-1679, at 6 (E. D. Pa. Feb. 3, 2011).

73. *Id.* at 10–13. The Court specifically discussed the differences between the amended TOS and the one at issue in *Bragg*. *Id.* at 11–12.

74. See JOHAN HUIZINGA, *HOMO LUDENS: A STUDY OF THE PLAY-ELEMENT IN CULTURE* (1938).

75. See EDWARD CASTRONOVA, *SYNTHETIC WORLDS: THE BUSINESS AND CULTURE OF ONLINE GAMES* 147–48 (2005) (describing the magic circle); DURANSKE, *supra* note 30, at 58–59 (describing the magic circle as “essentially a dividing line between play spaces and reality”); Joshua A.T. Fairfield, *The Magic Circle*, 11 VAND. J. ENT. & TECH. L. 823, 823 (2009) (describing the magic circle as “the metaphorical barrier that supposedly excludes real-world law from virtual worlds”).

that world, such as the ability to respawn after dying or to conjure food for your friends.⁷⁶ Outside of the magic circle, life is governed by our real-world rules.⁷⁷ The purpose of the magic circle is to shield virtual worlds from real world influences.⁷⁸

As discussed by scholars and practitioners, the magic circle has at least three functions: the protection of virtual play, the protection of stories and speech, and the protection of a level playing field.⁷⁹ First, players often perform acts in video games that would be illegal in the real world, such as killing other avatars.⁸⁰ The law does not regulate these “killings” any more than they regulate children “killing” each other with toy guns.⁸¹ Second, players telling stories within these games can do so without fear of prosecution. A player’s story depicting murder within a virtual world would not be punished any more than an author writing about a murder in a fiction book.⁸² Finally, a player creating an avatar in a virtual world is effectively creating a new life in a new world; in the game, everyone begins anew and has the chance to succeed. This “level playing field” is thus very important to players.⁸³

A sports analogy can also further illuminate the concept of the magic circle. If you were to tackle someone while playing American

76. See CASTRONOVA, *supra* note 75, at 147 (“Within the barrier, life proceeds according to all kinds of fantasy rules involving space flight, fireballs, invisibility, and so on.”).

77. *See id.*

78. See Fairfield, *supra* note 75, at 824–25 (outside influences such as “law, real-world economics, real-world money, and the like”); *see also* Castronova, *supra* note 1, at 200–01 (discussing the need to make the medieval world of Dark Age of Camelot a distinct play space). Not all influences are shielded, of course; players in MMORPGs discuss real-world news in addition to their in-game play. *See id.* at 194–95 (“[O]utside world issues, along with the affairs of the galaxy, are present in the minds of the players of the Star Wars [Galaxies] game.”). From a legal perspective, the magic circle potentially provides a bright-line test as to what should or should not be regulated in virtual worlds. See DURANSKE, *supra* note 30, at 59. Duranske has proposed a “magic circle test” which states: “An activity that occurs in a virtual world is subject to real-world law if the user undertaking the activity reasonably understood, or should have reasonably understood, at the time of acting, that the act would have real-world implications.” *Id.* at 75.

79. See Fairfield, *supra* note 75, at 826–27.

80. See *Player vs. Player*, *supra* note 36 (discussing PvP).

81. Fairfield, *supra* note 75, at 826.

82. *Id.*

83. The “level playing field” argument is why many players take issue with the ability to trade virtual world accounts and virtual assets for real money. *Id.* at 827.

football, you would not be sued for the tort of battery.⁸⁴ In fact, having to defend yourself in court for every football tackle would be outrageous and would defeat any purpose in playing the game as we currently know it. The rules of the game thus determine what is allowed in the game—just as the laws governing virtual worlds determine what is allowed within the world.

G. Interration

As proposed by Edward Castronova, the “Law of Interration” is one which allows for the creation of play space by granting EULAs a special legal status.⁸⁵ The idea for interreration stems from the law of incorporation, which effectively creates fictional persons.⁸⁶ Virtual worlds created under the terms of interreration become closed worlds, and virtual worlds not created under these terms become open worlds. Closed worlds operate under the EULA, without interference by the real world, and open worlds operate under real world laws.⁸⁷

The terms of creation under the law of interreration are placed in a Charter of Interration.⁸⁸ The charter defines the virtual world, the legal status of virtual assets within the world, as well as the rights of users, developers, and outsiders.⁸⁹ And perhaps most importantly, real world laws affirmatively shield the acts and assets within an interrated virtual world from the real world.⁹⁰ In return for the preservation as a play space, the virtual world must conform to certain standards, such as maintaining a separation of the game economy from the real world economy.⁹¹

84. See Fairfield, *supra* note 53, at 459–60 (“Within the game of football, certain actions that would be routinely considered tortious if engaged in off the playing field—tackling comes to mind—are just part of the game.”).

85. Castronova, *supra* note 1, at 201 (describing a “specific Law of Interration” which would grant EULAs a “legal status robust enough to allow them to preserve synthetic worlds as play spaces”).

86. See *id.* at 203–04 (describing the precedent of interreration to be the act of incorporation).

87. See *id.* at 201–02 (describing closed worlds and open worlds).

88. This process is similar to incorporation, in which the potential corporation must submit an Articles of Incorporation. See *id.* at 204 (describing the process of interreration).

89. *Id.*

90. *Id.*

91. *Id.*

On the other hand, virtual worlds which are not interrated are not preserved as play spaces. Open worlds are thus subject to real world laws, and economic activity within these worlds is treated the same as economic activity within the real world.⁹² Real world consequences thus apply when theft of an open world item occurs: even if the item is a magic sword in a fantasy world, it has real, identifiable value in the real world.⁹³

III. ANALYSIS

EULAs are currently the norm for virtual worlds, and they have been a workable solution to apply different sets of rules to the different virtual worlds. However, recent commentators believe that these EULAs are either sub-optimal or insufficient, and that real world laws will inevitably enter virtual worlds.⁹⁴ Given the substantial number of these arguments, it would not be surprising if EULAs are ultimately only a temporary solution to the regulation and governance of virtual worlds.

Even courts have begun to attack virtual world EULAs. While the result in *Bragg* was correct—the arbitration provision in the Second Life TOS was sub-optimal and the decision led to a better EULA—*Bragg* also tells us that, unlike computer software and online website licenses, courts may be less willing to uphold virtual world EULAs “without subjecting them to significant scrutiny.”⁹⁵ The importance of virtual worlds, both to their individual users and to our society at large, can point either way as to whether EULAs should receive more or less scrutiny when challenged.

However, the potential implications of *Bragg* may lead to unfortunate results if open worlds are not distinguished from game worlds. The problem stems from the fact that different virtual worlds

92. *See id.* at 205–06.

93. *See id.* at 206 (describing different ways by which we can determine the value of assets within the open world).

94. *See supra* note 70. Professor Balkin argues that it is precisely *because* virtual worlds are becoming increasingly important to our society that real world laws will start being applied to virtual worlds. *See Balkin, supra* note 2, at 2045.

95. *See DURANSKE, supra* note 30, at 123; Kunze, *supra* note 14, at 111; *see also supra* note 49 (discussing the general enforceability of other license agreements).

can be created for significantly different purposes.⁹⁶ The different aims of different virtual worlds can often be seen through variations in their respective EULAs,⁹⁷ and attempting to apply the same set of rules to both types of virtual worlds would be disastrous.

If we recognize the magic circle, then game worlds should be governed by specialized rules. Real world laws would not enter and break the magic circle.⁹⁸ The EULA that the provider imposes upon users should govern game worlds instead. If a potential user does not like the terms of a virtual world's EULA, he or she can choose beforehand to participate in a different virtual world.⁹⁹ Similarly, because open worlds are designed largely to be an extension of real life rather than a separate play space, it is unnecessary to apply the magic circle to them.¹⁰⁰

One simple way to distinguish game worlds from open worlds is to see whether the virtual world provider allows for real money trade of virtual assets.¹⁰¹ A pure game world may completely separate virtual assets from real assets, whereas property in an open world might be treated the same as real property, and currency in an open world can be freely exchanged for real currency.

Professor Castronova's "Law of Interration" thus provides a potential starting point for regulating virtual worlds beyond EULAs,

96. Although they are both virtual worlds, game worlds such as World of Warcraft are developed as distinct play spaces, whereas open worlds such as Second Life are developed largely as an extension of real life. *See supra* Part II.C.

97. Two examples are the intellectual property rights provisions in open worlds like Second Life, and the express allowance of transfer of virtual assets in Sony's Vanguard and two of their EverQuest II servers. *See supra* note 39 and accompanying text.

98. Real-world laws step in only to help *preserve* the magic circle; for example, Blizzard obtained a permanent injunction against In Game Dollar, LLC, the parent company of Peons4Hire, preventing them from, inter alia, "engaging in the sale of World of Warcraft virtual assets or power leveling services." Consent Permanent Injunction at 2, *Blizzard Entm't, Inc. v. In Game Dollar, LLC*, No. 07-CV-00589-JVS (C.D. Cal. Dec. 17, 2007).

99. *See* Kunze, *supra* note 14, at 118 (noting customers' "ability to compare products and evaluate substitutes").

100. *See* Castronova, *supra* note 1, at 201-02.

101. In fact, Professor Castronova's Law of Interration suggests this kind of distinction. *See id.* at 204 ("[T]he chartered interroration would be subject to strict rules. . . . For example, an interroration would have to maintain strict separation of the synthetic economy from the economy of Earth."). One idea behind making this particular distinction is that the virtual world becomes a tax haven rather than a play space if virtual property can be bought and sold for real money. *Id.*

as it distinguishes game worlds from open worlds.¹⁰² The basic idea of interration is to allow developers to choose whether they want to create pure game worlds that are immune from real-world laws or open worlds that are subject to real-world laws. Professor Balkin discussed four advantages of interration over EULAs in fixing the basic rights and duties of players and virtual world providers, the most important of which is that interration provides a set of expectations from a given virtual world.¹⁰³

However, the distinction between the different types of virtual worlds cannot be made simply by looking for the separation of virtual assets from real assets. For example, game worlds that use a microtransaction business model inherently encourage users to purchase virtual property with real money.¹⁰⁴ In addition, Sony encourages real money trade of virtual currency in their virtual worlds of Vanguard and EverQuest II, even though both are game worlds with subscription fees.¹⁰⁵ These “hybrid approaches” can frustrate the application of Professor Castronova’s Law of Interration.¹⁰⁶ Even in World of Warcraft, the primary example of a pure game world, one can obtain mounts, vanity pets, and other toys by using codes obtained from the World of Warcraft Trading Card Game or by directly purchasing them online.¹⁰⁷ The idea of a distinct

102. See *supra* note 87 and accompanying text.

103. The four advantages noted are: (1) reduction of transaction costs between players and providers; (2) the securing of rights of non-players who may not be able to contract easily with providers; (3) protection of important reliance interests of players by preventing basic understandings about the virtual world from being changed after a significant investment by the player; and (4) protection of free speech interests. See Balkin, *supra* note 2, at 2092.

104. See *supra* notes 43–44 and accompanying text.

105. See Kayser, *supra* note 50, at 83 (describing EverQuest II as a “hybrid” rather than a pure game space, due to Sony’s decision to commoditize the game).

106. See *id.* at 84–85 (discussing that within hybrids, “some elements of the game world are pure game play, while other elements are commoditized” and that the controlling analysis of a real-world court is likely to be traditional contract analysis). Kayser applied the Law of Interration to World of Warcraft and found that Blizzard’s clear terms disallowing real-money trade of virtual assets and their attempts to control all aspects of the virtual world would qualify World of Warcraft as a pure game world. See *id.* at 76–78.

107. See *World of Warcraft TCG Redeemable In Game Loot/Legendary Cards*, WOWTCGAME.COM, <http://www.wowtcgame.com/loot.asp> (last visited Apr. 10, 2011) (“Loot cards are special versions of cards . . . that have a unique code. When you enter this code into the website, you will get a unique in-game item for the World of Warcraft MMORPG.”). More recently, Blizzard has allowed users to directly purchase certain pets and mounts for real money. See BLIZZARD STORE, <http://us.blizzard.com/store/browse.xml?f=c:5, c:33> (last visited

play space is desirable, yet even game worlds typically do not draw a strict line between the virtual economy and the real economy.

Thus, although Professor Castronova's bright-line rules for intertation continue to be useful for pure game worlds and open worlds, they ultimately fail when applied to hybrid worlds.¹⁰⁸ As hybrid worlds are still game worlds and not open worlds, some degree of protection from real-world laws should still apply to them. A more expansive idea of intertation would allow developers to choose from a variety of options and design their virtual worlds accordingly.¹⁰⁹ This solution is ultimately the best in light of the changes that have occurred in virtual worlds over the past few years.

There are good reasons to believe that virtual property will someday become recognized as real property.¹¹⁰ As this day draws closer, it will become more important to distinguish game worlds from open worlds, to take hybrid worlds into account, and to distinguish virtual property which should be recognized from that which should not.¹¹¹

IV. PROPOSAL

The first step to properly governing the different types of virtual worlds is to explicitly adopt the concept of the magic circle. Two major benefits arise from doing so. First, game worlds would retain their status as distinct play-spaces where real-world laws would not

Apr. 15, 2011) (offering pets such as Lil' Ragnaros and Moonkin Hatchling, and mounts such as the Celestial Steed, for sale). However, Blizzard has repeatedly stated that any items obtained through outside means would not affect gameplay; for example, mounts and pets will not enhance a character's abilities—their only use is for “fun.” See *Pet Store FAQ*, BLIZZARD ENT., http://us.blizzard.com/support/article.xml?locale=en_US&articleId=29845 (last visited Apr. 12, 2011) (noting that such items are “purely cosmetic and just for fun” and that Blizzard will not introduce the ability to buy items such as epic weapons).

108. See Kayser, *supra* note 50, at 80–85 (attempting to apply intertation to Sony's EverQuest II and concluding that “the application of Castronova's Charter of Intertation is indeterminate”).

109. See Balkin, *supra* note 2, at 2091.

110. See DURANSKE, *supra* note 30, at 92 (“Although virtual property is not likely to be recognized soon as a new class of property, several very good arguments have been developed as to why it *should* be.”).

111. Duranske hypothesizes that if virtual property is acknowledged as a new class of property, then a mechanism like intertation would likely also be adopted to preserve play spaces. See *id.* at 97.

apply.¹¹² Second, adopting the magic circle would allow the legal system to adopt a bright-line rule as to what types of activities in which types of virtual worlds can be a cause of action.¹¹³

Next, a statute of intertation that allows developers to choose from a variety of options should be adopted. For pure game worlds such as World of Warcraft, the government can offer a form of intertation designed to prevent all real-world laws from entering the virtual world.¹¹⁴ This form of intertation should allow the provider to impose any set of rules on the game as they wish, while providing them freedom from liability unless they deviate from the form of intertation. The government must impose some standards or restrictions for the world to retain their status as a pure game world; for example, a good faith effort to maintain the pure game world.¹¹⁵ Given the evolution of such pure game worlds, however, strict separation of all economic activity would not be helpful. Instead, the government should allow extremely limited exceptions, such as real-world commodification for items that do not affect gameplay.¹¹⁶

For open worlds such as Second Life, the government should offer a form of intertation to designate these worlds as effectively extensions of the real world.¹¹⁷ This form of intertation should apply the full set of real-world laws to the virtual world, including most importantly property rights both in the virtual item itself (e.g., a sword) and in the creator's intellectual property rights (e.g., the trademark used on a brand of swords).¹¹⁸ The virtual world provider

112. Thus, players would continue to be able to kill each others' avatars or steal their items without fear of legal action, as long as they remained within the rules of the game. *See supra* notes 80–81 and accompanying text.

113. With a bright-line rule, players and providers alike can avoid confusion as to whether and when they should expect real-world laws to apply to the virtual world. *See DURANSKE, supra* note 30, at 59.

114. This is the essence of the Charter of Intertation in Castronova's original proposal as applied to closed worlds. *See Castronova, supra* note 1, at 201–04.

115. *Id.* at 204 (suggesting that "lack of good faith efforts to maintain the space as a *play* space could lead to the revocation of the charter").

116. For example, the non-combat pets in World of Warcraft may be an example of such an item. *See BLIZZARD STORE, supra* note 107, for a list of the various items that World of Warcraft offers which do not impact gameplay.

117. Although Balkin noted this form of intertation may be offered, his comments regarding it discuss the same First Amendment considerations as an open world. *See Balkin, supra* note 2, at 2091.

118. Other important rights implicated may include that of free speech. *See generally*

will likely incur basic obligations such as protecting the privacy rights of their players, but will not be responsible for imposing major sets of rules and behavioral codes. The government, however, must offer some liability protection to the provider.¹¹⁹

Finally, for hybrid worlds, the government should offer a sliding scale of protection depending on the degree of openness. For example, a microtransaction world may be entirely identical to a pure game world in all respects except the way the provider generates profits.¹²⁰ These should be afforded the exact same protection given to pure game worlds, even though they offer items for purchase by real world currency. However, if the hybrid world allows players to sell items back to the provider for real-world currency, the hybrid world should lose its protection, as its virtual economy becomes connected both ways with the real-world economy.¹²¹ Similarly, a hybrid world should receive more protection if all items must be purchased from the provider and less protection if items can be bought and sold for real money between players.¹²² Finally, the scope of rights and protection may be limited depending on what exactly is allowed; for example, many of these games implicate some virtual property rights, but all intellectual property rights would remain solely in the hands of the provider.

Apart from the details of the forms of interraction, two important ideas must be remembered. First, although we speak of preventing

Balkin, *supra* note 2 (discussing free speech and First Amendment rights within virtual worlds). Virtual crimes may be possible, although it is noted here only as a possibility as it is a complex subject. Virtual worlds are inherently different from the real world due to their existence solely on the Internet and on a company's servers, and any law of interraction must take this into account. The emerging field of "cyberlaw" may be instructive as to how we might deal with some of these matters.

119. For example, during temporary outages or updates, the provider must not be liable for the time in which users cannot log onto the virtual world.

120. In other words, it is possible that the only difference between a pure game world and a microtransaction world is that the pure game world derives its profits from subscription fees, whereas the microtransaction world derives its profits from selling in-game assets to players.

121. Where the provider is the only seller of virtual assets, the economies are connected only one way: money goes to the provider and the player obtains the virtual assets. In itself, this system does not promote the idea of virtual property because while a sword may cost the player fifteen dollars, the player cannot turn around and sell that sword back to the provider.

122. In addition, a virtual world such as Vanguard, which allows items and currency to be bought and sold for real money between players, may receive more protection than a virtual world, which offers a direct currency exchange, such as Second Life.

real-world laws from entering the pure game world, these laws must still be used to maintain the world.¹²³ Players and companies attempting to sell virtual currency for real currency within such a game world may thus be taken to court and enjoined from doing so. Second, virtual world developers must designate which type of virtual world they want to create when submitting their Charter of Interration. Once submitted, they cannot change the type of world created. Pure game worlds cannot open a currency exchange or begin allowing players to buy and sell virtual assets for real money. Open worlds cannot suddenly close their economy to the real-world economy. Hybrid worlds cannot change the fundamental status of virtual assets. To do so would defeat the purpose of interreration, as players would have come to rely on their rights and the legal status of their virtual assets within that world.

V. CONCLUSION

Although EULAs have governed virtual worlds for the past decade and are likely to continue doing so in the near future, a statutory solution to the governance of virtual worlds should be seriously considered. Scholars recognize the growing importance of virtual worlds to our society and economy, and virtual worlds will only continue to expand.¹²⁴ Many individuals already have an avatar in a virtual world somewhere. Soon, we may no longer be able to rely on contract law to govern our virtual lives. An alternate solution should be developed before we decide that EULAs are unenforceable or insufficient.

123. See *supra* note 96, for an example of real-world laws being used to maintain the integrity of a game world. As Professor Castronova notes, “Earth law would in fact state that these protections are necessary for the interrated space to provide social benefits. The safeguards are essential for its functioning, and that is why an Act of Interration even exists.” Castronova, *supra* note 1, at 204.

124. Though traditional virtual worlds such as World of Warcraft remain popular, new social games launched less than a year ago such as Zynga’s FarmVille have generated significant popularity, with tens of millions of users. Alicia Ashby, *Facebook Credits Coming Soon to FarmVille*, VIRTUAL WORLDS NEWS (Jan. 26, 2010 05:49 AM), <http://www.virtualworldsnews.com/2010/01/facebook-credits-coming-soon-to-farmville.html> (“FarmVille serves roughly 75 million monthly active users and is by far the single largest social game on the Facebook platform.”).

Professor Castronova's Law of Interration provides a good starting point for the governance of virtual worlds outside of EULAs. However, the original proposal is no longer sufficient in light of the changes to virtual worlds in the last few years. An incomplete statute of interreration will leave gaps under which confusion will result, and players and providers alike would be unsure of the scope of their respective rights and protections.

Building upon Professors Castronova and Balkin's visions of interrated virtual worlds, an updated solution that considers the recent changes to pure game worlds, as well as emerging hybrid worlds, is essential. A properly drafted statute of interreration would make appropriate distinctions between the different types of virtual worlds, and apply the fitting scope of protections and obligations appropriate to each type. Virtual worlds are not just closed or open anymore, and a statute that allows flexibility for providers will promote future innovation in this area.