

# On Virtual Worlds: Copyright and Contract Law at the Dawn of the Virtual Age<sup>†</sup>

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*This Article argues that copyright law can and should apply to artistic and literary creations occurring entirely in virtual worlds. First, the Article introduces the concept of virtual worlds as places millions of people visit not only for entertainment but also for life and work. Second, the Article reviews the philosophical justifications for copyright, examines objections to applying copyright to virtual, rather than real, creative works, and concludes that neither precludes copyright for virtual creations. Third, the Article articulates how copyright law would function within virtual spaces and reviews copyrightable creations from the perspective of both game developers and players. The Article also examines the validity of licensing agreements requiring players to waive their intellectual property rights as a condition of access to virtual spaces. Finally, the Article demonstrates that because virtual worlds are more than just games, courts and legislators will have to apply laws to virtual worlds as to protect the interests of developers and players alike.*

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## INTRODUCTION

Long a matter of imagination and precatory conjecture, virtual worlds are finally here. Millions of people around the world log on to virtual worlds every day and spend thousands of hours each year inhabiting virtual spaces. Virtual worlds in the form of “massively multiplayer” online games involving tens of thousands of participants serve as the paradigm model. These worlds are far more complex than traditional computer games, and people traveling to virtual spaces seek not only entertainment but also social interaction, community, economic gain, and environments in which to explore self-expression. As virtual worlds continue to grow in scope and popularity, they also become inextricably linked with the real world. Virtual worlds generate vast sums of real money for developers and players alike and serve as important social outlets. Much more than just games, virtual worlds are fast becoming places real people go to live and work. This Article argues that the emerging popularity of virtual worlds requires courts and legislators to apply copyright protection to the virtual-space creations of virtual-world participants and to reexamine copyright and contract law as applied to virtual-world developers and players alike.

Consider for a moment the hypothetical tale of Julian, a virtual-world participant. Julian’s virtual persona is a bard struggling to make a living in the world of Norrath.<sup>1</sup> After spending his formative years as an apprentice to a bard in the city of Rivervale, Julian strikes out on his own, traveling from town to town offering his services as a storyteller, composer, and collector of the oral tradition and history of Norrath.<sup>2</sup> Julian has taken to telling stories for a few silver pieces at a tavern in a small outpost outside Rivervale. Players gather at the tavern to rest after mining mineral ore used in weapon and armor smithing or to relax after a few hours of hunting forest goblins.

Few players gathered in the tavern pay much attention to Julian; however, many Rivervalian locals and countless travelers have noticed the wistful sonnet Julian scrawled on the walls of his small cottage near Rivervale. As word of the literary composition spreads across Norrath, many travelers make the long trek to Julian’s cottage in order to hear Julian’s sonnet. Julian’s sonnet manages to traverse the virtual divide by attracting attention back on Earth where a New York publishing house wants to publish it in an anthology. A well-known singer reads Julian’s sonnet and wants to record a musical version. Several reporters even find Julian’s real-world contact information, hoping to interview him.

1. Norrath is the name of the world in Sony’s massive online virtual world, EverQuest. *See* EverQuest, <http://en.wikipedia.org/wiki/EverQuest> (last visited Jan. 24, 2007). Norrath was populated by over 400,000 participants during the five-year period beginning in July 2001, and as of this writing has over 200,000 participants. MMOGCHART.COM, <http://www.mmogchart.com> (follow “Subscribers: 70,000–700,000” hyperlink) (last visited Jan. 24, 2007) (charting subscriber statistics for virtual worlds).

2. Rivervale is a city in Norrath, on the continent of Antonica. *See* EverQuest, *supra* note 1. A bard is one of several professions a citizen of Norrath may undertake. *See* <http://everquest.station.sony.com> (follow “Classes” hyperlink) (last visited Jan. 24, 2007).

The publicity surprises Julian, a thirty-four-year-old network administrator for a small company. Julian spends over sixty hours a week in Norrath<sup>3</sup> and views his time on Earth as necessary to support his virtual persona. Unlike many virtual-world participants who make thousands of dollars a year trading virtual goods like weapons, property, and currency in real marketplaces such as eBay and Yahoo Auctions,<sup>4</sup> Julian believes that commodifying virtual goods tarnishes the game's authenticity and discourages immersion within Norrath's storyline and geography. Yet Julian feels deeply attached to his virtual persona. Establishing oneself as a virtual bard is hard work and requires a varied and deep knowledge of Norrath's inhabitants, politics, history, and geography. Julian spends thousands of hours developing his character and interacting with the Norrathian game space. Imbuing Sony's virtual space with his own creativity, Julian, like hundreds of thousands of other Norrathians, contributes to the development and evolution of Norrath as a place. While Sony provides the virtual background within which Julian composed his sonnet, Julian's time, knowledge, skill, and hard work led to his spark of creativity. The sonnet is his, or so Julian and many like him believe.

Sony Entertainment has also heard about Julian's sonnet's popularity and sent Julian's real-world self a cease-and-desist letter to warn that any attempts to capitalize on his sonnet will result in Sony terminating Julian's game account pursuant to the End-User License Agreement (EULA) to which he agreed with a mouse click the first time he loaded EverQuest on his computer. Sony, not Julian, owns the rights to the sonnet.<sup>5</sup> In order to gain access to Norrath, Julian waived any rights to in-game property, characters, and artistic creations, as well as any other intellectual property related to Norrath.<sup>6</sup> Sony believes that it owns Julian's sonnet and plans to include a version of it in Sony Books' upcoming publication *Tales of Norrath*.

Julian cannot remember waiving the copyright to his sonnet, nor can he recall assigning any rights to Sony. After Julian states in an interview that he would exercise rights to the sonnet despite Sony's assertions to the contrary, Sony cancels his account.<sup>7</sup> Several lawyers following Julian's story in the press assure Julian that they will sue on his behalf should Sony try to prevent his exercise of his copyright over his sonnet. However Sony, more certain of its legal position, publishes *Tales of Norrath* in time for the holiday shopping season. Julian promptly registers his sonnet for copyright and sues Sony for copyright infringement.

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3. At the height of its popularity, roughly two percent of EverQuest players spent six hours a week in Norrath. Nick Yee, *The Norrathian Scrolls: A Study of EverQuest (Version 2.5)* 12 (2001), <http://www.nickyee.com/report.pdf>.

4. See Julian Dibbell, *The 79th Richest Nation on Earth Doesn't Exist*, WIREd, Jan. 2003, at 106, 108 (discussing online markets for virtual goods).

5. Players must acknowledge that they do not acquire any intellectual property rights related to the EverQuest game and that Sony owns any such rights exclusively. EverQuest User Agreement and Software License, [http://help.station.sony.com/cgi-bin/soe.cfg/php/enduser/std\\_adp.php?p\\_faqid=16210](http://help.station.sony.com/cgi-bin/soe.cfg/php/enduser/std_adp.php?p_faqid=16210) (last visited Jan. 24, 2007).

6. The EULA states that players have no property rights to in-game items and may not buy or sell such items. *Id.* ¶¶ 8–9.

7. The EULA grants Sony the right to revoke any player's EverQuest account at any time and for almost any reason. *Id.* ¶ 6.

This Article discusses the legal issues raised by Julian's hypothetical suit. Specifically, this Article examines the confluence of copyright and contract law in the context of online virtual worlds and discusses the validity of clickwrap EULAs that require virtual-world participants to waive any rights they may have to their artistic creations. Part I provides an overview of contemporary virtual worlds. Part II discusses how copyright law might apply to virtual spaces, first examining the difficulty of applying copyright law's conception of the author as a singular individual to collaborative works like virtual worlds. It then canvasses copyright's originality and fixation requirements and the philosophical justifications for copyright and concludes that neither precludes copyrights for virtual worlds and creations. Finally, Part II discusses what copyrights game developers and players hold in creations existing entirely in virtual space. Part III asks whether a game developer's EULA is binding as a matter of contract law insofar as the EULA forces players to waive their copyrights, and concludes that the developer's EULA is generally binding. Part III also examines whether EULAs, as contracts governed by state law, are preempted by federal copyright law, and concludes that generally such EULAs are not statutorily preempted but may be constitutionally preempted. Noting that courts are unlikely to invalidate developer's EULAs in most cases, Part IV reviews what remedies, if any, are available to players like Julian.

This Article's Conclusion contends that today's virtual worlds are more than mere entertainment. As virtual worlds continue to develop and as the number of individuals spending large portions of their time in these worlds continues to grow, courts and legislators should examine the public policy and fairness issues raised by game developer's EULAs. Both developers and players have a right to copyright protection, but EULAs that require players to waive their rights to in-game creative works may not further the goals of copyright law. Rather, EULAs may decrease incentives for players to create in the game space and alienate players thereby harming both developers and players. Thus, courts and legislators should consider copyright law's underlying policy rationale—encouraging creative works so as to increase the public good—as they seek to apply copyright and contract law to emerging virtual worlds.

### I. A BRIEF DESCRIPTION OF VIRTUAL WORLDS

Millions of people visit virtual worlds every day.<sup>8</sup> These worlds generate billions of dollars, and their profits are projected to balloon in the coming years.<sup>9</sup> Generally, a virtual world is a place people "co-inhabit with hundreds of thousands of other people simultaneously."<sup>10</sup> While the temptation to dismiss virtual worlds as simply another

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8. Geoff Keighley, *The Sorcerer of Sony*, BUSINESS 2.0, Aug. 2002, available at <http://www.timeinc.net/b2/subscribers/articles/print/0,17925,514908,00.html>; see F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CAL. L. REV. 1, 72 (2004) (noting that many people spend large parts of their lives in virtual worlds).

9. "One recent survey estimated the market for online electronic games in 2003 was \$1.9 billion, predicted to grow \$5.2 billion in 2006, and \$9.8 billion by 2009." Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043, 2043 n.1 (2004).

10. Lastowka & Hunter, *supra* note 8, at 3 (quoting What is UO?, Ultima Online, <http://www.uo.com/ageofshadows/viscent.html>).

form of entertainment exists, virtual worlds are far more complex than traditional, single-player computer games. Unlike traditional computer games, where the game world exists only so long as the player is playing, virtual worlds are persistent and exist independently of any individual's presence. Virtual worlds exist in real time even after a specific player logs off, and a person's actions can permanently shape the virtual world.<sup>11</sup> Thousands of individual choices influence the game environment, which result in virtual worlds that behave much like our own. Millions of people with Internet access live large portions of their lives in these worlds, establish friendships, amass virtual property and assets, and form extensive social networks and organizations.<sup>12</sup> At first, virtual worlds were largely text based<sup>13</sup> and not-for-profit as either cyber communities or sword-and-sorcery fantasy games.<sup>14</sup> Today, a majority of large virtual worlds are graphical and profit-driven.<sup>15</sup>

Virtual worlds share a basic characteristic with traditional computer games: the game environment is represented graphically through a computer monitor. However, unlike traditional single-player games, virtual worlds permit gamers to customize their character's appearance and participate in social interaction.<sup>16</sup> Participants construct a virtual-alter-ego called an avatar, through which they interact with other gamers and the virtual world.<sup>17</sup> Gamers design their avatar's physical characteristics—including body proportions, facial features, clothing,<sup>18</sup> and skin color—and communicate with other avatars using chat windows.

Avatars might build a business, establish a social club, marry a partner, or travel to exotic locations with other avatars. Participants use virtual money to purchase property or expand their avatar's existing holdings, giving rise to realistic, integrated economies as more players participate in the virtual world. For example, in a virtual world like Electronic Arts's Sims Online, players attempt to further professional careers by perfecting their skills and socializing with fellow gamers.<sup>19</sup> Other players choose to raise families and build extended social networks.<sup>20</sup> Additionally, each Sims player must ensure that his or her avatar performs such real-world functions as sleeping, bathing, visiting the toilet, and checking the mail.<sup>21</sup> Failing to complete these everyday tasks—as in the real world—results in a decline in hygiene, an inability to focus at work, and even the manifestation of depression in the player's avatar.<sup>22</sup> Other virtual

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11. *Id.* at 4–5.

12. *Id.* at 5 (discussing virtual worlds generally); see also Keighley, *supra* note 8, at 48.

13. Imagine an interactive book. Every part of the world is “illustrated” literally. Players fill in the interstices with their imaginations. However, despite the lack of graphical depiction of the interstices, such books are very similar to graphical virtual worlds.

14. See MUD, <http://en.wikipedia.org/wiki/MUD> (last visited Mar. 6, 2007).

15. See Lastowka & Hunter, *supra* note 8, at 18–29 (describing text- and graphic-based virtual worlds during the 1970s, 1980s, and 1990s).

16. See *id.* at 6.

17. Balkin, *supra* note 9, at 2047; Lastowka & Hunter, *supra* note 8, at 6.

18. Lastowka & Hunter, *supra* note 8, at 6.

19. See Introduction to the Sims Online, <http://sims.stratics.com/content/official/simsintro.php> (last visited Jan. 24, 2007) (describing social interaction in the Sims Online).

20. *Id.*; see also The Sims, [http://en.wikipedia.org/wiki/The\\_sims](http://en.wikipedia.org/wiki/The_sims) (last visited Jan. 24, 2007).

21. The Sims, *supra* note 20.

22. *Id.*

worlds, like Second Life, provide their players with the coding tools necessary to construct in-game items, thus facilitating further social interaction and in-game economic exchange.<sup>23</sup>

While some virtual worlds are dedicated almost exclusively to social interaction and encourage players to enjoy their day-to-day activities in a virtual environment with new people, others provide players a medieval fantasy setting.<sup>24</sup> In these fantasy-oriented worlds, avatars seek to accumulate virtual wealth and assets as they gain experience and skill. They do so over time by exploring the virtual world's geography, fighting monsters, and amassing treasure.<sup>25</sup> The more powerful an avatar, the more virtual wealth he or she is likely to have, which permits the purchase of more powerful weapons, armor, and larger plots of virtual property.<sup>26</sup> Avatars in these medieval worlds also band together to form guilds—smithies, tanners, herbalists, mercenaries, and so on—that pursue crafts or dedicate themselves to protecting fellow members and amassing even greater virtual wealth.<sup>27</sup> Members of these societies often socialize, explore together, hunt large prey, and create more complex socioeconomic structures.<sup>28</sup>

The appeal of interactive virtual worlds, in turn, nets their developers billions of dollars per year.<sup>29</sup> A recent survey by NPD Funworld Industry News estimates the market for online electronic games in 2003 as \$1.9 billion, predicting growth to \$5.2 billion in 2006, and \$9.8 billion by 2009.<sup>30</sup> Players pay forty to fifty dollars<sup>31</sup> for the game software and one month's worth of access and then pay a monthly subscription fee of ten to fifteen dollars.<sup>32</sup> As of this writing, more than 7.5 million Americans are registered as monthly subscribers to U.S.-based virtual worlds,<sup>33</sup> and that number is

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23. See Second Life, Developers: Overview, <http://secondlife.com/developers> (last visited Jan. 24, 2007) (describing the coding tools available to players in Second Life, a virtual world).

24. See About Camelot, <http://www.darkageofcamelot.com/about/> (last visited Jan. 24, 2007) (describing Dark Age of Camelot); EverQuest, <http://everquest.station.sony.com/> (follow "What is EverQuest?" hyperlink) (last visited Jan. 24, 2007) (describing EverQuest); What is UO?, Ultima Online, <http://www.uo.com/ageofshadows/viscent.html> (last visited Jan. 24, 2007) (describing Ultima Online).

25. See sources cited *supra* note 24; MMORG, <http://en.wikipedia.org/wiki/MMORG> (last visited Jan. 24, 2007).

26. See Lastowka & Hunter, *supra* note 8, at 25–29 (describing medieval fantasy virtual worlds).

27. See *id.* at 7, 26–29.

28. See *id.* at 25–29.

29. The amount has reached seven billion dollars as recently as 2004. Randall Stross, *When Long Hours at a Video Game Stop Being Fun*, N.Y. TIMES, Nov. 21, 2004, at BU3.

30. Balkin, *supra* note 9, at 2043 n.1.

31. See Lastowka & Hunter, *supra* note 8, at 25.

32. E.g., Dan Simmons, *Buying Success in Online Gaming*, BBC NEWS, Aug. 5, 2005, [http://news.bbc.co.uk/1/hi/programmes/click\\_online/4747939.stm](http://news.bbc.co.uk/1/hi/programmes/click_online/4747939.stm).

33. As of July 2006, roughly twelve million people paid the subscription fees necessary to visit virtual worlds regularly. MMOGCHART.COM, <http://www.mmogchart.com>, (follow "Total Active Subscribers" hyperlink) (last visited Jan. 24, 2007) (charting subscriber statistics for virtual worlds). For an explanation of Mr. Woodcock's methodology, follow the "Analysis and Conclusions" hyperlink.

likely to grow in the coming years.<sup>34</sup> Given the stakes, virtual-world developers spend millions of dollars a year developing, promoting, and maintaining their virtual worlds.<sup>35</sup>

This billion-dollar market is the product of the hundreds of thousands of virtual hours logged by millions of Americans.<sup>36</sup> Many thousands spend over sixty hours a week in virtual worlds.<sup>37</sup> For example, a survey of inhabitants of Sony EverQuest's Norrath conducted by Edward Castronova (an economics professor studying virtual worlds) reveals that twenty percent of respondents viewed themselves as living in Norrath, twenty-two percent expressed the desire to spend all their time in Norrath, and forty percent indicated that if they could find a sufficient wage in Norrath, they would cease working or studying back on Earth.<sup>38</sup>

Such aspirations are not all that far-fetched. Many players actually earn a living within virtual worlds by buying and selling game items in real-world marketplaces.<sup>39</sup> A 2001 study asserted that Norrath's gross national product, as it relates to the value of virtual goods in the real world, exceeded \$135 million dollars, which ranks Norrath as the seventy-seventh largest economy in the world, slightly larger than Bulgaria.<sup>40</sup> Norrath's economy supported an hourly wage of \$3.42 and the value of one Norrathian platinum piece was greater than that of the Japanese yen.<sup>41</sup> It has been estimated that nearly one billion dollars in capital is generated from the real-world sale and exchange of in-game assets.<sup>42</sup> Often a virtual world's business model encourages gamers to produce and sell virtual goods, which ingrains in players an expectation of ownership in their items and creations regardless of any contrary licensing language.<sup>43</sup> In fact, as of June 2005, Sony was the first virtual-world developer to explicitly permit the exchange of virtual goods by players by allowing real-world sales of virtual assets in

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34. See *id.* (follow the "Total Active Subscribers" hyperlink) (last visited Jan. 24, 2007) (note upward trend in subscriber numbers since January 1998).

35. See Hiawatha Bray, *Hello, World*, BOSTON GLOBE, Dec. 16, 2002, at C1; Mike Snider, *When Multiplayer Worlds Collide*, USA TODAY, June 24, 2003, at 1D.

36. For example, the average EverQuest player spends over twenty hours a week interacting in EverQuest's virtual world. Yee, *supra* note 3, at 12.

37. *Id.* (stating that roughly two percent of EverQuest players spend in excess of sixty hours a week pursuing their virtual lives).

38. Edward Castronova, *Virtual Worlds: A First-Hand Account of Market and Society on the Cyberian Frontier* 22 (Ctr. For Econ. Studies & Ifo Inst. for Econ. Research, Working Paper No. 618, 2001), available at <http://papers.ssrn.com/abstract=294828> (discussing the results of the author's survey regarding EverQuest).

39. See Dibbell, *supra* note 4, at 108–11.

40. Castronova, *supra* note 38, at 33.

41. *Id.* at 31–33.

42. See Posting of Edward Castronova to [http://terranova.blogs.com/terra\\_nova/2004/10/secondary\\_marke.html](http://terranova.blogs.com/terra_nova/2004/10/secondary_marke.html) (Oct. 30, 2004) (discussing an estimate by IGE president Stephen Salyer that the secondary markets related to virtual worlds are worth \$880 million dollars).

43. Balkin, *supra* note 9, at 2072–73 (describing virtual-world business models that encourage players to sell and produce virtual goods).

their virtual world, EverQuest II, and facilitating such sales through their own servers.<sup>44</sup>

Some developers predicate their worlds on virtual-to-real-world commerce. For example, There.com is a virtual world that allows real companies to sell their real-world brands to players in There.com's virtual space.<sup>45</sup> Some companies specialize in selling virtual-world advertising for real-world products.<sup>46</sup> Others reap thousands of dollars by serving as middlemen in the exchange of virtual goods<sup>47</sup> or listing de facto stock markets that facilitate the instantaneous exchange of virtual currencies from different virtual worlds.<sup>48</sup> Some developers go so far as to actively encourage investment-like speculation in virtual property. For example, the virtual world Project Entropia charges no fees and instead sells virtual items and money for real cash.<sup>49</sup> Players can exchange the virtual currency back into real dollars.<sup>50</sup> The developers auctioned off a "newly discovered" 6000-acre virtual tropical island, complete with a castle, valuable natural resources, and exotic game, for \$26,500.<sup>51</sup> The island's new owner can subdivide up to sixty plots to sell to other players—an estimated value of \$30,000<sup>52</sup>—and tax avatars who hunt or mine on the island, a potentially lucrative yet risky investment the owner plans to recoup.<sup>53</sup> As virtual worlds continue to grow, they will likely attract not only players interested in killing dragons, but also players seeking new economic opportunities seemingly less onerous than real-world labor.

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44. See Station Exchange: The Official Secure Marketplace for EverQuest II Players, <http://stationexchange.station.sony.com/> (last visited Jan. 24, 2007) (describing Sony's auction market for virtual goods based in its game EverQuest II).

45. Balkin, *supra* note 9, at 2067; see also Leslie Walker, *Will Women Go There?*, WASH. POST, Jan. 12, 2003, at H7 (discussing how Nike and Levi's have entered into licensing agreements with There.com whereby the clothing companies promote their real products through the sale of virtual renditions of these items to There's players).

46. See Massive Incorporated, In Game Advertising, <http://www.massiveincorporated.com> (last visited Jan. 24, 2007) (discussing the company's role as an in-game advertiser).

47. One example is IGE, self-proclaimed "leading" provider of value-added services to players and publishers of multiplayer online games. See IGE, [http://www.ige.com/aboutus\\_BO.html](http://www.ige.com/aboutus_BO.html) (last visited Jan. 24, 2007). IGE operates a virtual currency exchange where gamers can buy and sell virtual currency from different virtual worlds and also serves as an online storefront where gamers can buy and sell virtual property and even avatars. See IGE, About Us, <http://www.ige.com/about> (last visited Jan. 24, 2007) Think of it as Amazon.com, but for virtual goods.

48. See IGE, Trade Your Currency!, at <http://www.ige.com/trade.html> (last visited Jan. 24, 2007).

49. *Gamer Buys \$26,500 Virtual Land*, BBC NEWS, Dec. 17, 2004, <http://news.bbc.co.uk/1/hi/technology/4104731.stm>; Tim Surette, *Project Entropia Property Sells For \$26K*, GAME SPOT NEWS, Dec. 17, 2004, [http://www.gamespot.com/news/2004/12/17/news\\_6115292.html](http://www.gamespot.com/news/2004/12/17/news_6115292.html).

50. What is the Entropia Universe?, <http://www.project-entropia.com/Content.ajp?id=1303> (last visited Jan. 24, 2007).

51. *Gamer Buys \$26,500 Virtual Land*, *supra* note 49; Surette, *supra* note 49.

52. *Sci-Fi Game Players Selling Fictional Property*, REDORBIT, Aug. 27, 2004, <http://www.redorbit.com/news/display/?id=81928>.

53. See *Gamer Buys \$26,500 Virtual Land*, *supra* note 49.



The number of hours players spend online combined with the profits both developers and gamers earn from virtual worlds suggest that a real-world court will soon have to adjudicate a dispute arising entirely in virtual space.<sup>54</sup> In fact, lawsuits have already been filed, which further demonstrates that virtual worlds have become much more than games. As an example, consider Black Snow Interactive, the world's first virtual sweatshop. Black Snow set up a "point-and-click" sweatshop in Tijuana, Mexico, paid laborers to play in Dark Age of Camelot, a virtual world, around the clock, and then sold the virtual assets and characters they accumulated.<sup>55</sup> Claiming intellectual property infringements and licensing agreement violations, Mythic, Dark Age's developer, suspended the accounts of Black Snow's players; alleging unfair business practices, Black Snow responded by suing Mythic.<sup>56</sup> The case never went to trial.<sup>57</sup>

Consider also a recent lawsuit filed by Marvel Enterprises, Inc., publishers of the Marvel universe of comics, against NCSoft, a prominent developer that runs several virtual worlds,<sup>58</sup> including City of Heroes. City of Heroes takes place in a "sprawling online metropolis," called Paragon City, populated by thousands of superheroes who fight comic-book-like villains in order to safeguard Paragon City.<sup>59</sup> Players choose from hundreds of different superpowers, design their own costumes, and forge their avatar's identity as a super hero.<sup>60</sup> Marvel, owners of numerous comic book character copyrights, sued, alleging that City of Heroes infringed Marvel's copyrights by knowingly creating a game that permits players to fashion avatars that look like Marvel's characters.<sup>61</sup> Although the parties eventually settled,<sup>62</sup> the outcome of similar

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54. Balkin, *supra* note 9, at 2044–45 (arguing that the accelerating real-world commodification of virtual worlds will lead to legal regulation of virtual spaces).

55. Lastowka & Hunter, *supra* note 8, at 39 (describing Black Snow Interactive); see also Matt Slagle, *Bucks for Bytes: Gamers Buy, Sell Virtual Characters*, HOUSTON CHRONICLE, Mar. 25, 2002 (describing Black Snow Interactive).

56. Julian Dibbell, *Black Snow Interactive and the World's First Virtual Sweat Shop*, <http://www.juliandibbell.com/texts/blacksnow.html> (last visited Jan. 24, 2007) (describing the Black Snow litigation).

57. *Id.* Black Snow's lawyers ceased working on the case when Black Snow skipped town after the FTC fined some members of Black Snow for fraudulent business practices in a former business incarnation. *Id.*

58. For more information on NCSoft, see its homepage at <http://www.ncsoft.net/>.

59. What is City of Heroes?, <http://www.cityofheroes.com/gameinfo/synopsis.html> (last visited Jan. 25, 2007).

60. *Id.*

61. See *Marvel Enters., Inc. v. NCSoft Corp.*, No. 04 CV 9253 RGK (PLAx), 2005 WL 878090, at \*1 (C.D. Cal. Mar. 9, 2005).

62. As of this writing, the parties have settled the lawsuit under undisclosed terms as to Marvel's copyright and trademark claims. See *Marvel Entertainment, Inc., NCsoft Corporation, NC Interactive, Inc., Cryptic Studios, Inc. Settle All Litigation*, Dec. 14, 2005, [http://cityofheroes.com/news/archives/2005/12/marvel\\_entertai.html](http://cityofheroes.com/news/archives/2005/12/marvel_entertai.html); Nich Maragos, *NCsoft, Marvel Settle City of Heroes Suit*, GAMASUTRA, Dec. 14, 2005, [http://www.gamasutra.com/php-bin/news\\_index.php?story=7517](http://www.gamasutra.com/php-bin/news_index.php?story=7517). However, a third party, Cryptic Studios, the actual developer of City of Heroes, has filed counterclaims against Marvel for unfair trade practices and interference with contractual relations and business advantage. See *Marvel Enters., Inc. v. NCSoft Corp.*, No. 04 CV 9253 RGK (PLAx), 2006 WL 2703545, (C.D. Cal. Mar. 13, 2006).

cases that may arise portends serious financial implications for the litigants, threatens to limit the ability of future developers to provide players open-ended virtual worlds, and seriously restricts the entertainment, creative, social, and financial outlets virtual worlds provide players.

As the *Black Snow* and *Marvel* cases demonstrate, courts will soon deal with virtual worlds not only as just games, but also as environments beholden to real-world laws. The commodification of virtual worlds and the emergence of virtual goods worth real money effectively invites courts to cross the divide between the real and the virtual.

The remainder of this Article grapples with the intellectual property, contract, and policy issues presented by virtual worlds—specifically, the issues raised by an individual creating an artistic work within the confines of the game space—and contemplates legal and policy considerations relevant to the emergence of virtual worlds in the coming years.<sup>63</sup>

## II. COPYRIGHT LAW PROVIDES GAME DEVELOPERS AND PLAYERS ALIKE PROTECTION FOR THEIR CREATIVE WORKS

### A. *The Goals of Federal Copyright Law*

Copyright law exists to promote the creation of artistic works by providing authors exclusive rights to their creative expression for a limited period of time.<sup>64</sup> The underlying premise of copyright law is that creative works benefit society as a whole.<sup>65</sup> Thus, copyright provides creators with economic incentives in order to encourage the production of creative works that concomitantly yield tangible benefits to the public.<sup>66</sup> However, increasing the public good through access to useful literary and artistic works remains copyright's primary concern, with the monetary reward to creators as a secondary consideration.<sup>67</sup> Given this emphasis on the public good, Congress has

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63. Whether a player actually has a property interest in his assets is beyond the scope of this Article. For some preliminary discussion of the issue see Lastowka & Hunter, *supra* note 8, at 37 n.180; Daniel C. Miller, Note: *Determining Ownership in Virtual Worlds: Copyright and License Agreements*, 22 REV. LITIG. 435 (2003); Molly Stephens, Note: *Sales of In-Game Assets: An Illustration of the Continuing Failure of Intellectual Property Law to Protect Digital-Content Creators*, 80 TEX. L. REV. 1513 (2002).

64. U.S. CONST. art. I, § 8, cl. 8.

65. See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578–79 (1994).

66. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984); *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948) (“[R]eward to the author or artist serves to induce release to the public of the products of his creative genius.”).

67. E.g., *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991) (“The primary objective of copyright is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts.’ . . . To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work.” (quoting U.S. CONST. art. I, § 8, cl. 8) (alteration in original)); *Sony Corp.*, 464 U.S. at 429 (“The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, [sic] the limited grant is a means by which an important public purpose may be achieved.”); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of

legislated numerous exceptions to an author's exclusive right to his creative work that permit others to benefit from the work even while the author holds his exclusive copyright.<sup>68</sup>

Copyrightable works of authorship include literary, musical, dramatic, choreographic, pictorial, audio, audiovisual, and architectural works.<sup>69</sup> To qualify for copyright, an author's work must be fixed in a "tangible medium of expression . . . from which [the work] may be perceived, reproduced, or otherwise communicated, directly or with the aid of a . . . device."<sup>70</sup> Additionally, an author's work must be original to the author.<sup>71</sup> Originality requires only that the work be independently created by the author and that the work possess at least a modicum of creativity.<sup>72</sup> The creativity threshold is extremely low, as a creative spark, "no matter how crude, humble or obvious," normally suffices.<sup>73</sup> Additionally, "originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying."<sup>74</sup> Given this minimal originality threshold, absent contractual limitations to the contrary, both virtual-world developers and players would likely enjoy copyright protection over their contributions to the virtual world.

#### *B. Problems Applying Copyright's Conception of the Author to Virtual Space*

Copyright doctrine tends to assume that a creative work has a singular author,<sup>75</sup> and that the product of that singular author remains static once fixed.<sup>76</sup> The exclusive

literature, music, and the other arts."); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("The copyright law . . . makes reward to the owner a secondary consideration.' . . . [I]t is 'intended . . . to afford greater encouragement to the production of literary [or artistic] works of lasting benefit to the world.'" (citations omitted) (first bracketed alteration in original)).

68. These include fair use, library lending, archival rights, the first-sale doctrine, non-profit performance and display for teaching, and limitations on architectural copyright holder's rights to prevent pictorial works integrating the architectural work. 17 U.S.C. §§ 107–120 (2000).

69. *Id.* § 102(a)(1)-(8) (listing various works of authorship receiving copyright protection).

70. *Id.* § 102(a).

71. *Feist*, 499 U.S. at 345.

72. *Id.*

73. *Id.*

74. *Id.*

75. See *Aalmuhammed v. Lee*, 202 F.3d 1227, 1233 (9th Cir. 2000) (defining an author as "the person to whom the work owes its origin and who superintended the whole work, the 'master mind.'" (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 61 (1884))); *Lindsay v. R.M.S. Titanic*, 52 U.S.P.Q.2d 1609, 1613 (S.D.N.Y. 1999) ("An individual claiming to be an author for copyright purposes must show 'the existence of those facts of originality, of intellectual production, of thought, and conception.'" (quoting *Burrow-Giles*, 111 U.S. at 58)); see also Margaret Chon, *New Wine Bursting from Old Bottles: Collaborative Internet Art, Joint Works, and Entrepreneurship*, 75 OR. L. REV. 257, 257–76 (1996) (discussing and challenging the notion that a particular creative work has one particular author).

76. See Dan L. Burk, *Copyright and Feminism in Digital Media* 20–21 (Minn. Legal Studies, Working Paper No. 05-12) (discussing the difficulty in applying traditional copyright law to collaborative digital works of authorship), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=692029](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=692029) (last visited Jan. 25, 2007); see also 17 U.S.C. § 101 (2000) (defining fixation); *id.* § 103 (discussing derivative works); *Mai Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 516–18 (9th Cir. 1993) (discussing fixation).

authorial rights of the singular author will be triggered by any user manipulation, even when the work exists in a medium that invites secondary authors to manipulate and modify the work.<sup>77</sup> Several scholars have challenged copyright law's assumption that a creative work is the product of a single authorial genius.<sup>78</sup> Some argue that creative works depend in large part on the diversity of external inputs, a healthy public domain, and a large stock of publicly accessible cultural symbols.<sup>79</sup> Others contend that expression is a process, rather than a fixed point, and that a reader is as much an author as the original author.<sup>80</sup> Still others criticize the notion that the reader of a print-based work is a passive participant in the expressive process.<sup>81</sup> These arguments are especially apposite in the context of the collaborative authorship that takes place in virtual worlds. Developers often create only the virtual world's skeleton, encouraging players to create new material that the developers integrate into the game space. The interplay between developer and player-based creation is fluid, with the actions and creations of one affecting the creative responses of the other.<sup>82</sup> This collaborative cycle yields new and evolving plot elements, in-game events, social groups, and economic structures over which neither the developer nor the player can realistically claim sole creative ownership.

The binary nature of copyright, which is dependent on a division between either author and reader or artist and copier, fails to anticipate the collaborative creation occurring in virtual space. The Copyright Act does contemplate some types of collaborative authorship, including joint-authorship, works made for hire, collective works, and compilations.<sup>83</sup> However, these forms of collaborative works are ill-suited for virtual space creativity. These categories rely on the legal fiction of a single author in the context of collaborative authorship and treat the final work as if it were the work of a single guiding genius.<sup>84</sup> These categories also render player alterations to virtual environments "at best unrecognized, and at worst illegal" under copyright law.<sup>85</sup>

Courts can solve this problem by viewing virtual space creations in isolation, rather than as a creative whole. Courts could apply copyright's originality and fixation standards to each individual act of creativity occurring within a virtual world to

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77. See Burk, *supra* note 76, at 21.

78. See, e.g., Keith Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain Part II*, 18 COLUM.-VLA J.L. & ARTS 191 (1994); Chon, *supra* note 75; Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853 (1991); Peter A. Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455 (1991); Jessica Litman, *Copyright as Myth*, 53 U. PITT. L. REV. 235 (1991).

79. See Chon, *supra* note 75.

80. See Coombe, *supra* note 78, at 1863-64.

81. See, e.g., Keith Aoki, *Adrift in the Intertext: Authorship and Audience "Recoding" Rights—Comment on Robert H. Rotstein, "Beyond Metaphor: Copyright Infringement and the Fiction of the Work,"* 68 CHI.-KENT L. REV. 805, 810 (1993); Robert H. Rotstein, *Beyond Metaphor: Copyright Infringement and the Fiction of the Work*, 68 CHI.-KENT L. REV. 725, 727 (1993).

82. See Yochai Benkler, *Coase's Penguin, or, Linux and The Nature of the Firm*, 112 YALE L.J. 369, 389-90 (2002) (describing the collaborative authorship of virtual worlds).

83. See 17 U.S.C. § 101 (2000).

84. See Burk, *supra* note 76, at 21-23.

85. *Id.* at 23.

ascertain authorship and copyright over an individual work or contribution. This construction of copyright creates the inverse legal fiction of the Copyright Act's collaborative works. Thus, existing copyright law would view each creative contribution to the virtual space independently and separately from the collective whole. Copyright's derivative works doctrine serves as a convenient shoehorn in this regard. Normally, the owner of a copyright is entitled to the exclusive right to prepare derivative works based on his or her original work.<sup>86</sup> Thus, when a downstream creator utilizes elements of the copyright owner's original work in a new work without permission, the downstream creator loses any rights to the new work.<sup>87</sup> However, when the downstream creator obtains permission from the owner of the original work to utilize the work in a new work, the product likely constitutes a derivative work.<sup>88</sup> Under traditional copyright principles, the second creator retains copyright over the original aspects of the derivative work independent of the preexisting copyrighted work.<sup>89</sup>

Viewed in this light, the concept of derivative works fits virtual worlds, albeit imperfectly. Players pay a monthly fee and receive permission from the game owner to access the virtual world. While in that world, the player is encouraged to not only play but also to create content that adds to the world. By granting players access to the world, the developer, by implication, grants them permission to create.<sup>90</sup> Even where permission is explicitly refused, the individual content creator in a virtual world might retain copyright over the original aspects of the derivative work, so long as elements of the impermissibly used original work do not "pervade" the work.<sup>91</sup> Under this formulation, each author who contributes to the whole has a copyright-protected interest in his individual expression.

This is not necessarily a bad solution. Unfortunately, it does ignore the collaborative nature of authorship in virtual spaces in order to reach a convenient result. Moreover, it assumes that each individual work is artistically distinct and severable from the collective whole, which may not always be the case. However, barring sudden and sweeping congressional interest in virtual worlds and other forms of collaborative

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86. 17 U.S.C. § 106(2); *see also id.* § 101 (defining derivative works).

87. *See Pickett v. Prince*, 207 F.3d 402, 407 (7th Cir. 2000) (holding that because plaintiff's use of the underlying copyrighted work occurred without authorization, the derivative work was properly denied copyright protection); *Tiffany Design, Inc. v. Reno-Tahoe Specialty, Inc.*, 55 F. Supp. 2d 1113, 1118 (D. Nev. 1999) ("A derivative work copyright can only be obtained when the author legally used the material on which the derivative work was based." (citation omitted)); *Anderson v. Stallone*, No. 87-0592, 1989 U.S. Dist. LEXIS 11109, at \*29 (C.D. Cal. Apr. 25, 1989).

88. "A 'derivative work' is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted." 17 U.S.C. § 101.

89. *Id.* § 103(b) (limiting the copyright in derivative works to the material added to preexisting copyrighted material employed in the new work).

90. This of course assumes no contractual clauses to the contrary. *See infra* Part III.

91. *See MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 3.06* (2002); *Eden Toys, Inc. v. Florelee Undergarment Co.*, 697 F.2d 27, 34 n.6 (2d Cir. 1982). *But see Pickett*, 207 F.3d at 407 (rejecting the Eden court's discussion of copyright attaching to unauthorized derivative works that are not pervaded by the original as dicta).

digital authorship, the existing framework remains applicable to virtual worlds.<sup>92</sup> The remainder of this section applies traditional copyright doctrine to the copyright claims of developers and players to works fixed in virtual spaces.

### *C. The Virtual World Developer's Copyright Interest*

Given the large number of paying subscribers and the developer's financial investment, virtual-world developers have a strong interest in protecting their investment by way of copyright protection. Several elements of virtual worlds may merit copyright protection. The most relevant of these elements relates to the combination of text, sound, and imagery required to create a three-dimensional environment for players to explore. So long as these elements satisfy the originality and fixation requirements, copyright law applies, granting developers significant control over their virtual worlds.

#### 1. Virtual Worlds as Original Works of Authorship

Virtual worlds exhibit the creativity and originality that copyright requires. At their core, virtual worlds are audiovisual works. The Copyright Act defines an audiovisual work as a series of related images, together with accompanying sounds, intrinsically intended to be shown by the use of machines or devices, regardless of the nature of the material objects in which the works are embodied.<sup>93</sup> Courts have held that video games qualify as audiovisual works.<sup>94</sup> Similarly, any non-player, computer-controlled game character can be copyrighted.<sup>95</sup> So long as a video game involves a repetitive sequence of sights and sounds, the game qualifies as an original copyrightable work.<sup>96</sup> Repetitive elements in a virtual world—including non-player characters, geographic obstacles and

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92. Congress could solve the problem by legislating a new category of creative work encompassing online virtual worlds within its ambit. However, defining such a category is beyond the scope of this Article.

93. 17 U.S.C. § 101.

94. *See, e.g.*, *Atari Games Corp. v. Oman*, 979 F.2d 242, 247 (D.C. Cir. 1992) (analogizing a video game to a compilation and holding that while the individual graphic elements of each game screen may not be copyrightable, the compilation of a video game's images and the author's selection and arrangement of those images can reach the minimal degree of creativity required to qualify a work for copyright protection); *Williams Elecs., Inc. v. Artic Int'l, Inc.*, 685 F.2d 870, 374 (3d Cir. 1982) (holding that player interaction with a video game does not preclude copyright, so long as there is a repetitive sequence of a substantial portion of the sights and sounds of the game); *Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852, 854–56 (2d Cir. 1982) (holding that the repetitive sequence of a substantial portion of the sights and sounds of a video game qualify the game for copyright protection as an audiovisual work and noting that a player's participation in the game, varying the sequence of images appearing on the screen, does not withdraw the audiovisual work from copyright eligibility).

95. *Nintendo of Am., Inc. v. Elcon Indus.*, 564 F. Supp. 937, 943 (E.D. Mich. 1982) (holding that the characters, obstacles, and background, as well as the sequence of play of the game, are protectable expressions).

96. *See Williams*, 685 F.2d at 874.

panoramas, sound effects and musical score, and developer-created architectural structures—also satisfy copyright’s originality requirement.<sup>97</sup>

## 2. Virtual Worlds as Fixed Within a Tangible Medium of Expression

Video games must also satisfy copyright’s fixation and tangibility requirements. Virtual world participants perceive a virtual world’s visual and aural elements on their computer screens. However, these graphic and aural depictions are really only bits of code stored on the game developer’s server. When a player launches his game software and logs into the game server, the server transmits the audiovisual work embodied in the code to the player’s computer. The developer’s source code remains constant in the game developer’s server, regardless of any external inputs from players traversing the game space. Copyright law protects both the object and source code behind a game developer’s audiovisual works as literary works.<sup>98</sup> Thus, the code that serves as the backbone of the virtual world satisfies copyright law’s originality requirement. Additionally, a computer game’s memory devices satisfy the requirement for fixation within a tangible medium.<sup>99</sup> As such, it is likely that virtual worlds satisfy the fixation and tangibility requirements of copyright law, qualifying them for copyright protection as audiovisual works.

### *D. The Player’s Copyright Interest*

The combination of financial incentive, social interaction, and the players’ investment of hundreds of hours in their avatars leads players in virtual worlds to feel entitled to their virtual creations and possessions.<sup>100</sup> As such, players may seek copyright protection over their virtual creations. Like game developers, players may find protection in copyright if their creations satisfy the originality and fixation requirements.

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97. Some “standard” elements of virtual worlds may be common enough to be considered *scènes à faire* and thus ineligible for copyright protection. See *Stromback v. New Line Cinema*, 384 F.3d 283, 296–97 (6th Cir. 2004) (discussing *scènes à faire*). Nevertheless, the overall originality and creativity of the *combination* of elements making up the virtual world would likely qualify for copyright. Moreover, unique developer-controlled characters populating virtual worlds also would likely qualify for copyright. See, e.g., *Detective Comics, Inc. v. Bruns Publ’ns, Inc.*, 111 F.2d 432, 433 (2d Cir. 1940) (finding Superman a copyrightable character); *Anderson v. Stallone*, No. 87-0592, 1989 U.S. Dist. LEXIS 11109, at \*15–16 (C.D. Cal. Apr. 25, 1989) (finding Rocky Balboa copyrightable).

98. *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1249 (3d Cir. 1983).

99. See *Stern Elecs., Inc. v. Kaufman*, 669 F.2d 852, 856 (2d Cir. 1982) (“The audiovisual work is permanently embodied in a material object, the memory devices, from which it can be perceived with the aid of the other components of the game.”).

100. See Balkin, *supra* note 9, at 2044 (discussing this point in the context of the inevitability of real laws encroaching on virtual space).

### 1. Preliminary Concerns: Evanescence and Intangibility

A virtual-world participant's claim to copyright protection over in-game creative works may seem more difficult to make than that of a game developer. Two primary concerns relate to virtual artistic creations. First, these creations may seem intangible as they exist entirely in a virtual environment. Second, virtual creations are evanescent in the sense that they have a potentially limited temporal duration.<sup>101</sup> If Sony or Electronic Arts simply turn off the machines in which the artistic and literary creations reside, the virtual world disappears, along with any visual depiction of the creative works within. However, intellectual property rights in the form of copyright, while requiring originality and tangible fixation, attach not to the physical embodiment of the artistic work—a CD, DVD, or paperback novel, for example—but to the metaphysical manifestation of the expression embodied in the creative work.<sup>102</sup> Thus, the copyrightable work persists as fixed within the medium that houses its metaphysical existence—such as the game developer's code base and servers, or the CD a player uses to boot up the virtual world. Concerns over temporal evanescence—for example, if a gamer ceases paying his or her monthly subscription fee or is banned from the virtual world due to a violation of the developer's licensing terms—are similarly dispatched. Copyright attaches the moment an original work is fixed in a tangible medium,<sup>103</sup> and an author's inability to access his work does not affect the copyright calculus so long as the originality and fixation requirements were previously satisfied.<sup>104</sup>

### 2. Philosophical Justifications

A player's copyright claim to in-game creations must also contend with a paucity of case law dealing directly with the claim. However, the three major justifications for intellectual property rights—the utilitarian or economic-incentive view, the Lockean natural rights view, and the Hegelian personhood view—support an interpretation of copyright that grants intellectual property rights to players who create artistic works in virtual space.

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101. Recall that in order to qualify for copyright, artistic works must be fixed—in other words, perceivable—in a tangible medium of expression. 17 U.S.C. § 102(a) (2000); *see also* Lastowka & Hunter, *supra* note 8, at 40–43.

102. *See* Lastowka & Hunter, *supra* note 8, at 40.

103. *See* 17 U.S.C. § 102(a). A work is “fixed” in a tangible medium of expression “when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” *Id.* § 101.

104. However, evanescence may affect a player's ability to exercise their rights by way of a lawsuit. In order to file an infringement suit, a plaintiff must register for, or attempt to register for, copyright. 17 U.S.C. § 411(a) (2000). Should a developer deny a player access and erase their creation from the game, the player will face greater difficulty and expense in proving the work once existed in the developer's code base.



### a. The Utilitarian View

The utilitarian view, espoused in numerous Supreme Court cases, supports granting copyright protection to in-game player creations.<sup>105</sup> Utilitarian justifications for copyright deal with the financial incentive necessary to encourage creative works.<sup>106</sup> In the context of virtual worlds, the utilitarian view provides two possible justifications for copyright: encouraging players to play and encouraging them to create within the game-space. Many players are not interested in financial recompense; players pay game developers to participate in the virtual world. Therefore, the players have little financial incentive to participate, rendering utilitarian support for an incentive to play tenuous.<sup>107</sup> Incentives to create, however, remain, as many gamers likely would neglect in-game artistic and literary pursuits without some form of ownership over their creations. While some players might create simple works for fun, players would devote little time to complex or thoughtful creative works without some control over those works.

Players also collaborate with the game developers. The developer provides the tools with which players contribute to the construction of the game world and story line.<sup>108</sup> Players infuse their virtual selves and creations with their time, energy, and creativity. If players lack the protections of copyright, their desire to contribute creatively to the virtual world decreases, harming the robust exchange of creativity within the virtual world. Players will neglect creative works that enrich and diversify the virtual world—benefiting developers and players alike—and will choose instead only to “play.”<sup>109</sup> With fewer player contributions to the virtual space, the overall public benefit of such contributions diminishes and causes the public good within the virtual world to contract. Consequently, this could harm real-world artists, producers, and consumers, who may benefit from creations within the virtual space.<sup>110</sup> Such a result is diametrically opposed to the maximization principle of utilitarianism. Thus, utilitarian conceptions of copyright endorse granting copyright to players’ in-game creations.

### b. The Lockean View

The Lockean conception of copyright also supports granting copyright protection to players’ in-game artistic creations. The Lockean view is premised on the axiom that “[w]hatsoever [man] removes out of the state that nature hath provided and left it in, he hath mixed his labor with, and joined to it something that is his own, and thereby makes it his property.”<sup>111</sup> Taken to its logical extreme, Locke’s view holds that the

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105. See Lastowka & Hunter, *supra* note 8, at 44–46.

106. See *supra* note 66 and accompanying text.

107. See *Virtual Reality, Appropriation, and Property Rights in Art: A Roundtable Discussion*, 13 CARDOZO ARTS & ENT. L.J. 91, 95–96 (1994) (questioning whether people need copyright incentives to “play in the playland of virtual reality”).

108. Benkler, *supra* note 82, at 389.

109. Indeed, virtual-world developers seeking to encourage player creativity provide their users limited copyright protections. See Torley Linden, *Second Life Terms of Service*, (July 1, 2006), <http://secondlife.com/knowledgebase/article.php?id=060>.

110. See *infra* Part V.

111. Lastowka & Hunter, *supra* note 8, at 46 (quoting JOHN LOCKE, *SECOND TREATISE OF*

creator, by way of his labor, is solely responsible for the creation, and thus possesses absolute rights over his creation, as he could have chosen not to create it in the first place.<sup>112</sup> While some commentators challenge this absolutist view by noting that the public may be worse off if an author limits access to his creations as opposed to never having created them at all,<sup>113</sup> such reasoning seems inapplicable in a virtual world forged from computer code that by its nature as code is essentially limitless. Additionally, Locke limits his proviso by noting that property rights attach only where the "labour makes the far greatest part of the value of [the asset]."<sup>114</sup> This would limit a player's copyright to creative works to which he has supplied greater contributions than the game developer. A player could use the virtual world's storyline and themes as a backdrop or inspiration for a creative work, as the player's labor is the primary impetus for producing the work. Thus, Lockean justifications for intellectual property support a player's copyright in his or her in-game creations.

### c. The Hegelian View

The Hegelian view of property also supports a player's copyright over his or her in-game creations. Hegel conceived of property as an extension of personality, and thus a necessary antecedent to human freedom.<sup>115</sup> Hegel's conception of property is bifurcated into the personal, those items whose loss would occasion self-disconnect due to their intimate connection to one's personality, and the fungible, items whose value is primarily monetary and whose loss would not seriously affect an individual's personhood.<sup>116</sup> With so many people spending significant portions of their lives in virtual spaces, their avatars arguably become extensions of themselves. Participants become emotionally invested in their avatars' actions, blurring the distinction between

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GOVERNMENT 17 (Thomas P. Peardon ed., Liberal Arts Press 1952) (1690)). For a fuller discussion of John Locke's theory of property as applied to copyright, see PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 11 (1994) ("Bubbling beneath all [intellectual property] . . . is the intuition that people should be able to hold on to the value of what they create, to reap where they have sown."); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 *YALE L.J.* 1533 (1993).

112. See, e.g., Steven N. S. Cheung, *Property Rights and Invention*, in 8 *RESEARCH IN LAW AND ECONOMICS: THE ECONOMICS OF PATENTS AND COPYRIGHTS* 5, 6 (John Palmer & Richard O. Zerbe, Jr., eds., 1986).

113. See, e.g., Gordon, *supra* note 111.

114. Lastowka & Hunter, *supra* note 8, at 47 (quoting LOCKE, *supra* note 111, at 25). A second limitation, that the property right occurs only up to the point where the creator leaves "enough and as good" in common for others, Lastowka & Hunter, *supra* note 8, at 47 (quoting LOCKE, *supra* note 111, at 17), similarly tempers the extremes of Locke's view.

115. See Lastowka & Hunter, *supra* note 8, 48 & nn.253-55 (citing GEORG WILHELM FRIEDRICH HEGEL, *HEGEL'S PHILOSOPHY OF RIGHT* (T.M. Knox trans., Oxford Univ. Press 1967) (1821); JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 349-50 (1988); Margaret J. Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957, 973 (1982)). For a fuller discussion of Georg Hegel's conception of property and its application to copyright, see generally Radin, *supra* (as applied to copyright), and WALDRON, *supra* (as applied to property generally).

116. See Radin, *supra* note 115, at 986.

real and virtual desires.<sup>117</sup> For example, a player attacked in a medieval fantasy virtual world might experience anger and a thirst for revenge along with an immense sense of satisfaction should he or she secure vengeance. Likewise, an individual who successfully navigates the complexities of a virtual world's economy, emerging as the dominant purveyor of some virtual good, likely experiences satisfaction both virtually and in the real world. Virtual-world social interaction might lead to real-world friendships or even marriage.<sup>118</sup>

For many, the walls dividing real and virtual are inchoate and often nonexistent. What a person achieves virtually can affect his or her real-world desires and goals. For example, female avatars who experience virtual sexual harassment (and even rape) report suffering real-world anger and grief.<sup>119</sup> Some respond by refusing to participate in virtual worlds where they cannot kill the offending avatars.<sup>120</sup> Other players respond to virtual events with tragic real-world consequences, including violence<sup>121</sup> and suicide.<sup>122</sup> Likewise, an individual's real-world economic and social situation influences what he or she seeks to achieve virtually by way of building social networks or amassing virtual goods for real-world profit, and whether a person crosses the virtual divide in the first place.

In-game creative works can satisfy the Hegelian conception of property. Should Julian's sonnet become a corporation's mass-produced property, Julian loses an artistic extension of himself. Similar logic applies to any in-game creative work.<sup>123</sup> Thus, denying copyright to such creations causes the creator to suffer the disconnect of losing a part of one's "self." As such, personhood concerns support a player's copyright over his or her in-game creative works.

117. See Elizabeth M. Reid, *Text-Based Virtual Realities: Identity and the Cyborg Body*, in HIGH NOON ON THE ELECTRONIC FRONTIER: CONCEPTUAL ISSUES IN CYBERSPACE 340 (Peter Ludlow ed., 1996).

118. Lastowka & Hunter, *supra* note 8, at 66.

119. See JULIAN DIBBELL, MY TINY LIFE 11–30 (1998) (describing the rape of two female avatars by a male avatar in the text-based virtual world of LambdaMOO and the distress the female avatars suffered as a result).

120. See Reid, *supra* note 117, at 336; Elizabeth Kolbert, *Pimps and Dragons: How an Online World Survived a Social Breakdown*, THE NEW YORKER, May 28, 2001, at 88, 95.

121. See Michelle Levander, *Where Does Fantasy End?*, TIME, June 4, 2001, available at [http://www.time.com/time/interactive/entertainment/gangs\\_np.html](http://www.time.com/time/interactive/entertainment/gangs_np.html) (discussing off-line player killing, or fantasy game disputes spilling over into real-world violence between gang factions in Korea); *Online Gamer Killed for Selling Cyber Sword*, ABC NEWS ONLINE, Mar. 30, 2005, <http://www.abc.net.au/news/newsitems/200503/s1334618.htm> (reporting on a Chinese man who stabbed a man to death after the victim stole his virtual sword).

122. *Addicted: Suicide Over EverQuest?*, CBSNEWS.COM, Oct. 18, 2002, <http://www.cbsnews.com/stories/2002/10/17/48hours/main525965.shtml> (reporting on the suicide of a Wisconsin man who may have been addicted to EverQuest); Andy Patrizo, *Did Game Play Role in Suicide?*, WIRED NEWS, Apr. 3, 2002, <http://www.wired.com/news/games/0,2101,51490,00.html> (same).

123. Commentators use similar arguments to support the notion of the "author's right" to copyright protection. See, e.g., Roberta R. Kwall, *"Author-Stories: "Narrative's Implications for Moral Rights and Copyright's Joint Authorship Doctrine*, 75 S. CAL. L. REV. 1, 23–26 (2001). Such rights include the right to prevent the mutilation or distortion of his work and the right to be credited as the author. See 17 U.S.C. § 106A (2000).

d. All Three Philosophical Justifications are Necessary to Explain Incentives to Create in Virtual Spaces

While utilitarianism suggests encouraging players to create in virtual spaces is good for the general virtual (and real) world community, utilitarianism speaks in monetary terms and fails to capture the connection an author feels to his or her work. That is, contributors to virtual spaces often may not be motivated by profit, but instead may create for noncompensable social and psychological reasons. As such, the personhood and Lockean arguments are especially important in virtual spaces. Because developers purposely create only skeletal virtual worlds, players are encouraged to fill the interstices with their own creativity. Thus, for many players, the virtual space is as much a child of their creativity as the developer's creativity. In their minds, these players are less like commercial artists seeking financial gain, and more like artistic parents to the "child," the collaborative virtual environment. The Lockean view suggests players will feel a strong moral connection to their contributions to the virtual space. The personhood argument predicts that by collaborating with developers and creating new virtual environments, players will establish subtle but powerful personal connections with their creations and their environment. Both views supplement utilitarianism. In virtual space, incentives to create may at times correspond to pecuniary interests, while at other times they may correspond to subtler, non-monetizable personal and moral incentives. In other words, contributors do not necessarily fit neatly in a market-based view that predicts that players act rationally to maximize their utility by way of securing financial returns for their efforts. As such, all three philosophical justifications are necessary in explaining the motives underlying virtual-world creativity.

3. A Player's Copyrightable Elements

The same originality and fixation principles that govern a developer's copyrights govern a player's copyright over his or her in-game creations. Players may seek copyright protection for several elements of their characters, including their literary or visual representation and any original in-game artistic or literary creation.

a. Literary and Visual Depictions of a Player's Character

Courts might afford two elements of a player's character copyright protection—the unique persona or back story utilized by players while inhabiting the game world and the visual depiction of the character seen by other inhabitants of the game world interacting with the player. Copyright for an avatar's persona is more difficult to attain. Under Judge Hand's abstractions test,<sup>124</sup> the more general and abstract the character within the work, the more likely the character is merely an idea, rather than copyrightable expression.<sup>125</sup>

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124. The classic formulation of the abstraction test is found in *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

125. Judge Hand's abstraction test reads as follows:

Courts have established a high threshold for copyright in literary characters. For example, the Ninth Circuit denied Dashiell Hammett copyright in his *Maltese Falcon* protagonist, Sam Spade, reasoning a character could not receive copyright unless it “constitutes the story being told.”<sup>126</sup> Thus, while particularly distinctive characters in literary works might qualify for copyright independent of the literary work,<sup>127</sup> courts rarely grant copyright to literary interpretations of a character.<sup>128</sup> However, courts are more likely to grant copyright to characters that are depicted graphically.<sup>129</sup> For example, in the context of comic books, one court has noted that “while many literary characters may embody little more than an unprotected idea . . . a comic book character, which has physical as well as conceptual qualities, is more likely to contain some unique elements of expression.”<sup>130</sup> A court might view the combination of a literary work and its manifestation as a graphical or three-dimensional work as achieving the level of distinctiveness required for copyright.<sup>131</sup> Other courts apply this logic to movies, granting copyright to characters exhibiting “consistent, widely identifiable traits.”<sup>132</sup> Thus, a court may grant the visual representation of a player’s character copyright protection if the character is distinctively drawn, sufficiently original, and fixed in a tangible medium.

However, the finite nature of the available permutations of a character’s physical appearance will often militate against a finding of distinctiveness in terms of a character’s visual rendition. Whether an avatar’s visual depiction is sufficiently

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Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his ‘ideas,’ to which, apart from their expression, his property is never extended.

*Id.*

126. *Warner Bros. Pictures, Inc. v. CBS, Inc.*, 216 F.2d 945, 950 (9th Cir. 1954); *see also* *Gaiman v. McFarlane*, 360 F.3d 644, 660–61 (7th Cir. 2004) (criticizing Warner Bros., but implying that verbal descriptions in novels are less amenable to copyright than visual descriptions by way of film or graphic novels); *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003) (“[C]haracters that are ‘especially distinctive’ or the ‘story being told’ receive protection apart from the copyrighted work.”).

127. *See Nichols*, 45 F.2d at 120–22.

128. Kelly M. Slavvit, *Gabby in Wonderland—Through the Internet Looking Glass*, 80 J. PAT. & TRADEMARK OFF. SOC’Y 611, 628 (1998).

129. *Id.*

130. *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751, 755 (9th Cir. 1978).

131. *See Gaiman v. McFarlane*, 360 F.3d 644, 661 (7th Cir. 2004) (providing copyright protection to a character depicted in a graphic novel); *Warner Bros., Inc. v. ABC, Inc.*, 720 F.2d 231, 241–42 (2d Cir. 1983) (discussing the distinctiveness achieved by merging physical and conceptual elements of literary and graphical works); *Walt Disney*, 581 F.2d at 755 (stating that a comic book character is more likely to receive copyright protection than a literary character).

132. *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003); *see also* *Toho Co., Ltd. v. William Morrow & Co., Inc.*, 33 F. Supp. 2d 1206, 1215 (C.D. Cal. 1998) (finding Godzilla a copyrightable character); *MGM, Inc. v. Am. Honda Motor Corp.*, 900 F. Supp. 1287, 1297 (C.D. Cal. 1995) (finding James Bond a copyrightable character); *Anderson v. Stallone*, No. 87-0592, 1989 U.S. Dist. LEXIS 11109, at \*7 (C.D. Cal. Apr. 25, 1989) (finding Rocky Balboa a copyrightable character).

distinctive depends on the player's role in creating it. Normally, virtual worlds provide players with the tools to create their character's visual depictions. Players choose from a finite, coded number of physical features, clothing, and color schemes. With hundreds of thousands of characters inhabiting a virtual world, the limited choices granted players regarding their visual appearance yields overlap between avatars' depictions, weakening any argument that the depiction is sufficiently distinctive. Likewise, copyright's *scènes à faire* doctrine would prevent copyright attaching to avatar depictions where elements of the depiction are standard in the visual treatment of that type of avatar.<sup>133</sup> Accordingly, given the limited tools most game developers provide players for character creation, many characters will likely fail to satisfy the level of distinctiveness that copyright requires.

Some developers offer a complex character development system providing players billions of possible combinations when rendering an avatar's graphical appearance.<sup>134</sup> A truly complex system might provide sufficient choice to justify copyright. A virtual world might also allow players to code original attributes of their avatar's visual depiction. A proficient coder would have far more permutations available to him or her than a player relying on a game developer's preset options. In either of these examples, the player may retain the right to commercially or artistically exploit the character, including any derivative works based on it.<sup>135</sup>

Moreover, players need not share copyright over their avatar with the game developer as a co-author. Co-authorship depends on whether the "co-authors (1) made independently copyrightable contributions to the work; and (2) fully intended to be co-authors."<sup>136</sup> A player likely does not intend to share copyright in the character with the developer.<sup>137</sup> Only a contract clause stating otherwise would change this. Thus, players

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133. See *supra* note 97 and accompanying text.

134. City of Villains, NCSoft's follow-up to City of Heroes, boasts a "staggering" range of possible player permutations, effectively providing players endless choice in creating their avatars. Game Synopsis, <http://www.cityofvillains.com/gameinfo/synopsis.html> (last visited Nov. 6, 2006);

135. See 17 U.S.C. § 101 (2000) (defining derivative works); *supra* Part II.B. Even if a player retains copyright over his avatar's appearance, the player may have to contend with a suit from a third party alleging copyright infringement. For example, the player's avatar might look like Superman, or a third party might sue the player or the developer for infringing publicity rights where the avatar resembles a real person. Both of these claims are beyond the scope of this Article, although the copyright claim depends on whether the player has a fair use defense and the publicity claim would turn on whether the player or the developer was using the real person's likeness for commercial gain. See 17 U.S.C. § 107 (2000) (codifying fair use); *Midler v. Ford Motor Co.*, 849 F.2d 460, 463–64 (9th Cir. 1988) (discussing publicity rights).

136. *Thomson v. Larson*, 147 F.3d 195, 200 (2d Cir. 1998); see also 17 U.S.C. § 101 (2000) (defining a joint work as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole").

137. See 17 U.S.C. § 201(b) (2000) (describing works made for hire). A game manufacturer might also analogize the virtual-world dynamic to that of the relationship between a research university and its professors. Universities often own the rights to their research professors' work if the professor is an employee and the work is created within the scope of employment. However, the structure of virtual worlds, where players pay the game developers for access hardly qualifies the players as employees of the game manufacturer. Absent a contractual provision declaring otherwise, a "work for hire" argument would likely fail.

may retain not only copyright, but sole copyright over their avatar's visual depiction in worlds providing sufficiently complex character and object-creation tools.

#### b. A Player's Independent In-Game Artistic Works

Artistic works created by players in the virtual world, including musical, pictorial, graphical, sculptural, and architectural works, suffer some of the same problems as a player's visual depiction of his avatar. Many virtual worlds permit players to purchase virtual property and design their own virtual buildings. Other virtual worlds might allow players to create paintings or sculptures within the game space. Developers might also code in musical functionality, permitting players to play a few notes on a virtual flute. Unlike visual depictions of a player's avatar, players seeking copyright over artistic works need not satisfy the "distinctive" test applicable to literary and visual characters. However, these artistic works are often dependent on prefabricated tools, images, and sounds, thus raising the problem of originality. While the originality threshold is low,<sup>138</sup> players face the added burden of creating artistic works within the confines of the virtual world's code. Thus, while a real-world artist may paint a canvas using any brushstroke he chooses, virtual-world artists lack such freedom.<sup>139</sup> The scope of this creative freedom is relevant to copyright. The more limiting the virtual world's code is, the less likely an in-game artistic work can satisfy originality. Where the code is particularly limiting, artistic creations must also overcome the copyright concept of merger. That is, where only a few ways of artistically expressing an idea exist, the idea and its expression become inseparable, and copyright either doesn't attach or prohibits only verbatim copying.<sup>140</sup> Thus, where a developer's code provides a range of only a few types of artistic works that players can create, copyright may not attach to the work.<sup>141</sup>

Where a developer's code does not excessively limit the scope of a player's artistic creations, copyright should attach where originality and fixation are satisfied. Some developers permit players to create in-game objects, not limited by coded presets, that

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138. See *supra* text accompanying notes 71–73.

139. For example, in order to create a piano in Ultima Online's Britannia, a would-be artisan must use prefabricated bolts of virtual cloth and "trick" the game server by arranging the virtual bolts just so in order to create the physical semblance of a piano. See *How to Make the Pianos*, [http://uo.stratics.com/homes/betterhomes/essay\\_piano.shtml](http://uo.stratics.com/homes/betterhomes/essay_piano.shtml) (last visited Feb. 1, 2006).

140. See, e.g., *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 607 (1st Cir. 1988); *Frybarger v. Int'l Bus. Mach. Corp.*, 812 F.2d 525, 529–30 (9th Cir. 1987). Judge Aldrich articulated the policies underlying the merger doctrine in *Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678–79 (1st Cir. 1967). In cases where only a limited number of means of expressing an idea exist, permitting copyright "would mean that a party or parties, by copyrighting a mere handful of forms [of expression], could exhaust all possibilities of future use of the substance . . . [and thus] the subject matter would be appropriated by permitting the copyrighting of its expression." *Id.*

141. See, e.g., *Kern River Gas Transmission Co. v. Coastal Corp.*, 899 F.2d 1458, 1463 (5th Cir. 1990); *Morrissey*, 379 F.2d at 678–79. Some courts permit copyright to attach, but allow defendants to use merger as an affirmative defense to copyright infringement. *E.g.*, *Ets-Hokin v. Sky Spirits*, 225 F.3d 1068, 1082 (9th Cir. 2000).

their avatars can use or sell to other players.<sup>142</sup> Other worlds might provide players with drawing and painting tools comparable to software tools used by graphic designers.<sup>143</sup> In such worlds, a player proficient in the relevant coding language need only satisfy the copyright requirements in order to receive copyright. Thus, in-game artistic creations, which overcome concerns of originality and merger, are more likely to receive copyright protection than an avatar's virtual depiction.

### c. A Player's Independent In-Game Literary Works

Players have stronger copyright claims to any literary works created within the game space. Unlike an avatar's visual depiction or a player's artistic creations, literary works created within the game space do not suffer from the game's inherent creative limitations. In-game literary creations do not depend on the game designer's prefabricated tools and images. The code may function as "law,"<sup>144</sup> dictating what in-game actions a player may take, but the player applies his creativity, independent from the code, to the game space. Even where a player's in-game literary work refers to elements of the game space, the player still composes the literary work independently and imbues it with his own originality, much as a real-world author that incorporates real individuals or locations in his literary work nonetheless retains copyright in his work. So long as the in-game literary works of Julian or other players are original, express a minimal degree of creativity, and are fixed in a tangible medium from which they may be communicated to others, these works should qualify for copyright protection. Julian's sonnet, a creative, original literary work fixed within the code from which the sonnet's graphical depiction is derived, meets these requirements.<sup>145</sup>

A player creating literary works in a virtual world is akin to an author using Microsoft Word. The program's code limits the writer to certain document elements, such as tables, graphs, headings, or typography. But what the author writes is entirely dependent on his own creative spark. The player, like the writer, uses a medium limited by code to convey his unbounded message. The avatar itself may be constrained by the virtual world's code, but the avatar's literary manifestations exist separate from the code base, and are limited only by the player's own mental faculties. So long as these works satisfy the originality and fixation requirements and are not limited by *scènes à faire*, players should receive copyright over their creations.

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142. See Linden, *supra* note 109 (describing the coding tools available to players in Second Life, a virtual world).

143. As of this writing, no such virtual world exists. However, virtual worlds like Second Life and There.com that permit players to code their own objects and alter the game environment could offer such tools in the future. Copyright might attach to virtual-world artistic works where a player's artistic range is not limited by the virtual world's code.

144. See generally LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999).

145. Similar logic might apply to dramatic work. For example, a player might direct a virtual play within the game space. If original, the work would have to satisfy the fixation requirement. If the work is recorded, either by the player or the developer, or saved into the code for future viewing, the work satisfies fixation. On the other hand, a choreographic work would suffer the same limitations as an artistic work and a character's visual depiction, as the code base would limit the types of dance moves an avatar might perform.



#### 4. Player Creations as Derivative Works

Even if the developer maintains copyright ownership of a player's visual depiction of his avatar and his in-game possessions, a player's in-game creative work is not a derivative work based on copyrightable elements the game developer controls. The Copyright Act defines a derivative work as a "work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted."<sup>146</sup> A derivative work must be fixed and must substantially incorporate protected material from the preexisting work.<sup>147</sup> A game developer claiming that a derivative work infringes copyright must show a substantial similarity in both ideas and expression.<sup>148</sup> "Similarity of ideas may be shown by comparing the objective details of the works: plot, theme, dialogue, mood, setting, characters, etc. Similarity of expression focuses on the response of the ordinary reasonable person, and considers the total concept and feel of the works."<sup>149</sup> Put another way, a court compares copyrightable elements in the original work with the alleged derivative work, while also looking to how much of the copyrighted work is used in the derivative work.<sup>150</sup>

In the context of a literary or artistic work created within virtual space, this means the work must reflect a substantial similarity with copyrighted work created within the game space by the game developer. To claim that a player's work was derivative of its copyrights, a company like Sony would have to show that a player's sonnet was similar to some original expression that Sony created and fixed within the code governing the virtual world. A reference in a player's work to an in-game location or character would not qualify as a derivative work unless the referenced in-game object qualified for copyright and the reference itself was so significant a portion of the creative work as to render the work substantially similar to Sony's work. Also, any elements of an artistic or literary work created by Sony inherent to that type of work—setting, characters, locations, themes, and so on—may be precluded from the derivative work analysis, as they might not qualify for copyright protection under the doctrine of *scènes à faire*.<sup>151</sup> A player-created work utilizing such elements, even if similar to a work created by Sony, would not constitute a derivative work. Thus, barring substantial similarity to copyrightable works, a literary or artistic work such as Julian's is likely independently

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146. 17 U.S.C. § 101 (2000 & Supp. III 2003).

147. *Micro Star v. Formgen, Inc.*, 154 F.3d 1107, 1110 (9th Cir. 1998) (listing factors a court considers when analyzing a derivative work copyright claim); *see also Stromback v. New Line Cinema*, 384 F.3d 283, 294 (6th Cir. 2004) (formulating a derivative works analysis similar to the Ninth Circuit's).

148. *Micro Star*, 154 F.3d at 1112; *see also Litchfield v. Spielberg*, 736 F.2d 1352, 1357 (9th Cir. 1984) (stating that a work is derivative "only if it would be considered an infringing work if the material which it had derived from a prior work had been taken without the consent of the copyright proprietor of the prior work." (emphasis omitted) (citing *United States v. Taze*, 540 F.2d 961, 965 n.2 (9th Cir. 1976))).

149. *Micro Star*, 154 F.3d at 1112.

150. *See Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70, 75 (2d Cir. 1997).

151. *See supra* note 97.

copyrightable by its creator, so long as originality and fixation are satisfied.<sup>152</sup> As such, a developer's argument that a player's in-game creation is a derivative work of the developer's copyrighted game world should fail.

### III. COPYRIGHT WAIVER AS A CONDITION TO GAINING ACCESS TO VIRTUAL WORLDS

Given that copyright law might grant a virtual-world gamer copyright in his in-game creations, gaming companies justifiably seek to prevent gamers from asserting copyright claims that may impede developers' discretion to manage their game and decrease their profits due to litigation. A game developer cannot risk hundreds of players asserting copyright interests in some portions of his virtual world, holding up his assets in court and hindering his ability to expand the world in ways beneficial to a majority of players. For example, players might accuse Sony of infringing the copyright in their creative works or creating unauthorized derivative works by adding objectionable game content that somehow affects or alters the player's creative contribution. The vitality of virtual worlds depends on their continuous development and expansion. The possibility of player lawsuits impeding a developer's tinkering with the virtual world for the benefit of all could alienate players and render virtual worlds untenable as a business model.

Accordingly, developers seek to protect their interests by requiring any would-be player to accept EULAs, which require players to waive any intellectual property rights they may have over their in-game creations and acknowledge that any such rights belong exclusively to the game developer.<sup>153</sup> If the code functions as the "law"

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152. Moreover, even assuming a player's creation is a derivative work, a player likely retains copyright over the aspects of the work original to the player, given that the developer has authorized the player to create within the game space. *See supra* Part II.B.

153. Different games have different EULAs. However, Sony EverQuest's EULA is fairly indicative of virtual world EULAs as a whole. Three salient clauses affect virtual-world gamers. First, sale of the game software and access to the virtual world is licensed and may be revoked for any violation of the EULA. EverQuest User Agreement and Software License, *supra* note 5, ¶ 7. Second, Sony retains all rights, title, and interest to all property, including intellectual property, related to the virtual world. Players acknowledge that they have no rights to their virtual property or artistic creations, and even if they do, Sony retains all such rights. *Id.* ¶ 8. Third, players may not buy or sell virtual property for real money. *Id.* ¶ 9. And in case these provisions do not survive in court, Sony also requires players to grant it a worldwide, perpetual, irrevocable, royalty-free, sublicenseable right to any copyrightable material players upload to the virtual world. *See id.* ¶ 11.

Other EULAs include similar language. *See, e.g.*, City of Heroes User Agreement, [http://www.plaync.com/help/eula\\_coh.html](http://www.plaync.com/help/eula_coh.html) (last visited Jan. 27, 2007); The Dark Ages of Camelot End User Access and License Agreement, <http://support.darkageofcamelot.com/kb/article.php?id=072> (last visited Jan. 27, 2007); Privacy and Security: Membership Agreement, <http://webapps.prod.there.com/help/74.xml> (last visited Jan. 27, 2007); Star Wars Galaxies—Policies EULA, [http://starwarsgalaxies.station.sony.com/en\\_US/players/content.vm?page=Policies%20Eula&resource=tos](http://starwarsgalaxies.station.sony.com/en_US/players/content.vm?page=Policies%20Eula&resource=tos) (last visited Jan. 27, 2007); Turbine Terms of Service, [http://www.turbinegames.com/index.php?page\\_id=81](http://www.turbinegames.com/index.php?page_id=81) (last visited Jan. 27, 2007); Ultima Online End-User Licensing Agreement, [http://uo.custhelp.com/cgi-bin/uo.cfg/php/enduser/std\\_adp.php?p\\_faqid=20](http://uo.custhelp.com/cgi-bin/uo.cfg/php/enduser/std_adp.php?p_faqid=20) (last visited Jan. 27, 2007); World of Warcraft Terms of Use Agreement,

governing the actions of players within virtual space, the EULA is the social contract between players and developer, establishing how developers expect their players to behave within the game and oftentimes even outside of it.<sup>154</sup> Players must accept EULA terms by clicking “I accept” on a screen that appears when booting up the game software for the first time. Such licenses—referred to as “shrinkwrap” or “clickwrap” licenses—are a relatively new development in contract law,<sup>155</sup> and have elicited lengthy academic discussion.<sup>156</sup> Opponents of shrinkwrap licenses cite several complaints, including: a flawed contract-formation process in terms of mutual assent; the “take it or leave it” nature of the license; the unfairness of “pay now, terms later” contracts; the ease with which sellers can hide terms; and the extent to which such terms improperly extend or limit intellectual property protection.<sup>157</sup> Terms purporting to extend or limit intellectual property protections can be especially problematic, requiring consumers to waive first-sale, reverse engineering, and archival copying rights Congress explicitly granted in the Copyright Act.<sup>158</sup> Proponents contend that the licenses are necessary for the distribution of computer software—especially when that software is distributed through or utilizes the Internet.<sup>159</sup> EULAs enable mass-market distribution of computer software, serving as an efficient tool for setting standard terms where individually negotiated contracts are infeasible.<sup>160</sup> EULAs can help inform customers—should they actually read the EULA—about their rights and obligations under copyright law, rights they may not normally be aware of.<sup>161</sup> EULAs also allow

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<http://www.worldofwarcraft.com/legal/termsofuse.shtml> (last visited Jan. 27, 2007). One exception to the general rule is Second Life, which, in order to facilitate virtual object coding by players, grants players limited intellectual property rights to their creations. See Linden, *supra* note 109.

154. Consider EULA provisions which prevent the transfer of characters between players or the sale of any virtual items and property in real-world markets. Some developers reserve the right to terminate any account suspected of participating in real-world markets for their virtual goods.

155. Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1240, 1241 n.5 (1995) (noting that shrinkwrap licenses likely first emerged during the 1980s).

156. See, e.g., Robert W. Gomulkiewicz, *Getting Serious About User-Friendly Mass Market Licensing for Software*, 12 GEO. MASON L. REV. 687, 691–92 (2004); Lemley, *supra* note 155, at 1241; Charles R. McManis, *The Privatization (or “Shrink Wrapping”) of American Copyright Law*, 87 CAL. L. REV. 173, 173 (1999); David Nimmer, Elliot Brown & Gary N. Frischling, *The Metamorphosis of Contract into Expand*, 87 CAL. L. REV. 17, 19 (1999); see also Robert W. Gomulkiewicz & Mary L. Williamson, *A Brief Defense of Mass Market Software License Agreements*, 22 RUTGERS COMPUTER & TECH. L.J. 335 (1996) (discussing the benefits of EULAs from the perspective of both corporations and consumers).

157. Gomulkiewicz, *supra* note 156, at 691.

158. Lemley, *supra* note 155, at 1246–47.

159. See Gomulkiewicz & Williamson, *supra* note 156, at 341–66.

160. *Id.* at 342; see generally Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261, 295 (1985) (comparing types of software transactions and discussing the benefits of EULAs).

161. Gomulkiewicz & Williamson, *supra* note 156, at 346–52 (noting that EULAs place valuable information in the hands of end-users); Maureen A. O’Rourke, *Drawing the Boundary Between Copyright and Contract: Copyright Preemption of Software License Terms*, 45 DUKE L.J. 479, 487–90 (1995) (discussing the need to inform software end-users of their rights as opposed to purchasers of traditional hard-copy printed materials).

software publishers to tailor a desirable package of rights for sale to customers at the lowest possible price.<sup>162</sup>

Clickwrap licenses have gained traction in many jurisdictions.<sup>163</sup> Generally, courts consider three factors when determining the enforceability of shrinkwrap and clickwrap licensing agreements like a game developer's EULA: (1) whether the license is valid as a matter of contract formation; (2) whether the transfer of the software is a sale or a license; and (3) whether federal copyright law preempts all or part of the contract.<sup>164</sup>

#### *A. Is the EULA Binding as a Matter of Contract Formation?*

Like any contract, EULAs must satisfy the prerequisites of contract formation—offer, acceptance, and consideration.<sup>165</sup> Each underscores contract law's notion of mutual bargain between parties.<sup>166</sup> Prior to the advent of the Internet and mass-market software, contracting parties negotiated terms face-to-face, before completing the sale. Conversely, software manufacturers utilizing clickwrap licenses provide consumers with a product at the moment of purchase but provide actual terms in the form of the license after the sale's completion. This "cash now, terms later" method of selling mass-market software does not require the prior mutual assent that classic contract doctrine does.

#### 1. Early Interpretations: *Step-Saver* and EULAs as Unenforceable

Given the unilateral nature of shrinkwrap agreements, courts during the 1980s and early-1990s tended to view them through the prism of Uniform Commercial Code (UCC) sections 2-207<sup>167</sup> and 2-209<sup>168</sup>, thus rendering them unenforceable.<sup>169</sup> *Step-*

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162. Gomulkiewicz & Williamson, *supra* note 156, at 352–54; *see also* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1449–50 (7th Cir. 1996).

163. *See, e.g., ProCD*, 86 F.3d at 1449 (holding that shrinkwrap licenses are enforceable unless their terms are objectionable on grounds applicable to contracts in general). *ProCD* began the trend and other courts are following suit. *See, e.g., Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317 (Fed. Cir. 2003); *Specht v. Netscape Commc'ns. Corp.*, 306 F.3d 17 (2d Cir. 2002) (approving mass-market license agreements where sellers provide consumers with reasonably conspicuous notice of the existence of contract terms and consumers unambiguously manifest assent to those terms).

164. Lemley, *supra* note 155, at 1248.

165. *See* E. ALLAN FARNSWORTH, CONTRACTS § 3.1 (2d ed. 1990); Lemley, *supra* note 155, at 1248 (citing RESTATEMENT (SECOND) OF CONTRACTS § 17 (1988)).

166. Lemley, *supra* note 155, at 1248; *see* RESTATEMENT (SECOND) OF CONTRACTS § 17 (1988).

167. U.C.C. § 2-207 (2001).

168. *Id.* § 2-209.

169. *See, e.g., Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91 (3d Cir. 1991) (holding that UCC sections 2-207 and 2-209 render shrinkwrap licenses generally unenforceable); *Ariz. Retail Sys., Inc. v. Software Link, Inc.*, 831 F. Supp. 759, 766 (D. Ariz. 1993) (holding that "it is much more consistent with the policies underlying section 2-207 to assume that package disclaimers, that arrive only after the parties have reached a general agreement under section 2-207, constitute proposals to modify the agreement.").

*Saver Data Systems, Inc. v. Wyse Technology*<sup>170</sup> serves as the classic example of this rationale. In *Step-Saver*, the court, relying on UCC sections 2-207 and 2-209, refused to uphold a waiver clause in a shrinkwrap license that accompanied the product upon delivery.<sup>171</sup> The court reasoned that the contract was formed when the plaintiff buyer responded to a magazine advertisement, placing a telephone order with defendant seller, as both parties acted as if a contract existed.<sup>172</sup> Thus, the shrinkwrap's terms arrived after contract formation and functioned as an attempt by the seller to modify the terms of the contract.<sup>173</sup> Because UCC sections 2-209 and 2-202 required both parties to intend to adopt the additional terms, the court found the shrinkwrap inapplicable to the plaintiff.<sup>174</sup> While *Step-Saver* turned on the fact that the transaction was conducted over the telephone,<sup>175</sup> some commentators believed that similar logic would extend *Step-Saver* to other commercial contexts.<sup>176</sup>

## 2. Modern Interpretations of EULAs as Enforceable

Since the Seventh Circuit's decision in *ProCD v. Zeidenberg*,<sup>177</sup> courts generally uphold shrinkwrap licenses as satisfying the assent requirements of contract law. The *ProCD* court relied on UCC section 2-204 to support the conclusion that the offeror, as master of the offer, can specify what conduct constitutes acceptance by the buyer—for example, using the software rather than returning it—thus incorporating the terms of the shrinkwrap license into the agreement after the fact of purchase.<sup>178</sup> *ProCD* avoided the “battle-of-the-forms” analysis required by UCC section 2-207, instead emphasizing conduct that indicates implied acceptance of the shrinkwrap's terms.<sup>179</sup> Courts have applied similar reasoning in the context of clickwrap license agreements, holding that if shrinkwrap licenses, which manifest only implied assent, are valid, then clickwrap licenses—which *explicitly* require the software user to read the terms of service and click “OK”—must also be enforceable.<sup>180</sup> More generally, where the clickwrap license's terms are reasonably conspicuous and the consumer unambiguously manifests assent to those terms, courts are likely to uphold the clickwrap license's validity.<sup>181</sup> While a minority of courts have refused to uphold shrinkwrap and clickwrap licenses, these courts have relied on factors unique to each case, rather than general contract

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170. 939 F.2d 91 (3d Cir. 1991).

171. *Id.* at 98–99.

172. *Id.* at 98.

173. *Id.*

174. *Id.*

175. See Lemley, *supra* note 155, at 1251.

176. *Id.* (arguing that *Step-Saver* should apply to over-the-counter sales).

177. 86 F.3d 1447 (7th Cir. 1996).

178. See *id.* at 1450–55.

179. See *id.*

180. See, e.g., *I.Lan Sys., Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 338 (D. Mass. 2002).

181. See, e.g., *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 35 (2d Cir. 2002) (commenting that clickwrap licenses will bind consumers where notice of the license's terms is explicit and the consumer unambiguously assents to those terms, but holding the particular license in the case invalid due to failure to satisfy the notice and assent requirements).

principles. For example, one court focused on how long a consumer kept a product before returning it;<sup>182</sup> another relied on the fact that a licensing agreement did not appear on the web page viewable by the customer, but on an unseen web page.<sup>183</sup> Barring such special circumstances, judicial construction of EULAs tends to follow the same analysis as other standard form contract cases: terms are construed against the drafter, unconscionable terms are not enforced, specifically negotiated terms win out over terms in the form, and the buyer tends not to be excused merely because he chose not to read the contract.<sup>184</sup> Thus, barring “terms . . . objectionable on grounds applicable to contracts in general,”<sup>185</sup> 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.

### B. The Sale/License Distinction

A second factor affecting a EULA’s applicability to a virtual-world participant is whether the manufacturer sells or licenses his software. The distinction determines whether a software end-user retains the right to sell the software under copyright law’s first-sale doctrine,<sup>186</sup> and whether the UCC governs the transaction.<sup>187</sup> The distinction is important, as the first-sale doctrine and the UCC apply only to software that is sold.<sup>188</sup> Some courts hold that software is sold,<sup>189</sup> while a majority of courts categorize software transfers as licenses.<sup>190</sup> Generally, however, contract principles permit developers to dictate the nature of the sale of their software.<sup>191</sup> Should contractual

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182. See *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1340–41 (D. Kan. 2000) (invalidating standard terms included in a computer box where the purchaser only kept the computer for five days).

183. *Specht*, 306 F.3d at 32.

184. *Gomulkiewicz*, *supra* note 156, at 691–92.

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

186. See *Lemley*, *supra* note 155, at 1248.

187. See, e.g., *Adobe Sys., Inc. v. Stargate Software, Inc.*, 216 F. Supp. 2d 1051, 1060 (N.D. Cal. 2002).

188. See *id.*

189. See, e.g., *Softman Prods. Co. v. Adobe Sys., Inc.*, 171 F. Supp. 2d 1075, 1085 (C.D. Cal. 2001); *Novell, Inc. v. Network Trade Ctr., Inc.*, 25 F. Supp. 2d 1218 (D. Utah 1997) vacated in part, 187 F.R.D. 657 (D. Utah 1999); *Novell, Inc. v. CPU Distribution, Inc.*, No. CIV.A. H-97-2326, 2000 WL 33672900 (S.D. Tex. May 15, 2000) (opinion vacated). *Softman* cited several older cases decided prior to the mass-market software revolution, including *Advent Sys. Ltd. v. Unisys Corp.*, 925 F.2d 670, 676 (3d Cir. 1991), *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 99–100 (3d Cir. 1991), and *Downriver Internists v. Harris Corp.*, 929 F.2d 1147, 1150 (6th Cir. 1991).

190. See, e.g., *DSC Commc’ns Corp. v. Pulse Commc’ns, Inc.*, 170 F.3d 1354, 1360 (Fed. Cir. 1999); *Adobe Sys., Inc.*, 216 F. Supp. 2d at 1060; *Adobe Sys., Inc. v. One Stop Micro, Inc.*, 84 F. Supp. 2d 1086, 1091–92 (N.D. Cal. 2000); *Microsoft Corp. v. Harmony Computers & Elecs., Inc.*, 846 F. Supp. 208, 210 (E.D.N.Y. 1994).

191. See *Adobe Sys., Inc.*, 216 F. Supp. 2d at 1059 (citing *Gray v. Am. Exp. Co.*, 743 F.2d 10 (D.C. Cir. 1984)).

ambiguity exist, the economic realities of the software transfer determine whether the transfer is a sale or a license.<sup>192</sup>

In the context of virtual worlds, courts will likely classify the transfer of the software as a license, rather than as a sale. First, developers unambiguously declare the transfer to be a license in their EULAs.<sup>193</sup> The continued validity of a player's license to access the virtual world is contingent upon the player's obedience to the terms of the license, including prohibitions against the sale or transfer of in-game assets and characters.<sup>194</sup> Likewise, while a player might argue that he "owns" a tangible copy of the software, he still needs a license to access the virtual world itself.<sup>195</sup> Further, game developers not only sell their software to consumers by way of one-time lump-sum payment, but also require players to pay a monthly subscription.<sup>196</sup> Even if developers transferred the software to consumers exclusively by way of a one-time fee, the numerous encumbrances developers place on the ongoing use of the software through the EULA militate against construing the transfer as a sale.<sup>197</sup> As such, a court would likely find the EULA constitutes a license to access the virtual world rather than a sale.

The sale/license distinction affects certain intellectual property rights and contract remedies, discussed below,<sup>198</sup> but does not affect whether the EULA precludes a player from retaining copyright over his in-game creative works. The specific terms of the EULA that state the software transfer is a license refer to the software that provides access to the game and the right to access the game, not the virtual world itself.<sup>199</sup> The first-sale doctrine and the dictates of the UCC would not apply to in-game creative works that remain fixed in the code base and thus exist outside the scope of the terms of access. Knowing this, developers include explicit contractual provisions in the EULA requiring players to acknowledge that they possess no intellectual property

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192. *In re DAK Indus., Inc.*, 66 F.3d 1091 (9th Cir. 1995).

193. See *EverQuest User Agreement and Software License*, *supra* note 5, ¶ 7.

194. *Id.* ¶ 9.

195. Some courts distinguish between ownership of intangible intellectual property rights embodied in a medium such as a DVD or CD and ownership rights to the software's tangible storage medium itself. See *Softman Prods. Co. v. Adobe Sys., Inc.* 171 F. Supp. 2d 1075, 1084-85 (C.D. Cal. 2001) ("Section 202 of the Copyright Act recognizes a distinction between tangible property rights in copies of the work and intangible property rights in the creation itself."). The *Adobe* court held that "a single payment for a perpetual transfer of possession is, in reality, a sale of personal property and therefore transfers ownership of that property, the copy of the software." *Id.* at 1086. Other courts dismiss the distinction as simplistic and an inaccurate portrayal of the realities of software ownership. See *DSC Commc'ns. Corp. v. Pulse Commc'ns., Inc.*, 170 F.3d 1354, 1362 (Fed. Cir. 1999).

196. The monthly subscription is a ubiquitous feature of the gaming industry. See *Simmons*, *supra* note 32.

197. *DSC Commc'ns., Corp.*, 170 F.3d at 1362 (noting that the time of payment scheme or encumbrances on the software are probative of whether the software is sold or licensed); *Adobe Sys., Inc. v. Stargate Software, Inc.*, 216 F. Supp. 2d 1051, 1057 (N.D. Cal. 2002) (holding that the numerous restrictions placed on a reseller's ability to distribute software indicated the software was licensed); *Softman Prods. Co.*, 171 F. Supp. 2d at 1091-92.

198. See *infra* Part V.

199. See, e.g., *EverQuest User Agreement and Software License*, *supra* note 5, ¶ 7.

rights related to the game in the first place.<sup>200</sup> These clauses render the sale/license distinction moot in the context of in-game creations.<sup>201</sup>

### C. Federal Copyright Preemption and EULAs

Federal law can preempt a EULA that is binding under state law. As federal law, copyright law can preempt both a specific cause of action asserted under state law or the state law itself.<sup>202</sup> There are two types of copyright preemption that can supersede state contractual provisions—statutory and constitutional.

#### I. Statutory Preemption

Statutory preemption occurs when federal copyright law preempts state law or state law-governed contractual provisions that conflict directly with the Copyright Act.<sup>203</sup> Section 301 of the Copyright Act creates a two-pronged preemption test.<sup>204</sup> First, courts determine if the rights at issue fall within the subject matter articulated in sections 102 and 103 of the Copyright Act.<sup>205</sup> Second, courts examine claims on a case-by-case basis to determine whether a state-created right is equivalent to a federally protected right under section 301.<sup>206</sup>

Most courts construe statutory preemption by applying an “extra element” test to determine whether rights enforceable under state law are equivalent to, and thus preempted by, rights granted under federal copyright law.<sup>207</sup> If an extra element

200. *Id.*

201. Whether the language of virtual world EULAs actually directly affects in-game artistic or literary creations like Julian’s sonnet is addressed *infra* Part V.

202. *See Orson, Inc. v. Miramax Film Corp.*, 189 F.3d 377, 381–82 (3d Cir. 1999). The *Orson* court mentions statutory, constitutional, and field preemption. However, only statutory and constitutional preemption are relevant to copyright law, as copyright law permits states to concurrently occupy the field and enforce contract and trade practices law that affects copyrights. *See Lemley, supra* note 155, at 1272.

203. O’Rourke, *supra* note 161, at 517–19.

204. 17 U.S.C. § 301(a) (2000). Section 301 of the Copyright Act, states in relevant part that “all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 16 [17 U.S.C. § 106 (2000)] in works of authorship that . . . come within the subject matter of copyright as specified by sections 102 and 103 [17 U.S.C. §§ 102–03 (2000)]” are exclusively governed by federal copyright law. *Id.*

205. *Lipscher v. LRP Publ’ns, Inc.*, 266 F.3d 1305, 1311 (11th Cir. 2001) (citing *Crow v. Wainwright*, 720 F.2d 1224, 1225–26 (11th Cir. 1983)).

206. *Id.* *See also* Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 111, 139–40 (1999).

207. *See, e.g., Bowers v. Baystate Techs., Inc.*, 320 F.3d 1317, 1323–27 (Fed. Cir. 2003); (holding that a contract provision preventing a party from reverse engineering software was not preempted by the Copyright Act, as a contract mutually assented to constitutes an extra element); *Wrench L.L.C. v. Taco Bell Corp.*, 256 F.3d 446, 459 (6th Cir. 2001) (finding that the extra element of an implied promise to pay for the use of a copyrighted work distinguished a contract claim from a copyright claim); *Rosciszewski v. Arete Assocs., Inc.*, 1 F.3d 225, 229–30 (4th Cir. 1993) (applying the extra element test to find that a breach of contract claim was preempted by copyright law because the contract did not contain an extra element that



changes the “nature of the action so that it is qualitatively different from a copyright infringement claim,” then the “state law claim is not preempted.”<sup>208</sup> Many courts even consider the fact that parties bargained privately to achieve mutual assent to be an extra element sufficient to distinguish a breach of contract claim from a claim the Copyright Act preempts.<sup>209</sup> Some jurists and commentators argue that contracts of adhesion lack an extra element, as they are not freely bargained, but dictated to consumers.<sup>210</sup> If a EULA is construed as a contract of adhesion, similar reasoning could apply.<sup>211</sup> Even the *ProCD* court was unwilling to completely eliminate statutory preemption of contracts affecting federal copyright law.<sup>212</sup>

A court utilizing *ProCD*'s reasoning might hold that contract claims alleging no more than infringement of a party's copyright are preempted under Section 301 of the Copyright Act.<sup>213</sup> For example, a contractual promise to refrain from reproducing, performing, distributing, or displaying an artistic work could be preempted.<sup>214</sup> However, the EULA is more than just a promise by a party to waive or refrain from exercising rights enumerated in the Copyright Act; the EULA also elicits various promises from players to abide by the game developers' terms of service—essentially

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distinguished it from copyright law); *Nat'l Car Rental Sys., Inc. v. Computer Assocs. Int'l, Inc.*, 991 F.2d 426, 431 (8th Cir. 1993) (holding that a contractual restriction on use of a program constitutes an extra element that makes the contract-based cause of action qualitatively different from one for based on copyright, and thus not preempted by the Copyright Act); *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 716 (2d Cir. 1992) (finding that a restriction on use of a licensed program that did not involve rights enumerated in the Copyright Act was an extra element). In *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1453–55 (7th Cir. 1996) (holding that a contract between two parties creates exclusive rights between those parties while a copyright is an exclusive right against the world), the court did not explicitly mention the extra element test, but an extra element—a bargain between two parties—is apparent.

208. *Computer Assocs.*, 982 F.2d at 716 (emphasis omitted) (quoting *Mayer v. Josiah Wedgwood & Sons, Ltd.*, 601 F. Supp. 1523, 1535 (S.D.N.Y. 1985)).

209. *E.g., Bowers*, 320 F.3d at 1325; *ProCD*, 86 F.3d at 1454; *see also Lemley, supra* note 206, at 128 (discussing the various ways parties may attempt to contract around the Copyright Act).

210. *E.g., Bowers*, 320 F.3d at 1336–37 (Dyk, J., dissenting) (stating that shrinkwrap contracts do not involve an extra element of bargain because “like any other contract of adhesion, the only choice offered to the purchaser is to avoid making the purchase in the first place.”). Judge Dyk's dissent in *Bowers* asserts that parties can contract away their intellectual property rights, but only if the contract is freely negotiated. Academics lament this lack of a mutually assented bargain as evidence that software manufacturers are using contract law to marginalize consumers' intellectual property rights. *See McManis, supra* note 156, at 173; Nimmer et al., *supra* note 156, at 63.

211. *See infra* Part V.D. A contract of adhesion is defined as a contract “prepared by the party with excessive bargaining power who presents it to the other party . . . on a take-it-or-leave-it basis.” *E.g. Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 265 (3d Cir. 2003) (quoting *Trailer Marine Transp. Corp., v. Cbarley's Trucking, Inc.*, 20 V.I. 282, 284 (1984)).

212. *ProCD*, 86 F.3d at 1454.

213. *See, e.g., Foley v. Luster*, 249 F.3d 1281, 1285–86 (11th Cir. 2001); *Am. Movie Classics Co. v. Turner Entm't Co.*, 922 F. Supp. 926, 931 (S.D.N.Y. 1996); *cf. Balt. Orioles, Inc. v. MLB Players Assoc.*, 805 F.2d 663, 677 (7th Cir. 1986) (“[A] right [under state law] is equivalent to one of the rights comprised by a copyright if it is infringed by the mere act of reproduction, performance, distribution or display.”).

214. *Wrench L.L.C. v. Taco Bell Corp.*, 256 F.3d 446, 457 (6th Cir. 2001).

rules governing access to the virtual space.<sup>215</sup> Moreover, even without these additional promises, players click “OK” and consent to the EULA, providing the extra element a majority of courts require to preclude preemption. Even the minority of courts open to viewing the EULA as a contract of adhesion lacking the extra element of bargain might not allow preemption. These courts would have to separate contractual clauses amounting to a player’s promise to refrain from exercising a right granted by the Copyright Act from other clauses that do involve an extra element, preempting, at best, only parts of the EULA. Regardless, a majority of such courts refuse statutory preemption altogether.

## 2. Constitutional Preemption

Constitutional preemption arises under the Supremacy Clause of the U.S. Constitution,<sup>216</sup> and preempts causes of action governed by state law where the cause of action raises constitutional concerns by “upset[ting] the balance struck by Congress”<sup>217</sup> or by “stand[ing] as an obstacle to the accomplishment of the full purposes and objectives of Congress.”<sup>218</sup> Courts often use the extra element test in this context as well, because constitutional preemption “takes place in the shadow of section 301 of the Copyright Act.”<sup>219</sup> Constitutional preemption, however, focuses on Congress’ overall intent in enacting a legislative scheme, rather than relying solely on Section 301.<sup>220</sup> The Supreme Court has characterized this intent as striking a balance between using copyright’s limited monopoly to provide incentives to create and maintaining a free flow of information beneficial to the public which fuels creativity in the first place.<sup>221</sup>

*Vault Corp. v. Quaid Software Ltd.*<sup>222</sup> serves as an example of constitutional preemption. The *Vault* court held that a provision of the Louisiana License Act which prohibited the decompilation or adaptation of a computer program was preempted because the provision touched upon matters governed by federal copyright law.<sup>223</sup> Consequently, it invalidated the shrinkwrap license relying on the preempted law.<sup>224</sup> The Court cited *Sears, Roebuck & Co. v. Stiffel Co.*,<sup>225</sup> a Supreme Court decision on patent preemption holding that “[w]hen state law touches upon the area of [patent or copyright statutes], it is ‘familiar doctrine’ that the federal policy ‘may not be set at

215. See EverQuest User Agreement and Software License, *supra* note 5.

216. U.S. CONST. art. IV, cl. 2.

217. Lemley, *supra* note 155, at 1272.

218. O’Rourke, *supra* note 161, at 534.

219. Lemley, *supra* note 155, at 1272.

220. O’Rourke, *supra* note 161, at 534–35. See also *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 280 (1987) (“In determining whether a state statute is pre-empted by federal law and therefore invalid under the Supremacy Clause of the Constitution, our sole task is to ascertain the intent of Congress.”).

221. See *supra* notes 65–67 and accompanying text.

222. 847 F.2d 255, 269 (5th Cir. 1988).

223. *Id.* at 270.

224. *Id.*

225. 376 U.S. 225 (1964).

naught, or its benefits denied' by state law."<sup>226</sup> *Bonito Boats Inc. v. Thunder Craft Boats, Inc.*,<sup>227</sup> another Supreme Court patent case, further illuminates the rationale underlying constitutional preemption. The Court preempted a Florida statute prohibiting boat manufacturers from using a direct molding process to duplicate unpatented boat hulls where federal law permitted such duplication.<sup>228</sup> The Court held that permitting states to enact contrary intellectual property provisions would render the federal regime meaningless.<sup>229</sup>

### 3. Constitutional Preemption and Congress' Delicate Balance

While some commentators view the Copyright Act as correcting market inefficiencies by granting parties default rights which they can choose to contract away,<sup>230</sup> the Supreme Court has time and again interpreted the Copyright Act as evincing Congress' intent that the public good remain copyright's paramount concern, over and above other interests.<sup>231</sup> State law-governed contracts that arguably hinder the public good may fall within the analytical rubric of constitutional preemption. As mentioned previously, granting intellectual property rights to game developers allows developers to improve the game environment and maintain control over the virtual world they create, while granting similar rights to players might impede the development and expansion of virtual worlds. However, granting intellectual property rights to players may encourage in-game creation that improves the public good of both the game space and the real world. Thus, constitutional preemption analysis should ask how much copyright protection for players would best reflect congressional intent.

EULAs granting game developers absolute intellectual property rights decrease the public good, given the disincentive they provide players to create in the game space. One commentator argues that the EULA could even impede player incentives to play the game in the first place.<sup>232</sup> Taken to its extreme, this disincentive could yield a

226. *Vault Corp.*, 847 F.2d at 269 (quoting *Sears*, 376 U.S. at 253).

227. 489 U.S. 141 (1989).

228. *Id.* at 144.

229. *Id.*

230. Wendy J. Gordon, *Assertive Modesty: An Economics of Intangibles*, 94 COLUM. L. REV. 2579, 2579 n.1 (1994) (asserting that intellectual property at its core is "a mode of converting mental labor into a 'vendible commodity'"); I. Trotter Hardy, *Copyright, Contracts, and Preemption in a Digital World*, 1 RICH. J.L. & TECH. 2, ¶37 (1995), <http://www.richmond.edu/jolt/vlil/hardy.html> (arguing that the Framers' original intent was that copyright would be like any other property right, including the owner's right to transact as he saw fit); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 286-87 (1997) (discussing the "neoclassicist" view of copyright where markets influence resource allocation to create an optimally efficient amount of creative works); Maureen A. O'Rourke, *Copyright Preemption after the ProCD Case: A Market-Based Approach*, 12 BERKELEY TECH. L.J. 53, 77-81 (1997) (discussing the two justifications for copyright—the freedom of contract view and the public domain view). See generally William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989) (exploring the extent to which copyright law can be explained as a means of efficient allocation of resources).

231. *E.g.*, *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50 (1991);

232. See Balkin, *supra* note 9, at 2065.

downward cycle where few new players join the game and many existing players leave for other virtual worlds or leave virtual worlds altogether, decreasing the public good for game developer and players alike. This scenario becomes even more plausible when considered in light of the increasing numbers of individuals who visit virtual spaces for more than just entertainment.<sup>233</sup> Free market theory suggests that the market can correct this problem once a sufficient number of virtual-world participants demand less-restrictive EULAs. Where too many players leave because of restrictive EULAs, developers will relax their EULA terms and offer virtual worlds with fewer restrictions. As of this writing no sword-and-sorcery virtual world has responded to player concerns by loosening copyright restrictions.<sup>234</sup> In contrast, some (but not all) virtual worlds based on social interaction grant their players a modicum of intellectual property protection.<sup>235</sup>

However, the market is incapable of correcting the problem on its own. This is because several different market forces are at work in virtual worlds. For example, the market seems to exacerbate the problem by encouraging players to sell their in-game assets outside of the game world. Such inducements force developers to respond with more restrictive EULAs and more active enforcement of EULA terms. From the developer's perspective, relaxed EULA terms would embolden players to assert property rights and encourage expensive lawsuits that would impede development and expansion of the virtual world. These concerns outweigh any market forces that could facilitate an optimal EULA regime. So long as the potential costs of player-initiated lawsuits outweigh the profits developers can earn by creating virtual worlds with minimal intellectual property restrictions, developers will continue to use restrictive EULA terms. The aggregate effect of strict EULAs is a general decrease in the public good related to virtual worlds. Congress likely never contemplated such an effect.<sup>236</sup> Even adherents to the freedom of contract and market imperfection views of copyright law would agree that so long as players are free to contract away their bundle of rights under copyright, contractual provisions forcing players to waive any intellectual property rights in their creations decreases incentives to create marketable commodities in the form of artistic creations. As applied to Julian and similar players, courts should preempt terms that disrupt the Copyright Act's legislative scheme by decreasing the public good and overall creative output.<sup>237</sup>

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233. See *supra* Part I.

234. See *supra* note 153.

235. See *supra* note 109 (citing *Second Life*, which grants players limited intellectual property rights in player-coded objects).

236. Though Congress likely never contemplated copyright as applied to virtual worlds, it did express general concern with increasing the overall public good when drafting the Copyright Act.

237. See *infra* Parts IV.E–V. Whether or not a court preempts such clauses may also depend on whether the court uses the extra element test in the constitutional preemption context and whether the court is willing to view virtual worlds not only as games, but as mediums through which creators can contribute to the public good of both virtual and real environments.

## IV. APPLYING CONTRACT LAW TO BINDING EULAS

If a court views a developer's EULA as a valid contract that survives preemption, gamers might seek to knock out EULA provisions affecting intellectual property rights using arguments based on Restatement 211, the UCC, waiver, unconscionability, and public policy.<sup>238</sup> The next section addresses each of these doctrinal arguments in the context of virtual-world EULAs.

*A. Restatement (Second) of Contracts Section 211*

The Restatement (Second) of Contracts, section 211, states that where a party to an agreement manifests assent to a writing and has reason to believe that similar writings are regularly used to embody agreements of the same type, then the party adopts the writing as an integrated agreement with respect to the terms included in the writing.<sup>239</sup> Conversely, "Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement."<sup>240</sup> Courts have applied section 211(3) of the Restatement to invalidate standardized contract terms in software transactions purporting to modify existing law.<sup>241</sup> In the shrinkwrap license context, section 211(3) is more limited, invalidating only those contract terms that are both unknown and beyond a party's reasonable expectation.<sup>242</sup> A comment to section 211 states that businesses should reasonably anticipate that a consumer would disagree to terms that defeat the purpose of the deal, that are "bizarre or oppressive," or that conflict with bargained-for terms.<sup>243</sup> Thus, an unreasonable rule that was arguably well known and used universally in EULAs, without materially affecting the contract and without being unduly oppressive, would survive a section 211(3) inquiry.<sup>244</sup>

EULA terms requiring players to waive their intellectual property rights are nearly universal.<sup>245</sup> Virtual-world participants might not actually know that they are waiving their intellectual property rights when they click "OK" and accept the EULA.<sup>246</sup> Many

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238. Unjust enrichment also comes to mind, but would likely either be preempted statutorily under section 301 of the Copyright Act, *see supra* Part III.C, or addressed beneath the rubric of public policy, *see infra* Part IV.E.

239. RESTATEMENT (SECOND) OF CONTRACTS § 211(1) (1981).

240. *Id.* § 211(3).

241. Lemley, *supra* note 155, at 1255; *e.g.*, *Angus Med. Co. v. Digital Equip. Corp.*, 840 P.2d 1024, 1030–31 (Ariz. Ct. App. 1992) (refusing to enforce a contract term shortening the statute of limitations from six years to eighteen months); *cf.* *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388, 397 (Ariz. 1984) (adopting section 211(3) of the Restatement). *See generally* Lemley, *supra* note 155, at 1255 (discussing Restatement section 211(3)).

242. Lemley, *supra* note 155, at 1255.

243. RESTATEMENT (SECOND) OF CONTRACTS § 211, cmt. f (1981); *see also* Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 458 (2002).

244. *See* Hillman & Rachlinski, *supra* note 243, at 458.

245. *See supra* note 153.

246. *See* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1206 (2003) (suggesting that consumers only care

players never read the relevant terms before accepting, and while some EULAs state particularly important terms in conspicuous typeface and fonts, others do not.<sup>247</sup> However, as nearly every EULA requires waiver of intellectual property rights and every player has an opportunity to read the EULA prior to playing the game, courts likely will hold such terms sufficiently notorious and reject a section 211 argument.

A minority approach, developed in Arizona courts, focuses its 211(3) analysis on consumers rather than businesses,<sup>248</sup> often examining the consumer's state of mind and whether the consumer expected the term.<sup>249</sup> These courts even ignore section 211(3)'s mandate that a party to a contract can only free himself from a term if he would not have signed had he known of it.<sup>250</sup> Section 211(3) has had little influence on courts outside of Arizona,<sup>251</sup> and is applied primarily to insurance contracts.<sup>252</sup> Thus, a defense based on section 211 made by players like Julian will likely fail.

### B. UCC (2-204, 2-207, 2-209)

The UCC's rules governing the sale of goods would apply to EULAs if the EULAs are construed as sales rather than licenses.<sup>253</sup> As mentioned earlier,<sup>254</sup> prior to *ProCD*, some courts used UCC sections 2-207 and 2-209 to invalidate shrinkwrap licenses. Since *ProCD*, however, few courts have used the UCC to void them. However, some courts have elected to ignore *ProCD*'s reasoning, viewing the customer, rather than the vendor, as master of the offer. For example, in *Klocek v. Gateway, Inc.*,<sup>255</sup> the court construed the consumer as master of the offer and required Gateway, a computer manufacturer, to unambiguously notify the consumer that it was unwilling to contract unless its standard form terms were accepted.<sup>256</sup> The court utilized UCC section 2-207

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about a limited number of product attributes as part of their purchasing decision, and that this fact encourages sellers to include contractual terms in standard forms that favor them at the expense of the consumer); *Gomulkiewicz & Williamson*, *supra* note 156, at 335 (alleging that consumers care little for intellectual property rights like reverse engineering of software).

247. See sources cited *supra* note 153.

248. *E.g.*, *Broemmer v. Abortion Servs. of Phoenix, Ltd.*, 840 P.2d 1013, 1017 (Ariz. 1992) (citing a consumer's lack of education and inexperience as reasons to void an arbitration clause in an adhesion contract between an abortion provider and the plaintiff); see also *Hillman & Rachlinski*, *supra* note 243, at 459.

249. *E.g.*, *Broemmer*, 840 P.2d at 1017.

250. James J. White, *Form Contracts Under Revised Article 2*, 75 WASH. U. L.Q. 315, 346-47 (1997) (discussing Arizona cases utilizing section 211(3)).

251. *Id.* at 347.

252. *Hillman & Rachlinski*, *supra* note 243, at 458 (discussing section 211(3) cases). A similar argument, known as the doctrine of reasonable expectations, also applies primarily in the insurance context. *Id.* at 459. That doctrine holds that "[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169, 176 (Iowa 1975) (quoting *Rodman v. State Farm Mut. Ins. Co.*, 208 N.W.2d 903, 906 (Iowa 1973)).

253. See discussion *supra* Part III.B.

254. See discussion *supra* Part III.A.

255. 104 F. Supp. 2d 1332.

256. *Id.* at 1341.

despite the fact that the case involved only one contract form—Gateway’s.<sup>257</sup> The court held that the additional terms enclosed with the computer in the form of a shrinkwrap license did not satisfy the notice requirement.<sup>258</sup> The court also noted that its analysis would be the same if it relied on UCC section 2-209 and construed the shrinkwrap as a proposal for modifying the contract.<sup>259</sup> However, the holding in *Klocek* is useful to players attempting to void a developer’s EULA in limited circumstances. The consumer in *Klocek* kept the computer for no more than five days, which the court found did not constitute express assent to new terms.<sup>260</sup> Thus, the *Klocek* court’s reasoning would be useful to virtual-world gamers where the player complained within a few days of when he first accessed the virtual world. Even then, the player has likely already accepted the clickwrap license—in contrast to the consumer in *Klocek*, who did not click “OK.” As such, it seems unlikely that most courts would accept a UCC argument against the EULA.

### C. Waiver

Gamers might also pursue a waiver argument as defined by the UCC and common law. UCC section 1-303, in conjunction with UCC section 2-209, indicates that a course of performance is relevant to show waiver or modification of any terms inconsistent with the performance.<sup>261</sup> If a court construes the sale of the software with which consumers access the virtual world as a sale rather than a license, the UCC conception of implied waiver and modification could apply. Notwithstanding the sale/license distinction, the common law doctrine of waiver would also support a gamer’s argument against EULA provisions.<sup>262</sup> This is particularly relevant in the context of virtual worlds where game developers countenance thousands of players buying and selling virtual assets. While developer EULAs explicitly forbid real-world trading of in-game assets, items, and characters,<sup>263</sup> developers have never consistently or uniformly enforced these terms.<sup>264</sup>

Developers arguably benefit from the sale of virtual assets. Many players do not have sufficient time to develop their avatars to the point of advancement necessary to visit much of the virtual world. Without the equalizer of real-world markets providing players unable to otherwise develop their characters the virtual assets they need to compete, those players would cease paying their monthly subscription fees, decreasing

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257. *Id.* at 1340.

258. *Id.*

259. *Id.* at 1341 n.13.

260. *Id.* at 1340–41.

261. U.C.C. § 1-303 (2004).

262. *See, e.g.,* *Bott v. J.F. Shea Co.*, 388 F.3d 530, 533–34 (5th Cir. 2004) (applying Texas law and discussing implied waiver).

263. *See supra* note 153.

264. Sony has cracked down on real-world markets in virtual goods. Greg Sandoval, *Sony To Ban Sale of Online Characters from its Popular Gaming Sites*, CNET NEWS.COM (Apr. 10, 2000), [http://news.com.com/2100-1017\\_3-239052.html](http://news.com.com/2100-1017_3-239052.html). But these crackdowns are sporadic, inconsistent, and often random, especially in light of Sony’s recent sanctioning of sales of virtual goods on some of its servers. *Sony Opens Games Goods Marketplace*, BBC NEWS, Apr. 22, 2005, <http://news.bbc.co.uk/1/hi/technology/4469807.stm>.

developer revenues. This may explain why developers may often choose not to enforce their EULAs. Players like Julian could raise a waiver argument as a defense to a game developer's ownership claim to a player's in-game creative works.<sup>265</sup> So long as the developer knowingly tolerates a player's contravention of the EULA, the player can raise the waiver argument.<sup>266</sup> At the very least, a court might allow the player to demonstrate reliance on a developer's implied waiver, or the game developer might be required to provide players currently exploiting their creations, commercially or otherwise, with notice of their intent to enforce the EULA.<sup>267</sup> Thus, where a player can prove that a game developer knows about the player's contravention of a contractual condition, the player may be able to assert a waiver defense. However, such proof may be difficult to come by, rendering a waiver claim more difficult in practice.

#### D. Unconscionability

Virtual world participants might also seek to knock out EULA terms by arguing that they are unconscionable. While courts apply the unconscionability doctrine sparingly,<sup>268</sup> the doctrine, in conjunction with public policy arguments discussed below,<sup>269</sup> may provide virtual-world participants with their best hope of voiding the EULA's intellectual property provisions. UCC section 2-302 articulates the general concept of unconscionability, and the common law version essentially tracks the UCC.<sup>270</sup> The doctrine has two components: procedural and substantive. Procedural unconscionability generally concerns the absence of meaningful choice or bargaining power on the part of one party, while substantive unconscionability concerns the existence of contract terms which unreasonably favor one party.<sup>271</sup> If the contract was not negotiated<sup>272</sup> and the party claiming unconscionability lacked meaningful choice in

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265. This logic applies where the developer knowingly tolerates both a specific player's EULA violation or general contravention of the EULA by players at large, although the former would likely present a stronger waiver claim than the latter.

266. "Silence or inaction, for so long a period as to show an intention to yield a known right, is also enough to prove waiver." *Bott*, 388 F.3d at 533 (quoting *Tenneco, Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 643 (Tex. 1996)); *see, e.g.*, *PPM Fin., Inc. v. Norandal USA, Inc.*, 392 F.3d 889, 895 (7th Cir. 2004) (applying Illinois law); *Lamborn v. Dittmer*, 873 F.2d 522, 529 (2d Cir. 1989) (applying New York law).

267. Compare Judge Posner's interpretation of UCC section 2-209 with Judge Easterbrook's in *Wisconsin Knife*. *Wis. Knife Works v. Nat'l Metal Crafters*, 781 F.2d 1280 (7th Cir. 1986).

268. *See Forsythe v. BancBoston Mortgage Corp.*, 135 F.3d 1069, 1074 (6th Cir. 1997).

269. *See infra* Part V.E.

270. U.C.C. § 2-302(1) (1987); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

271. *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 265 (3d Cir. 2003); *Lemley, supra* note 155, at 1254.

272. The most common examples of non-negotiated contracts are contracts of adhesion. *See, e.g.*, *Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003) (applying California law) ("A contract is procedurally unconscionable if it is a contract of adhesion, i.e., a standardized contract, drafted by the party of superior bargaining strength, that relegates to the subscribing party only the opportunity to adhere to the contract or reject it.") (citing *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000)). A contract of adhesion is defined as a contract prepared by the party with excessive bargaining power who presents it to the other party on a take-it-or-leave-it basis. *E.g.*, *Alexander*, 341 F.3d at 265.



entering into the contract, then the procedural element is satisfied.<sup>273</sup> Showing that contract terms unreasonably allocate risk to the party lacking bargaining power satisfies the substantive element.<sup>274</sup> Courts often state that a substantively unconscionable term is one that is “overly harsh” or “one-sided,” is “so one-sided as to be oppressive,” is “unreasonably favorable to the drafter,” or “shocks the conscience,” but judges uniformly decline to offer any formulation of how to apply this standard.<sup>275</sup>

Contractual procedures that alter existing law in significant ways are prone to unconscionability arguments,<sup>276</sup> as are contracts that hide important terms within a labyrinth of complex language.<sup>277</sup> Courts also frown upon clauses unduly burdening an individual’s ability to earn a living.<sup>278</sup> On the other hand, courts continue to apply the unconscionability doctrine in a manner that maintains the presumption that consumers impliedly assent to reasonable boilerplate terms.<sup>279</sup>

EULA terms requiring players to waive intellectual property rights may satisfy both components of unconscionability. While consumers are presumed to read their contracts,<sup>280</sup> a court might view the textual construction of the EULA as designed to facilitate ignorance of the terms.<sup>281</sup> Moreover, EULAs are adhesion contracts, offered to consumers on a take-it-or-leave-it basis *after* the consumer has purchased the game.<sup>282</sup> While developers might argue that gamers retain meaningful choice, all developer EULAs require players to waive intellectual property rights, presenting players with a Hobson’s choice of accepting the EULA or not playing at all.<sup>283</sup> As such, the requirements of procedural unconscionability are likely satisfied.

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273. See, e.g., *Ferguson v. Countrywide Credit Indus.*, 298 F.3d 778, 783 (9th Cir. 2002).

274. See, e.g., *Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1101, 1107 (9th Cir. 2003); *Hillman & Rachlinski*, *supra* note 247, at 457 (“When a form contains incomprehensible boilerplate, fine print, or otherwise hidden terms that undermine the user’s purpose of contracting or otherwise ‘shock the conscience,’ courts unhesitatingly apply unconscionability.”)

275. *Korobkin*, *supra* note 246, at 1273 (discussing judicial treatment of substantial unconscionability).

276. *Lemley*, *supra* note 155, at 1255; see, e.g., *A & M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 126 (Cal. Ct. App. 1982) (holding form terms repudiating warranties and liability for consequential damages unconscionable).

277. See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (holding that where, for example, important terms are “hidden in a maze of fine print,” the “usual rule that the terms of the agreement are not to be questioned should be abandoned”).

278. E.g., *Woodward v. Cadillac Overall Supply Co.* 240 N.W.2d 710, 716 (Mich. 1976) (*Williams, J.*, dissenting); see also *Novelty Bias Binding Co. v. Shevrin*, 175 N.E.2d 374, 375–76 (Mass. 1961); *Junker v. Plummer*, 67 N.E.2d 667, 668 (Mass. 1946).

279. See *Hillman & Rachlinski*, *supra* note 243, at 458.

280. E.g., *Gaskin v. Stumm Handel GmbH*, 390 F. Supp. 361, 366 (S.D.N.Y. 1975).

281. See *Williams*, 350 F.2d at 449.

282. See *supra* note 211.

283. Further, it is unlikely that gamers, after purchasing the software, installing the game, and booting it up will read the fine print in the EULA and then elect to return the game. See *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91, 102 (3d Cir. 1991) (commenting generally on the time and energy expended by purchaser in acquiring the software product before even reaching the contract terms). The purchaser is likely to use the game regardless of the additional terms specified in the EULA.

Whether substantive unconscionability is satisfied is a more difficult question. Certainly terms requiring gamers to waive intellectual property rights to in-game creations are one-sided and favor the drafter. Such terms benefit game developers, who can—should the opportunity present itself—commercially exploit their players' creations. If the average reasonable person, fully aware of EULA terms foreclosing any right to intellectual property and in-game assets, would refuse to accept the EULA, then a court might find such clauses substantively unconscionable. However, the analysis also depends upon whether the player relies on the virtual world for entertainment, or whether the player actually earns his living in the virtual world. Many players likely care little about intellectual property rights,<sup>284</sup> and are primarily interested in their gaming experience—not earning a living online. As such, the gamer whose only desire is to play will either consent to waiver of intellectual property rights or remain ignorant of such EULA terms. Further, those players concerned with intellectual property rights are likely savvy enough to refuse to accept the EULA and seek a virtual world that provides players with intellectual property rights. Given that a court's default posture is to enforce general contractual terms,<sup>285</sup> and that courts rarely void contractual clauses on unconscionability grounds,<sup>286</sup> courts are not likely to find unconscionability when all that is at stake is participation in what is considered a "game."

In those increasingly common instances where a player utilizes the virtual world as his primary means of income, a court may strike terms directly impinging the player's ability to earn a living.<sup>287</sup> Specifically, courts may void terms where restrictive boilerplate language inserted into a contract by a party with disproportionately strong bargaining power forces a player to forego future opportunities for the sake of short-term gain.<sup>288</sup> A clause depriving a person of their ability to make a living is unreasonable when it is not necessary to protect the company demanding the concession, not limited in duration, and contrary to the public interest.<sup>289</sup> EULA terms requiring the waiver of intellectual property rights, while arguably necessary to protect the game developer's interests, are permanent and contrary to the public interest. Developers are aware of secondary markets in virtual-world goods, and may rely on those markets to build player bases. In addition to players earning money from secondary markets, some players use virtual worlds as investment vehicles, viewing their in-game assets much like an investor views stocks and bonds.<sup>290</sup> To these players, the virtual world is more than just a "game," and EULA terms requiring these players to waive intellectual property rights may be substantively unconscionable.<sup>291</sup>

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284. See *supra* notes 107, 246 and accompanying text.

285. See Hillman & Rachlinski, *supra* note 243, at 461.

286. Forsythe v. BancBoston Mortgage Corp., 135 F.3d 1069, 1074 (6th Cir. 1997).

287. See, e.g., Woodward v. Cadillac Overall Supply Co. 240 N.W.2d 710, 716 (Mich. 1976) (Williams, J., dissenting) (discussing non-compete agreements).

288. *Id.* at 715–16.

289. Novelty Bias Binding Co. v. Shevrin, 175 N.E.2d 374, 375 (Mass. 1961).

290. See *supra* notes 49–53 and accompanying text.

291. This is not to belittle the importance of virtual worlds to people who do not seek to profit from the game. As discussed above, see *supra* Part I, virtual worlds are important to many people for more than just monetary reasons. However, for better or worse, courts are more likely to void contractual clauses on unconscionability grounds when money is involved.

Overall, it remains unlikely a court will void a EULA's clauses as unconscionable so long as the average player cares little for intellectual property rights and relies on the virtual world for entertainment rather than income. However, given increased interest in virtual worlds, the day is fast approaching when courts may find that reasonable people no longer view virtual worlds as just a "game." Moreover, the number of people conducting business in virtual worlds should provide courts increasingly salient reasons to find such EULA terms unconscionable.

#### *E. Public Policy*

The Restatement (Second) of Contracts states the general principle that contract terms are unenforceable on policy grounds if either legislation provides so, or a public policy against the enforcement of such terms clearly outweighs enforcement.<sup>292</sup> Many such clauses relate to federal intellectual property policies,<sup>293</sup> while others are employment related.<sup>294</sup> Courts seldom invalidate contractual clauses on public policy grounds,<sup>295</sup> and the public policy analysis often falls within the rubric of unconscionability.<sup>296</sup> However, the evolving nature of virtual worlds—from mere games into places of community and commerce—might lead courts to invalidate EULA terms using public policy principles.

### V. VIRTUAL WORLDS AS MORE THAN JUST "ENTERTAINMENT"

Virtual worlds are fast evolving as places where millions of people spend increasing amounts of time.<sup>297</sup> With so many people living and working in virtual worlds, it is only a matter of time before courts and legislators apply real laws to virtual worlds.<sup>298</sup> Consider again the *Black Snow*<sup>299</sup> and *Marvel*<sup>300</sup> cases, retailers who advertise in

292. RESTATEMENT (SECOND) OF CONTRACTS §§ 178–79 (1981); *see, e.g.*, *Newton v. Rumery*, 480 U.S. 386, 392 (1987); *Spinetti v. Serv. Corp. Int'l*, 324 F.3d 212, 214 (3d Cir. 2003) (discussing the strong policy of invalidating arbitration agreements when "large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum") (citing *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000)); *Van Hosen v. Bankers Trust Co.*, 200 N.W. 2d 504, 509 (Iowa, 1972) (holding a non-competition forfeiture clause in a pension plan to be in violation of public policy given that pension plans are a vital component of socioeconomic community welfare).

293. *See Stark v. Advanced Magnetics, Inc.*, 119 F.3d 1551, 1554 (Fed. Cir. 1997) (holding that the determination of inventorship under 35 U.S.C. § 256 is a matter of federal patent law); *Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F.2d 1191, 1200 (7th Cir. 1987) (rejecting licensee estoppel in copyright law, even where the licensee expressly agreed to not challenge the copyright).

294. Lemley, *supra* note 206, at 164–65.

295. Lemley, *supra* note 155, at 1259; *see also Cange v. Stotler & Co.*, 826 F.2d 581, 596 (7th Cir. 1987) (Easterbrook, J., concurring) ("Contracts rarely defeat the function of the statute so utterly that they may be set aside [on public policy grounds].").

296. Korobkin, *supra* note 246, at 1204, n.8.

297. *See supra* Part I.

298. Balkin, *supra* note 9, at 2044–45.

299. *See supra* notes 55–57 and accompanying text.

300. *See supra* notes 58–61 and accompanying text.

virtual worlds<sup>301</sup> and pay developers to sell their products in virtual markets,<sup>302</sup> players who “invest” in virtual worlds,<sup>303</sup> or the numerous individuals who profess to prefer the virtual to the real.<sup>304</sup> Consider also the deeply-rooted connections many players feel towards their avatars and the lives that their virtual selves lead.<sup>305</sup> Many Americans suffer cognitive dissonance and depression when unable to access the Internet for prolonged periods of time.<sup>306</sup> Such dissonance is only magnified when individuals view their avatars as extensions of themselves and game developers retain the power to permanently eliminate those extensions.

Legislators and courts must also consider the possible social ramifications of thousands of people migrating online. Instant connectivity in the form of email, instant messenger, cell phone, Blackberry, and so forth, have fundamentally changed the way human beings communicate and socialize.<sup>307</sup> The expansion of virtual worlds and their growing appeal continue this trend, which some might find alarming, if not at least unhealthy.<sup>308</sup> Thus, while current copyright doctrine supports providing players intellectual property rights, and current contract law might support voiding unduly restrictive EULA terms, both courts and legislators must consider the effects of intellectual property and contractual regimes that have the secondary effect of encouraging people to establish virtual identities that may lead to further disconnect between real people. However, countervailing fairness, First Amendment, and copyright policy issues also pervade the future of virtual worlds, suggesting that public policy not only should, but must confirm intellectual property rights for players, regardless of arguably unhealthy effects. First, while the potential success for an unconscionability or Restatement (Second) section 211(3) argument against the EULA is tenuous at best,<sup>309</sup> when viewed through the lens of the underlying social and economic realities of virtual worlds, these arguments gain strength. It is unfair to permit a powerful contracting party to enrich itself at the expense of a powerless gamer by extracting the gamer’s intellectual property rights as the price of admittance to the virtual world. This is especially so in a world governed by the public choice school of

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301. See *supra* note 46.

302. See *supra* note 45.

303. See *supra* notes 49–53 and accompanying text.

304. See *supra* note 38 and accompanying text.

305. See *supra* Part 1.

306. See Jim Hu, *Yahoo: Internet Withdrawal Anguishing*, CNET NEWS (Sept. 22, 2004), [http://news.com.com/Yahoo+Internet+withdrawal+anguishing/2100-1025\\_3-5377867.html](http://news.com.com/Yahoo+Internet+withdrawal+anguishing/2100-1025_3-5377867.html) (discussing a study examining the effects of Internet withdrawal).

307. See, e.g., ROBERT PUTNAM, *BOWLING ALONE* (2000). *But see* Dmitri C. Williams, *Trouble in River City: The Social Life of Video Games* (2004) (unpublished Ph.D. dissertation, University of Michigan), <https://netfiles.uiuc.edu/dcwill/www/Dissertation.doc> (concluding that virtual worlds lead to social withdrawal while at the same time improving community spirit and activism).

308. See Darren Water, *Losing Yourself in Online Gaming*, BBC NEWS, Feb. 17, 2005, <http://news.bbc.co.uk/2/hi/technology/4265407.stm> (discussing the risks of online gaming). Consider also Internet support groups for the significant others of people who venture into virtual worlds obsessively. E.g., EverQuest-Widows, at <http://health.groups.yahoo.com/group/EverQuest-Widows/> (last visited Jan. 28, 2007).

309. See *supra* Parts IV.A, IV.D.

thought<sup>310</sup> with game developers and powerful technology groups lobbying Congress to prevent the emergence of copyrights for in-game player creations.<sup>311</sup> Such player-owned intellectual property rights might limit the developer's ability to exert absolute control over the game.<sup>312</sup> But with the "game" fast becoming a source of social and economic fulfillment for millions of individuals—often with developer encouragement—developer concerns must be balanced against concerns of fairness to the player. Further, if developers view their players as "consumers," then it would seem that consumer protection laws should protect those players, especially if developers encourage players to view their in-game assets and creations as property despite the EULA. The more commodified a virtual world, the more reason for consumer protection laws to apply.<sup>313</sup>

First Amendment issues also predominate, especially freedom of association and expression concerns. Just as people are free to associate with whomever they choose in the real world, so too can they choose to associate with people in virtual form. To deny people the opportunity of virtual interaction might infringe First Amendment rights.<sup>314</sup> More importantly, to deny authors, whether within virtual or real domains, copyright over their creative expression raises freedom of speech concerns.<sup>315</sup> Especially troubling is the fact that developers require total abdication of players' rights to their independent speech. This is not to say that the First Amendment does not apply to a developer's right to expression in the world they create and the right to associate with whom they wish in that world. However, the developer's rights are not absolute, nor is the First Amendment rhetoric intended to shield developers from consumer-protection

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310. See generally Daniel A. Farber & Philip P. Frickey, *Law and Public Choice: A Critical Introduction* (1991).

311. One need only look at the legislative history of the Sonny Bono Copyright Extension and the Digital Millennium Copyright Act to bear out this conclusion. See Joseph Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 130-32 (2004); Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 819 (2001); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to be Revised*, 14 BERKELEY TECH. L.J. 519, 519 (1999); see generally Saul Levmore, *Property's Uneasy Path and Expanding Future*, 70 U. CHI. L. REV. 181, 188-91 (2003); Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 870-81 (1987) (discussing how copyright legislation is subject to interest group pressure).

312. See Balkin, *supra* note 9, at 2065.

313. See *id.* at 2081-82.

314. See generally *id.* (discussing freedom of association and freedom of expression in the context of virtual worlds).

315. Courts tend to reject claims that copyright monopolies impinge individual free speech, holding instead that the idea-expression dichotomy and the fair use doctrine draw the appropriate line between copyrightable works and protected speech. See *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 63 (1911); *Sid & Marty Krofft Television v. McDonald's Corp.*, 562 F.2d 1157, 1170 (9th Cir. 1977). However, the evolving nature of copyright doctrine, First Amendment jurisprudence, and the emergence of virtual worlds as a medium of expression suggest that this one-size-fits-all view of the nexus between copyright and free speech may be outdated, and even mistaken. See Neil Weinstock Netanel, *Locating Copyright Within the First Amendment Skein*, 54 STAN. L. REV. 1, 5 (2001); Jed Rubenfeld, *The Freedom of Imagination: Copyright's Constitutionality*, 112 YALE L. J. 1, 4 (2002).

laws and claims of unjust enrichment.<sup>316</sup> The day is not far off when litigants might raise the specter of *Marsh v. Alabama*<sup>317</sup> in seeking to assert that the Constitution applies to game developers and their virtual worlds just as it does to company towns and their owners.<sup>318</sup> Of course, the nexus between copyright and the First Amendment also militates against wholesale waiver of consumers' rights over their artistic creations.<sup>319</sup>

Copyright policies, both of the public good and market failure variety, suggest that courts and legislators should be leery of absolutist EULAs. Intellectual property laws exist to encourage artistic creations that benefit the public by providing creators with limited monopolies over their creations. While commentators and courts might disagree over whether these intellectual property rights can be waived by private contracts that purport to eliminate elements of the copyright regime as between private parties,<sup>320</sup> the underlying policy of the Copyright Act remains. Developers, gamers, and the public at large benefit from the Copyright Act's careful balance. Developers maintain an incentive to develop and enlarge their virtual worlds; players maintain an incentive to create, as well as play; and the public at large enjoys any spillover, as any

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316. Balkin, *supra* note 9, at 2083–84 (noting how media companies use the principle of free speech as a shield against economic regulation and arguing that such use of the First Amendment is inappropriate).

317. 326 U.S. 501 (1946) (applying free speech rights to a “company town”). *Marsh* involved a Jehovah's Witness that was arrested for criminal trespass while attempting to disseminate her religious beliefs in Chickasaw, Alabama, a “company town” owned by Gulf Shipbuilding Corporation. *Id.* at 503–04. The town resembled a regular town, with a main street, a business district, and residential neighborhoods, and was open to the public at large. *Id.* The United States Supreme Court held that Gulf Shipbuilding served as the functional equivalent of a municipal government. *Id.* at 507. As such, Gulf's actions constituted state action, beholden to the same constitutional standards as public government. *Id.* at 508–09; *see also* Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CAL. L. REV. 395, 456–60 (2000) (“Cyberfora and networks that are generally open to the public should similarly be seen as ‘places of public accommodation,’ whether by statutory construction or legislative extension.”). *But see* Noah v. AOL Time Warner, Inc., 261 F. Supp. 2d 532, 544–45 (E.D. Va. 2004), *aff'd*, No. 03-1770, 2004 U.S. App. LEXIS 5495 (4th Cir. Mar. 24, 2004) (holding that America Online chat rooms are not public accommodations for purposes of Title II of the Civil Rights Act of 1964 because they are not physical spaces).

318. *See* Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to “Private” Regulation*, 71 U. COLO. L. REV. 1263, 1302–06 (2000) (arguing for application of constitutional norms in debates over the regulation of cyberspace); *cf.* Peter S. Jenkins, *The Virtual World as Company Town—Freedom of Speech in Massively Multiple On-Line Role Playing Games*, 8 J. OF INTERNET L. 1, 17 (July 2004) (proposing a company town analogy for virtual worlds that have public access but not for worlds that select their members).

319. *See generally* Netanel, *supra* note 315, at 5.

320. *Compare* Lemley, *supra* note 155, at 1240 (lamenting the weakening of copyright by way of shrinkwrap licenses); *and* McManis, *supra* note 156, at 176 (same); *and* Nimmer et al., *supra* note 156, at 19 (arguing that contractual attempts to alter copyright's “delicate balance” through contract should be preempted), *with* Hardy, *supra* note 230, ¶ 37 (contending that the Framers intended for copyright to serve as an alienable property right); *and* O'Rourke, *supra* note 161, at 488–89 (arguing that fair use rights should be alienable in contract as a default position, despite potential federal preemption).

virtual artistic and literary creations expand the real public domain, and thus the public good.<sup>321</sup> The market failure view of copyright supports a similar outcome. The concern with creating incentives for the production of vendible commodities,<sup>322</sup> coupled with the concern that copyright markets will not always function adequately,<sup>323</sup> suggests that players, not developers, should maintain copyright over their works. Virtual worlds like EverQuest and Ultima Online will continue to host player creation of vendible commodities whether or not developers control all copyright related to the virtual world. Moreover, player creations are more likely to be created in the first place, and thus reach the market, if players maintain the incentive to create.<sup>324</sup>

The fact that virtual worlds are marketed to consumers as “games” does not, and should not, end any inquiry into whether copyright and contract law and policy should apply to them. Consider the case of *SEC v. SG, Ltd.*<sup>325</sup> There, the court considered whether a “virtual stock market,” marketed by its owners as a game, was essentially a real stock market for purposes of SEC fraud regulations.<sup>326</sup> The district court characterized the purchases of virtual shares as a “clearly marked and defined game,” that was not part of the commercial world, and thus beyond the ambit of federal securities laws.<sup>327</sup> However, the First Circuit reversed, finding the virtual stock market qualified as an investment contract within the SEC’s jurisdiction.<sup>328</sup> Of particular note was the court’s dismissal of the defendants’ claim that their virtual market was only a “game,” and not a real commercial instrument:

We do not gainsay the obvious correctness of the district court’s observation that investment contracts lie within the commercial world. Contrary to the district court’s view, however, this locution does not translate into a dichotomy between business dealings, on the one hand, and games, on the other hand, as a failsafe way for determining whether a particular financial arrangement should (or should not) be characterized as an investment contract. . . . As long as the [relevant legal test] is satisfied, the instrument must be classified as an investment contract. Once that has occurred, ‘it is immaterial whether the enterprise is speculative or non-speculative or whether there is a sale of property with or without intrinsic value.’ It is equally immaterial whether the promoter depicts the enterprise as a serious commercial venture or dubs it a game.<sup>329</sup>

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321. *Id.*

322. Gordon, *supra* note 230, at 2579 n.1.

323. Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600, 1613 (1982).

324. Asking whether or not player creations are more likely to successfully reach the market if corporations control the marketing and distribution process misses the point. The incentive to create is what yields the creations in the first place. Once the artistic or literary work is created, corporations like Sony can then negotiate with the creator should Sony desire a distribution deal.

325. 265 F.3d 42 (1st Cir. 2001).

326. *Id.*

327. *Id.* at 47.

328. *Id.* at 48–55.

329. *Id.* at 47–48 (citations omitted).

Similar logic should frame the debate of what is real or virtual and what is legitimate or just a game, especially when people no longer look at virtual worlds as only games, but also as lucrative investment opportunities. With so much at stake monetarily and socially for the corporations and individuals who develop and populate virtual worlds, courts and legislators should consider the underlying policies behind copyright and contract before upholding developer EULAs. If not, courts enforcing such EULAs risk tipping the Copyright Act's delicate balance. Such distortion can cause a contraction in the public good for all parties involved. While the Constitution's framers may not have conceived of online virtual worlds in their day, they surely did not intend for future generations to use copyright as a means of decreasing the public good. Rather, when technological change has rendered the Copyright Act's terms ambiguous, copyright law must be construed in light of the law's fundamental purpose to increase the public good.<sup>330</sup> Courts should deal with these issues with care, lest the underlying economic, social, and policy realities bubbling beneath the veneer of the EULA contravene the delicate balance of the Copyright Act.

#### CONCLUSION

To many, virtual worlds are very real. As increasing numbers of people migrate to virtual worlds seeking social and economic fulfillment, legislators and courts will have to apply real laws to virtual spaces. Legislators might consider First Amendment and consumer protection issues when applying real laws to virtual spaces. But courts also have an important role to play in the context of virtual worlds. While EULA terms on their face are likely binding, courts should interpret those terms in light of the Copyright Act's purposes. The public good must remain the paramount consideration when forging the appropriate balance between contract and copyright law. Therefore, the emergence of virtual worlds and their continued growth and popularity requires courts and legislators to interpret and modify existing law in order to protect the interests of developers and players alike. To do otherwise is to overlook the Copyright Act's fundamental purposes and to ignore the evolving nature of virtual worlds from mediums of play into venues for creation, commerce, and community.

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330. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. . . . When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose.") (internal citations omitted).