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**Regulating Virtual Realms Optimally: The Model End User
License Agreement**

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Regulating Virtual Worlds Optimally: The Model End User License Agreement

By Jason T. Kunze*

I. INTRODUCTION

¶1 Imagine that the federal government took your house, sold it, and kept the money from the sale, because of a claim that you had violated a rule when acquiring the property. Then imagine that you had no recourse, no way to dispute the government's actions. One would expect such a scenario to cause an outcry (and also a challenge based on the Takings Clause of the Fifth Amendment). But what if this occurred in a virtual realm? That is, what if the property was purchased with virtual money and only existed in a virtual world? Does the user have the same rights? And what recourse does this person have against the developer¹ of the virtual world?

¶2 A real example of this scenario is presented in the case of *Bragg v. Linden Research Inc.*² The plaintiff in this case, Mark Bragg, bought several plots of land through an auction system in the virtual world of *Second Life*.³ This popular simulated world provides an environment for users to explore and interact with other players, as well as a virtual economy (based on the Linden dollar⁴) for use in purchasing in-game property and experiences. When the validity of Bragg's in-game land purchase was questioned, Linden Lab (the company that created and administers *Second Life*) seized the virtual property, resold it on the open market, and kept the proceeds. Furthermore, Linden Lab seized all of Mark Bragg's additional in-game property and froze his account.⁵ This unilateral behavior by the developer, while shocking in a real world context, is commonplace in the virtual world. This is a world where developers wield godlike power and users—typically paying customers—have little or no ability to challenge this power.

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¹ The term developer is used to describe the entity that designs the virtual world, drafts the license agreement, and operates the world on a daily basis.

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

³ *Second Life* is a trademark of Linden Research, Inc. *Second Life* can be found on the Internet at <http://www.secondlife.com>.

⁴ The Linden dollar is the virtual currency used in *Second Life*. The Linden Dollar Exchange (LindeX) facilitates the conversion of U.S. currency to Linden currency. According to Linden Lab, the exchange rate has stabilized around 250 Linden Dollars per U.S. Dollar. The LindeX is quite complex and even has its own circuit breakers. See *Second Life: LindeX Market Data*, <http://secondlife.com/whatis/economy-market.php> (last visited Oct. 22, 2008); *Second Life: Economic Statistics*, http://secondlife.com/whatis/economy_stats.php (last visited Oct. 22, 2008).

⁵ Kathleen Craig, *Second Life Land Deal Goes Sour*, WIRED, May 18, 2006, <http://www.wired.com/gaming/virtualworlds/news/2006/05/70909>.

¶3 At first glance, the issue of virtual property rights—whether a user has a property right in an item that only exists in an online realm—seems to be paramount in the *Bragg* case.⁶ Closer inspection, however, shows that while virtual property plays a role, the larger issue in the case is one of “virtual rights”—the rights of users and the rights of developers in virtual realms—and the way in which disputes over these virtual rights are settled. District Judge Robreno summed this up quite effectively:

Ultimately at issue in this case are the novel questions of what rights and obligations grow out of the relationship between the owner and creator of a virtual world and its resident-customers. While the property and the world where it is found are “virtual,” the dispute is real.⁷

¶4 The issue of virtual rights is, of course, not specific to *Second Life*. Consider the virtual world of *EVE Online*, a science-fiction based role-playing game, where a player using the pseudonym Cally created an in-game investment bank. This bank offered high returns which encouraged other players to deposit ISK, the virtual currency of *EVE Online*. When the bank acquired roughly 790 billion ISK (which is estimated at about \$170,000 in U.S. currency), Cally ran off with all the bank’s assets.⁸ But in *EVE Online*, such theft and trickery are part of the game, and since Cally did not explicitly violate any game rules, he was not punished for the “*EVE* Intergalactic Bank Scandal.” One *EVE* player analogized that going after Cally for the money “would be like suing someone you lost to at poker.”⁹ Other players were outraged and wanted the game’s developer to take action against Cally. Because of the differences between the real world (where bank scandals will land you in prison) and the virtual world of *EVE* (which is far less regulated, like pirates in uncharted territory), players were confused with regard to their rights and expectations.

¶5 The examples above hint at the inherent tension present in virtual worlds. Part of the allure of the fantasy realm is the opportunity to escape and play in an area where real world rules do not apply. But without real world concepts, such as contract law and dispute resolution, virtual worlds cannot function efficiently.

¶6 The primary law for a particular virtual realm is established by its end user license agreement (EULA) or terms of service agreement (TOS).¹⁰ These are agreements between the user and the developer that typically must be accepted by the potential user before entering the virtual world. As this Comment will show, the current implementation of these agreements is riddled with problems. The virtual world

⁶ In fact, many articles describe the case as a virtual property dispute. See, e.g., *Virtual Property Rights Are No Game*, INFORMATIONWEEK, Dec. 16, 2006, <http://www.informationweek.com/news/showArticle.jhtml?articleID=196604327>.

⁷ *Bragg*, 487 F. Supp. 2d at 595.

⁸ Peter Pollack, *Online “Banker” Runs off with Cash, Avatars Cry Foul*, ARS TECHNICA, Aug. 28, 2006, <http://arstechnica.com/news.ars/post/20060828-7605.html>.

⁹ Caroline McCarthy, *Cons in the Virtual Gaming World*, ZDNET, Aug. 31, 2006, http://news.zdnet.com/2100-1040_22-6111089.html.

¹⁰ Some games, such as *World of Warcraft*, use the term End User License Agreement (EULA) to describe the agreement between the developer and the customer. Others, such as *Second Life*, use Terms of Service (TOS) to describe the agreement. For the purposes of this Comment, EULA and TOS are used interchangeably and are intended to have the same meaning.

marketplace is not fully competitive, as lock-in¹¹ and network effects¹² conspire to limit the mobility of players, and barriers to entry prevent new market entrants from providing a more optimal solution—a better EULA or TOS agreement. The user ordinarily has no real choice: either accept the license agreement as is, or forfeit the ability to play. As a result, the customer typically accepts a suboptimal license agreement that hinders the management and evolution of the virtual realm, while also effectively squelching any rights the user might have in the world. By optimizing these agreements, the proper balance can be struck between the fantasy world and the real world, and between the users and the developers. Ultimately this will lead to a better experience for all parties and greater economic success for virtual worlds.

¶7 The remainder of this Comment will focus on five problematic areas of current EULAs and how fixing those areas will significantly improve these agreements.¹³ Part II provides background information on virtual worlds, to assist readers in understanding this relatively new domain, and discusses why virtual worlds are important due to their impact on the real world. Part III examines several problems with the current EULA implementation. Next, recommendations for changes (termed the “Model EULA”) to the typical EULA are proposed in Part IV, along with an explanation of the reasoning for the improved terms. Concluding remarks are provided in Part V.

¶8 It is informative to note what is not covered here. The specific issue of virtual property rights is not the focus of this Comment.¹⁴ Secondly, when talking about virtual rights, the focus is on the rights of the real users that are controlling in-game avatars,¹⁵ not the avatars themselves.¹⁶ Avatar rights are a separate issue. Finally, free speech in

¹¹ Lock-in occurs when high switching costs prevent a user from switching to a competing product. For example, if a consumer playing *World of Warcraft* was to switch to another virtual world, the player would lose everything they had accumulated in that game (e.g. weapons, powers, in-game currency, friends) and would have to start from the very beginning in that new realm. Bruce Schneier, Schneier on Security, <http://www.schneier.com/blog/archives/2008/02/lockin.html> (last visited Oct. 28, 2008).

¹² A network effect occurs when a service becomes more valuable to its users as more people join. For example, a *Second Life* user can communicate with many, many other users and participate in many activities developed for that world, but a participant in a fledgling virtual world would have fewer options for interaction and participation. The network effect of the established *Second Life* user base makes that virtual world more valuable than a competitor with a smaller established base. Arun Sundararajan, Network Effects, <http://oz.stern.nyu.edu/io/network.html> (last visited Oct. 24, 2008).

¹³ This Comment does not focus on a specific EULA, although there are examples provided from specific games such as *Second Life* and *World of Warcraft*. Some investigation shows that these agreements are quite similar across the virtual world “market” in the way they reserve nearly all power to the developer, limit the ability of the user to dispute any claims, allow for selective enforcement, and so on. There are some notable exceptions, however, such as the *Second Life* agreement, which allows users to have limited IP rights in their creations and openly trade in-game assets for real currency.

¹⁴ See Charles Blazer, *The Five Indicia of Virtual Property*, 5 PIERCE L. REV. 137 (2006), for an informative discussion of the virtual property issue.

¹⁵ An avatar is the in-game character that represents the computer user in the virtual world. The avatar is typically created by the user and will vary depending on the game and the user’s creativity. It might be a basic caricature of the user, a wild fantasy figure, or something in between. When other players in the virtual world interact with that user, they see that user’s chosen avatar on their monitor. Avatar is defined as “an electronic image that represents and is manipulated by a computer user (as in a computer game).” Avatar, Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/avatar> (last visited Oct. 23, 2008).

¹⁶ See Raph Koster, A Declaration of the Rights of Avatars, Aug. 27, 2000, <http://www.raphkoster.com/gaming/playerrights.shtml> (creating a “bill of rights” for avatars).

virtual worlds is an enormous issue, and while certainly related to the issue of virtual rights, is simply too broad to be covered within the scope of this Comment.¹⁷

II. BACKGROUND

¶9 What is a virtual world? A virtual world is an interactive world where players may battle, barter, talk, or otherwise interact with other players.¹⁸ A virtual world is persistent, which means that even when the player is not logged in, the world continues to exist and evolve.¹⁹ Like the real world, the virtual world exists and develops around the clock, although the passage of time may be handled differently. Typically, a virtual world simulates a first person or third person physical environment, so that the user is either seeing the world as if they were actually walking through it, or instead watching their avatar move through the world.

¶10 For example, consider the popular MMORPG²⁰ *World of Warcraft*. A player can develop their character by performing quests and killing monsters, but even when the player is logged off, other players will continue to go on quests, collect treasure, and so forth. Consequently, if a user goes away for a bit and returns to the game later, the world she returns to will be different than the one she left. There is an interactive element, both in the ability to talk to other players and also to team up to complete in-game quests.²¹ The world is viewed through a third person perspective that provides the ability to see your particular avatar interact with the other players in the world.

¶11 Because virtual worlds are typically associated with games, it might seem easy for non-gamers to dismiss the issues associated with their regulation, but there are several reasons why virtual worlds are important and should be taken seriously. First, the activities in virtual worlds have real economic consequences. Second, online social networks provided by virtual worlds are quite important to the participants. Next, virtual worlds are not immune to crime, at least some of which is unacceptable in the real world and must be addressed. Finally, and perhaps most importantly, the virtual worlds originally developed for gaming are setting the stage for future virtual realms that will be more broadly used for meetings, education, shopping, and whatever else the designers can imagine.²²

¹⁷ In fact, Yale Professor Jack Balkin wrote a fifty-plus page article on First Amendment rights in virtual worlds. See Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043 (2004).

¹⁸ See Kevin W. Saunders, *Virtual Worlds—Real Courts*, 52 VILL. L. REV. 187, 191 (2007) (outlining Professor Edward Castronova's definition of virtual worlds).

¹⁹ This is part of what can make virtual worlds so addictive, as other players may be "leveling up" or otherwise improving their standing in the virtual realm while the user is away from their computer (gamers even have a specific shorthand term for this—AFK—meaning "away from keyboard").

²⁰ MMORPG is short for Massively Multiplayer Online Role-Playing Game. MMORPGs are a popular type of online game that typically involve taking the character on quests or through battles to raise the experience of the character, which in turn raises the character's abilities and allows it to take on more challenging quests and win more difficult battles. What is MMORPG?, Webopedia Computer Dictionary, <http://www.webopedia.com/TERM/M/MMORPG.html> (last visited Oct. 24, 2008).

²¹ World of Warcraft: Your First Few Levels, <http://www.worldofwarcraft.com/info/basics/firstfewlevels.html> (last visited Oct. 22, 2008).

²² See generally F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CAL. L. REV. 1 (2004) (providing a thorough background on virtual worlds that is often cited by articles addressing the subject).

¶12 The economic consequences of virtual worlds are very real. Customers pay money, typically a monthly fee,²³ to play most games, and many invest an alarming amount of time and effort into virtual gaming.²⁴ Some users have found a way to make money online, with several making their living entirely in the virtual world. This may be by selling virtual wares in *Second Life* or by “gold farming” in a MMORPG.²⁵ (Gold farming is done by players who collect gold and other valuable in-game items for the sole purpose of selling their wares to players who are willing to pay real money for in-game treasure.) Because the in-game goods and avatars themselves have monetary value, there is a vibrant market for exchanging goods—including the leveled up characters²⁶ themselves—for real world currency. Although many developers try to prevent this practice, this simply leads to an extensive out-of-game black market.²⁷ Surprisingly, this market, which consists of people trading real world currency for virtual game assets, is estimated to be at least \$250 million per year—and is likely much larger.²⁸

¶13 The social consequences of virtual worlds are also real. Gamers often develop strong personal attachment to their characters. The virtual realm provides a social network for players as they chat, interact, or complete tasks together.²⁹ For example, in some MMORPGs groups of players form a guild that meets regularly to perform in-game quests (e.g., a raid on a castle defended by another guild), and players schedule and attend these raids with the veracity of a businessperson attending an important meeting.

¶14 Virtual crime raises another in-game issue that affects the real world. Determining where the line is between what is acceptable and what is wrong in the virtual world is an extraordinarily challenging task. For example, games often allow deception or theft,³⁰ so

²³ For example, *World of Warcraft* charges from U.S. \$12.99 to \$14.99 per month. *World of Warcraft: General F.A.Q.*, <http://www.worldofwarcraft.com/info/faq/general.html> (last visited Oct. 22, 2008). *Second Life*, on the other hand, allows a basic account for free, but to own land the user must upgrade to a premium account which costs from U.S. \$6.00 to \$9.95 per month. *Second Life: Membership Plans*, <http://secondlife.com/whatis/plans.php> (last visited Oct. 22, 2008). Realistically, to enjoy *Second Life* one must also make an additional investment to acquire Linden dollars.

²⁴ According to a 2004 study, the mean number of game hours played per week was 21.9, with 1.6% of gamers playing more than 60 hours per week. Nick Yee, *The Daedalus Project*, <http://www.nickyee.com/daedalus/archives/000758.php> (last visited Oct. 11, 2008).

²⁵ See *Virtual Land, Real Money*, BUSINESS WEEK, May 1, 2006, http://businessweek.com/magazine/content/06_18/b3982009.htm (*Second Life* land developer amassed U.S. \$250,000 in *Second Life* assets); Associated Press, *Virtual Jobs in Virtual Worlds Yield Real Cash*, MSNBC, Nov. 4, 2005, <http://www.msnbc.msn.com/id/9925794> (Romanian gold farmer makes about \$200 a month).

²⁶ In most MMORPGs, a new user starts with a level one avatar, and by investing time into the game, completing quests, and winning battles, the avatar receives experience points which, as they accumulate, raise the level of the avatar. This process is called “leveling up.” By purchasing a high level character, a new entrant to the game can immediately obtain a powerful avatar while avoiding the time-consuming process of leveling up.

²⁷ Daniel Terdiman, *eBay Bans Auctions of Virtual Goods*, CNET NEWS, Jan. 29, 2007, http://www.news.com/eBay-bans-auctions-of-virtual-goods/2100-1043_3-6154372.html (while most games ban real money trades, *Second Life* has taken a different stance, specifically allowing trades on sites like eBay and also providing a market for the exchange of game currency and real currency).

²⁸ *Id.* (estimating that annual real money trading is between \$250 and \$880 million U.S.).

²⁹ Daniel Terdiman, *No End in Sight to Hacking of ‘WoW’ Accounts*, CNET NEWS, Apr. 10, 2007, http://www.news.com/No-end-in-sight-to-hacking-of-WoW-accounts/2100-1043_3-6174704.html (gamer says it was unfortunate to lose his in-game equipment when his account was hacked, “but what was really important was to play and hang out with my friends”).

³⁰ As an analogy, consider the game of poker. It is perfectly within the rules to bluff—that is, to intentionally misrepresent the strength of a hand in order to “steal” another player’s chips. But other forms of deception, such as using marked cards, are completely against the rules (and may get your arms broken

the act of stealing a weapon³¹—or even stealing money³²—might be allowable in this context. But Internet sweatshops certainly raise the same issues as real world sweatshops.³³ And most would find money laundering and securities fraud just as unacceptable in the virtual world as it is in the real world.³⁴

¶15 Finally, virtual world applications are not limited to gaming. The way that virtual worlds are being developed and administered within the gaming context will lay the groundwork for other virtual environments. Companies such as Cisco Systems, IBM, and Sun Microsystems are already experimenting with virtual worlds for business collaboration.³⁵ Virtual worlds have tremendous potential in the area of education,³⁶ as students could learn online regardless of location, time, or disability.³⁷ And a creative thinker could easily imagine many more valuable applications for virtual worlds in the future.³⁸

¶16 The economic aspects, social effects, criminal possibilities, and future development opportunities of virtual worlds make them significant in the real world. Recognizing the importance of virtual worlds outside of their gaming context is important when considering the impact of the problems created by the current EULA implementation.

III. PROBLEMS WITH THE CURRENT EULA IMPLEMENTATION

¶17 The first problem with the typical virtual world license agreement is the developer gets unilateral, unchecked, godlike power, while the customer has few or no rights. Many EULAs explicitly state that the user has no right to any in-game property, even the user's avatar and inventory (such as weapons). These items have real world monetary value, but the player who has spent time and money to acquire them typically has no

as well).

³¹ This is referred to as the “Bone Crusher Dilemma” by Gregory Lastowka & Dan Hunter. The Bone Crusher mace is a weapon in the game *Ultima Online*. Treating the theft of a Bone Crusher as a crime is a problem since “Ultima Online is styled as a game where Bone Crusher maces are designed to be stolen,” just as a basketball is intended to be “stolen” in a basketball game. F. Gregory Lastowka & Dan Hunter, *Virtual Crimes*, 49 N.Y.L. SCH. L. REV. 293, 304 (2004–2005).

³² McCarthy, *supra* note 9 (discussing the *Eve Online* investment bank scam that was allowable within the rules of the virtual world, and unpunished by the game creator).

³³ Lastowka & Hunter, *supra* note 22, at 39 (discussing the point-and-click sweatshop created in Tijuana, Mexico that paid unskilled laborers minimal amounts to mine virtual in-game assets that were then resold at a profit).

³⁴ See American Bar Association, *Global Business in the Metaverse: Money Laundering and Securities Fraud*, 3 ABA SCI TECH LAW 4 (2007) (asserting that it is easy to use virtual world currency to move a sizable amount of money across international borders with minimal reporting and little risk).

³⁵ Jon Brodtkin, *IBM, Second Life Create Business-Friendly Virtual Worlds*, NETWORK WORLD, Apr. 3, 2008, <http://www.networkworld.com/news/2008/040308-ibm-second-life-virtual.html>; Matt Hamblen, *Cisco Chief Lauds Coming Virtual-World Technology*, COMPUTERWORLD, June 24, 2008, <http://www.computerworld.com/action/article.do?command=viewArticleBasic&articleId=9103079>.

³⁶ See, e.g., Active Worlds for Education Use, <http://library.thinkquest.org/23138/hawedu.htm> (last visited Oct. 11, 2008).

³⁷ How about a class on virtual worlds conducted in a virtual world? Harvard Law created Berkman Island within *Second Life* to host virtual classes for enrolled students and the public as well. For a course description, see Rebecca Nesson, E4: Virtual Worlds, <http://www.eecs.harvard.edu/~nesson/e4/> (last visited Oct. 22, 2008).

³⁸ See Chris Gaylord, *Can Web-Based Worlds Teach Us About the Real One?*, CHRISTIAN SCI. MONITOR, Jan. 23, 2008, <http://www.csmonitor.com/2008/0123/p13s01-stct.html> (suggesting that virtual communities may be useful for social science research).

practical recourse against the developer if these items are misappropriated. For example the *World of Warcraft* EULA expressly disclaims any player ownership interests:

All title, ownership rights and intellectual property rights in and to the Game and all copies thereof (including without limitation any titles, computer code, themes, objects, characters, character names, stories, dialog, catch phrases, locations, concepts, artwork, character inventories, structural or landscape designs, animations, sounds, musical compositions and recordings, audio-visual effects, storylines, character likenesses, methods of operation, moral rights, and any related documentation) are owned or licensed by Blizzard.³⁹

Even *Second Life*, which by comparison is quite user friendly in allowing its customers to have a limited intellectual property right to their virtual creations and freely trade in-game assets for real currency, maintains an enormous amount of power for itself. In regard to the Linden dollar, the *Second Life* TOS proclaims:

You agree that Linden Lab has the absolute right to manage, regulate, control, modify and/or eliminate such Currency as it sees fit in its sole discretion, in any general or specific case, and that Linden Lab will have **no liability** to you based on its exercise of such right.⁴⁰

Assuming that this agreement is enforceable, Linden Lab could arbitrarily eliminate their entire monetary market at any time with no refund to its users.⁴¹ This is incredibly alarming considering that, according to Linden Lab's own information, about \$21 million U.S. was exchanged on the LindeX (the official *Second Life* Linden Dollar exchange) in the third quarter of 2007.⁴² Why does Linden Lab need to retain this abusive amount of power? Why should they not be liable to their own customers when eliminating the customer's assets? This is analogous to a casino arbitrarily eliminating the market for its chips and keeping all of its customer's money. And it gets even worse for the potential *Second Life* participant:

Linden Lab has the right at any time for any reason **or no reason** to suspend or terminate your Account, terminate this Agreement, and/or refuse any and all current or future use of the Service without notice or liability to you. In the event that Linden Lab suspends or terminates your Account or this Agreement, you understand and agree that you shall receive **no refund or exchange** for any

³⁹ World of Warcraft End User License Agreement, § 3A, <http://www.worldofwarcraft.com/legal/eula.html> (last visited Oct. 22, 2008).

⁴⁰ Second Life: Terms of Service, § 1.4, <http://secondlife.com/corporate/tos.php> (last visited Oct. 22, 2008) (emphasis added).

⁴¹ As of August 14, 2007 the aggregate market value was approximately \$2.6 billion Linden, which at an exchange rate of 260 Linden per U.S. dollar corresponds to \$10 million U.S. See Zee Linden, The Second Life Economy, <http://blog.secondlife.com/2007/08/14/the-second-life-economy/> (last visited Oct. 28, 2008).

⁴² Second Life: Economic Statistics: Graphs, <http://secondlife.com/whatis/economy-graphs.php> (last visited Oct. 22, 2008).

unused time on a subscription, any license or subscription fees, any content or data associated with your Account, or for anything else.⁴³

According to the above, Linden Lab has the right at any time to remove a user account, with the consequence that the user forfeits all in-game possessions. Under the agreement, Linden Lab can do this without even showing good—or *any*—cause.⁴⁴ It would be more palatable for Linden Lab to retain the right to remove a cheating user or a user who was somehow harassing other users. But unrestricted termination of any user, at any time, with complete forfeiture of all in-game assets is excessive.⁴⁵

¶18 The second problem with EULAs in virtual worlds (and most EULAs generally) is that these agreements are unreadable. These agreements are typically extremely long, and use more legalese than plain language. Because EULAs are written poorly, the user will not comprehend the terms or understand what he is agreeing to, and thus is unlikely to make a rational, informed choice regarding his virtual world selection and participation. Ultimately, given the length of the document and the confusing language, most readers abandon reading these agreements altogether.⁴⁶

¶19 Also, the EULA typically contains a clause allowing the developer the right to change the agreement at any time, with no notice to the user.⁴⁷ Developers will argue that this gives them the ability to modify the world as they see fit, without being limited contractually. But this argument fails for at least three reasons. First, the developer has already reserved so much power for itself under the EULA it is hard to imagine how the existing agreement would limit further innovation. Next, businesses have to consider the rights of existing customers all the time. The challenge of introducing new functionality without making an existing product base obsolete encourages innovative companies to create new ideas that can co-exist within the existing framework, or new solutions that

⁴³ Second Life: Terms of Service, *supra* note 40, § 2.6 (emphasis added).

⁴⁴ The *Bragg* case is undoubtedly an example of Linden Lab exercising this unchecked power. When Bragg and Linden Lab disagreed over a land auction, all of Bragg's land was confiscated, his account was frozen (thus preventing him from cashing in his in-game currency), and he was kicked out of the game. *See* Craig, *supra* note 5.

⁴⁵ Furthermore, *Second Life* has a tricky balancing act to administer. Per its TOS, the users have a limited intellectual property right to their virtual creations, but the TOS does not confer a specific property right to a user for the land and other possessions they own in the game. Section 5.3 states that any and all in-game content may be destroyed at any time at the developer's discretion. This presents at least two problems. First, it is unclear how a party can own in-game property (as Linden Lab advertises) if that right can be removed at any time, without cause, and without any compensation. Second, if Linden Lab bans a user from the game, it would not destroy the user's intellectual property rights, but would destroy the value of those rights that the user held, since the entire market to utilize the intellectual property would be effectively eliminated. In other words, a party may obtain intellectual property rights to content created in the *Second Life* world, but there is no right of access to the world, which happens to be the only market where those rights can be exercised. *See* Second Life: Terms of Service, *supra* note 40, §§ 3.1–3.3, 5.3.

⁴⁶ As an extreme example showing how infrequently EULAs are read, PC Pitstop included a clause in its EULA promising money to the user if they sent a note to an email address provided. More than 3000 people downloaded the software before one person finally wrote in and received a \$1000 check. Larry Magid, It Pays to Read License Agreements, <http://pcpitstop.com/spycheck/eula.asp> (last visited Oct. 22, 2008).

⁴⁷ From the *Second Life* TOS: "Linden Lab may amend this Agreement at any time in its sole discretion, effective upon posting the amended Agreement at the domain or subdomains of <http://secondlife.com> where the prior version of this Agreement was posted, or by communicating these changes through any written contact method we have established with you." Second Life: Terms of Service, *supra* note 40.

can still interface with the older technology (backward compatibility).⁴⁸ Finally, from a legal standpoint, a contract requires a manifestation of mutual assent and consideration, and the modification of the EULA without the user's assent and without any consideration from the developer is arguably not an enforceable contract.⁴⁹

¶20 The fact that there is typically either no notice at all or, at best, constructive notice of the changes makes the case against enforceability even stronger. For example, the *Second Life* agreement would require a conscientious user to read the TOS each time before playing and check it against his existing agreement, as this would be the only way to determine if changes had been made. The check would have to be made before each login, as any use of *Second Life* would constitute agreement to the (changed) terms.

¶21 Since the EULA may not be enforceable in court, or at least it is unclear what parts of the EULA are enforceable, this uncertainty creates a chilling effect as both developers and users are not sure of their rights. EULA terms are dictated by the developer and either accepted as is by the user or rejected; the user has no bargaining power. Even a sophisticated party with considerable negotiating skill will not be able to negotiate its terms. Because *Second Life* consumers had no bargaining power—consider that Mark Bragg was an experienced attorney yet still had no chance to negotiate with Linden Lab regarding the terms of the *Second Life* agreement⁵⁰—the court found the *Second Life* TOS to be a contract of adhesion.⁵¹ And in the market of virtual realms, the user is helpless to shop around for better contract terms as long as all competitors are using similar clauses in their EULAs.⁵²

¶22 Contracts of adhesion may be challenged successfully under the doctrine of unconscionability, or as otherwise against public policy. To prevail in an unconscionability claim, a plaintiff must show that the contract was procedurally unfair (which for a form contract is easily met by showing unequal bargaining power) and substantively unfair (by showing that the actual terms of the contract are unfair).⁵³ In the case of EULAs, both parties are harmed when the terms are substantively unfair. The user, unaware of his actual rights, will have to pay considerable transaction costs to determine those rights. The developer will be exposed to numerous potential lawsuits

⁴⁸ An example of each case may be illustrative. For the first case, compact discs with record-once capability (CD-Rs) were designed so that after recording, they could be played back on existing CD players. For the second case, the Playstation 3 hardware was designed to play its new software, as well as existing Playstation 2 and Playstation games.

⁴⁹ RESTATEMENT (SECOND) OF CONTRACTS § 17 (1981).

⁵⁰ The court stated, “Although Bragg is an experienced attorney . . . he was never presented with an opportunity to use his experience and lawyering skills to negotiate terms different from the TOS that Linden offered.” *Bragg v. Linden Research Inc.*, 487 F. Supp. 2d 593, 606 (E.D. Pa. 2007).

⁵¹ *Id.* A contract of adhesion, also referred to as a form contract or boilerplate contract, has its terms written by a dominant party and is offered to the weaker party on a take it or leave it basis. It is understood that the consumer is powerless to negotiate the terms of the agreement. *See also* Legal Definition of Adhesion Contract, <http://legal-dictionary.thefreedictionary.com/adhesion+contract> (last visited Nov. 16, 2008).

⁵² Standard contracts are typically used by enterprises with strong bargaining power. The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. Friedrich Kessler, *Contracts of Adhesion – Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943).

⁵³ *See* Sharon K. Sandeen, *The Sense and Nonsense of Web Site Terms of Use Agreements*, 26 HAMLINE L. REV. 499, 547 (2003).

and forced to restructure the license agreement. By drafting the terms fairly—or at least less lopsidedly—in the first place, both parties to the agreement stand to benefit.

¶23 The *Bragg* case provides an illustration of a court applying the unconscionability doctrine to strike down a binding arbitration clause. Linden Lab tried to prevent Mark Bragg from having his day in court by claiming, *inter alia*, that its binding arbitration clause in the TOS agreement was enforceable against the plaintiff. The court found the arbitration clause to be unconscionable when considering several elements: the one-sided nature of the agreement, the costs of the arbitration as compared to court, the forum selection clause forcing the user to travel to California, and the confidentiality provision that prevents would-be plaintiffs from having access to information on previous disputes.⁵⁴ As a result of the court’s strongly worded opinion⁵⁵ striking down the agreement, and undoubtedly realizing the potential legal impact for its virtual world if the case went to trial, Linden Lab opted to settle (keeping the terms of the settlement confidential).⁵⁶ Linden Lab did revise the arbitration terms after the case, providing the option of binding, non-appearance based arbitration of small claims (under \$10,000) between a user and Linden Lab.⁵⁷ Ultimately, *Second Life* residents now have the choice to use this arbitration to cheaply and quickly resolve disputes, but this solution came at great time and expense to both Mark Bragg and Linden Lab.

¶24 Unfortunately, the market has moved slowly to correct weaknesses in the EULA, perhaps because of the combination of information costs, lock-in, network effects, and oligopolistic market structure. Because contracts require time and legal skill to interpret, users typically do not read them (and therefore the EULA is not a factor in the customer’s decision-making process). Furthermore, once a user does select a virtual world, they can only switch to another realm if they are willing to forfeit their avatar, items, and social network. Because switching costs are so high, competition between developers for existing customers is stifled. The market of virtual world providers operates with the conscious parallelism of an oligopoly, instead of a truly competitive market. As a result,

⁵⁴ *Bragg*, 487 F. Supp. 2d at 611.

⁵⁵ The opinion, when summarizing the unconscionability arguments, stated:

When a dispute arises in *Second Life*, Linden is not obligated to initiate arbitration. Rather, the TOS expressly allow Linden, at its “sole discretion” and based on mere “suspicion,” to unilaterally freeze a participant’s account, refuse access to the virtual and real currency contained within that account, and then confiscate the participant’s virtual property and real estate. A participant wishing to resolve any dispute, on the other hand, after having forfeited its interest in *Second Life*, must then initiate arbitration in Linden’s place of business. To initiate arbitration involves advancing fees to pay for no less than three arbitrators at a cost far greater than would be involved in litigating in the state or federal court system. Moreover, under these circumstances, the confidentiality of the proceedings helps ensure that arbitration itself is fought on an uneven field by ensuring that, through the accumulation of experience, Linden becomes an expert in litigating the terms of the TOS, while plaintiffs remain novices without the benefit of learning from past precedent.

Id.

⁵⁶ Although the settlement terms were not disclosed, Bragg did get his *Second Life* account and privileges restored. Marty Linden, *Resolution of Lawsuit*, Oct. 4, 2007, <http://blog.secondlife.com/2007/10/04/resolution-of-lawsuit/>.

⁵⁷ Robin Linden, *A Change to the Terms of Service*, Sept. 28, 2007, <http://blog.secondlife.com/2007/09/18/a-change-to-the-terms-of-service/>.

consumers often do not have meaningful choice when selecting between EULAs of virtual realms.⁵⁸

IV. THE MODEL EULA

¶25 To combat the negative effects outlined above, I propose the following EULA modifications (the “Model EULA”) for adoption by virtual world developers. By adhering to these suggestions, developers can create a better environment for virtual world participation. Also, this will help to more closely align developer and user incentives and allow the competitive market to develop innovative solutions to virtual world problems—including problems that have yet to be recognized or even imagined. As a result, additional users and investment dollars will flow into virtual worlds.

¶26 An individual developer may, at first, view a more competitive marketplace as a detriment. But this view is shortsighted. While the existing developers may be able to band together and control the license terms offered, this makes the marketplace ripe for an upstart company to come in and offer better terms and steal potential customers. A more competitive marketplace will test and, through survival of the fittest, select the optimal conditions for administering a virtual world. These optimal conditions will lower consumer search costs and improve user experiences, attracting more customers to the marketplace⁵⁹ and enlarging the revenue available to all market participants. Instead, if the improvements are forestalled, the innovation process is slowed, user satisfaction is diminished, and industry-wide growth is undermined.

¶27 As an example, consider the suggestion that a developer allow a user to “cash out” and move between virtual worlds.⁶⁰ At first, it might seem desirable for the developer to do everything in its power to prevent a user from leaving its world (call it World A) and going to a competitor. But this user is likely less than satisfied with her experience in World A, and the developer would be better off without this user (since the developer may incur additional costs from this user through complaints or behavior that has a negative impact on other users). In an open environment, this user cashes out and is free to select a different world, but this loss can be offset by other users who are cashing out of other worlds and switching *into* World A. So, in essence, it is possible for the developer to trade a disgruntled customer with a satisfied one. Also, in this scenario, developers will have the incentive to create the best possible product, with the reward being the ability to attract more users, since these users are able to move more freely among virtual worlds and gravitate to their preferred product.

¶28 The terms proposed below are not intended to be adopted as part of a governmental regulation of internet worlds. This would be a non-optimal solution, since the political and judicial systems of the physical world are slow to react and likely do not fully

⁵⁸ As the exception that proves the rule, the *Second Life* agreement was disruptive to the industry because it was the first virtual world to recognize users’ intellectual property rights to in-game creations and expressly allow real world money trades for virtual items. *But see* *Second Life: Terms of Service*, *supra* note 40 (it is unclear how much of a right the user really has because of the terms granting Linden Lab unilateral power to deny access to the only market for this intellectual property).

⁵⁹ Or the inverse may be true; the reduction in negative user experiences will mean fewer potential customers will be discouraged from contributing to the virtual world economy. See *infra* note 66 for an example of rapid, negative user feedback in response to a software offering.

⁶⁰ See discussion *infra* Part IV.5.

understand the needs and challenges specific to the virtual environment. Furthermore, attempted enforcement in court raises all sorts of jurisdictional problems, while putting an additional burden on an already overloaded system. The threat of regulation, however, might promote “voluntary” adoption by developers.⁶¹ More likely, developers will recognize the benefits conferred on both users and developers when more optimal contract terms are utilized. If not, new market entrants can differentiate themselves by offering better terms (while making sure to clearly communicate these advantages to the customer). Yet another possibility, based on the open source model, would be for multiple parties to build on the proposed terms below, while also creating a free database that evaluates how existing EULAs fare against these terms.⁶²

¶29 However it comes to fruition, the concepts below should be incorporated into virtual world EULAs. This will promote a better virtual world experience and will provide for continued successful development and rapid growth of virtual worlds.

A. Make a Reasonable Effort to Balance Power Between the User and the Developer

¶30 The first and most obvious benefit of creating a bilateral contract—especially for the developer—is it will more likely be enforceable in court. As the *Bragg* case demonstrated, EULAs that retain unilateral power for the developer may be struck down for unconscionability reasons.⁶³

¶31 There are several other compelling benefits to this change. Contract drafters who create a balanced contract will have to consider the desired regulatory environment for their virtual realm, instead of simply retaining complete control to determine the rules along the way, however and whenever they see fit. In turn, the information created by this drafting process will be incorporated into the EULA, and will allow users to better comprehend what is and is not allowed in the virtual world. Because users will have a superior understanding of their rights *ex ante*, rather than being surprised later, the specter of complicated and costly litigation to clarify and enforce those rights will be reduced.

¶32 As a further benefit, the chilling effect created by having an indeterminate agreement will be reduced. A chilling effect occurs when behavior might run afoul of the EULA, but the agreement may potentially be unenforceable, so parties err on the side of too much caution in order to avoid the potential risk that exists in the grey areas of the agreement. This affects actual users and also potential users, who choose to avoid the virtual world because the perceived risks are too high (assuming for the moment that they are able to read and understand the EULA).

¶33 For instance, consider the clause regarding control of the Linden dollar. Although Linden Lab reserves the right to eliminate the entire LindeX at any time, with no liability

⁶¹ The threat of congressional regulation of steroids in sports was quite effective in getting professional baseball to “voluntarily” adopt better regulations. See Michael Wilbon, *Finally, Baseball’s Steroid Policy Shows a Little Muscle*, WASH. POST, Nov. 16, 2005, at E01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/15/AR2005111501674.html>.

⁶² This process may already be in the works. See Building a Better EULA Wiki, http://www.bettereula.com/index.php?title=Main_Page (last visited Oct. 23, 2008) (“[T]he next stage of evolution in virtual space involves the rights and ownership of the participants in that virtual space, and that existing forms of virtual government and user rights are antiquated and insufficient to give virtual citizens the investment necessary to ensure their long term buy-in with a virtual world.”).

⁶³ *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 607 (E.D. Pa. 2007).

to any customers, it is questionable whether they could actually do this.⁶⁴ Undoubtedly, players who sustained real money losses of thousands of dollars would race to court to challenge this action. Because the outcome of this potential litigation is unknown, it is arguable whether or not Linden Lab could actually close this market without any repercussions. Consequently some users may avoid the LindeX completely, because of the lack of security that this uncertainty creates. As a result, both parties suffer. Linden Lab misses out on potential market entrants (and the associated revenue), and current *Second Life* participants who own Linden dollars are unable to protect themselves without the extreme time and expense of a legal battle.⁶⁵ A more balanced provision would still place the risk of any market fluctuations on the users, but the responsibility for providing the market itself on Linden Lab.

¶34 Although the developer will incur some additional costs as it works to define the best regulatory agreement, the long term benefits will far outweigh these costs. First, the developer stands to benefit from reduced litigation expenses, which would undoubtedly dwarf the additional upfront development expense. Also, the developer will improve the experience of its customers by providing a more user friendly virtual world. In a domain where everyone is networked, user opinions can be a tremendous benefit—or a horrendous detriment—to the growth and success of the product.⁶⁶ The end result will be additional growth of the customer base for innovative developers, as new customers will be attracted to the worlds with license agreements that protect their interests, and dissatisfied with the worlds that rely on overbroad and indeterminate license agreements that concentrate all the power with the developer.

B. Provide Concise Agreements Written in Plain Language

¶35 The obvious goal of this Model EULA element is to get more users to read and understand the EULA. This would allow users to evaluate and compare various EULAs offered by developers, and incorporate this information into their purchasing decision. Ultimately this will lead to a more efficient market. Developers can promote a virtual realm based on its EULA provisions, and ingenious competitors can be rewarded.⁶⁷

⁶⁴ Furthermore, it is questionable that Linden Lab would even *want* to do this—after all they are making money on these transactions—more likely they have simply drafted this provision as broadly as possible in an attempt to protect themselves in the future. Ironically, this overbroad drafting may actually invalidate the entire clause, instead of protecting the drafter, as it was probably intended.

⁶⁵ Given the small amount of money normally at stake, economically rational parties will decide to eat their losses rather than pursue a legal remedy.

⁶⁶ The recent release of the game *Spore* is a good example of rapid, detrimental user feedback. The game was released in early September 2008 with an oppressive DRM (digital rights management) scheme that caused a user uproar. Less than a month after the initial release, over 3000 users have posted reviews of *Spore* on Amazon.com with the vast majority (about 2600 reviewers) giving the game a one star rating (out of five stars). A potential customer visiting Amazon to purchase *Spore* will see the game's average customer review of 1.5 stars, along with a massive number of user complaints about the game, and may be convinced to not buy the game. Earnest Cavalli, *DRM Opponents Attack Spore's Amazon.com Rating*, WIRED, Sept. 8, 2008, <http://blog.wired.com/games/2008/09/drm-opponents-a.html>; Meg Marco, *Backlash: Anti-DRM Protesters Trash Spore's Amazon Rating*, CONSUMERIST, Sept. 9, 2008, <http://consumerist.com/5047426/backlash-anti+drm-protesters-trash-spores-amazon-rating>.

⁶⁷ *Second Life* was able to capture market share by promoting their enhanced in-game content rights, allowing users to buy virtual land and (openly) trade in-game goods and currency for real world money. But a problem with this strategy was that the TOS did not match the promotional claims of Linden Lab, leading to confusion over the actual rights of users and an attempt to enforce the promised rights in court.

Users can then have meaningful choice between competing products. Furthermore, users will be able to better understand what conduct is permissible and what is prohibited, and can tailor their behavior accordingly.

¶36 With a clear, understandable definition of the rights between the developer and the user, the developer stands to benefit as well. A game owner could create multiple worlds, with the differentiating characteristic being rights conferred under the EULA, and let the customer decide (and pay for) what rights best fit his desired virtual world experience.⁶⁸ As a result, a more competitive gaming landscape could emerge. But without a readable EULA, it becomes very difficult to communicate this market differentiation to customers.

C. Disallow Specific Disclaimers of Notice and Liability

¶37 Certain EULA disclaimers are so disruptive that they should be disallowed in all agreements. Two clauses are immediately suspect, and future experience may show that other restrictions fit in this category as well.

¶38 First, the right to change the license agreement at any time *without notice* is overly cumbersome and unnecessary. At a minimum, providing notice to the user community would allow the community to be aware of their rights—conferring benefits on both users and developers as discussed above. Unlike the physical world, where notice may be prohibitively expensive and time consuming, the virtual world provides the possibility of nearly instantaneous and free notice via email.⁶⁹ By providing the guarantee of notice via email to all users, the developer will be required to explain the changes to the user community, and the users will have the ability to evaluate the changes and potentially provide feedback to the developer. The developer already collects the user’s email address during the registration process, and the duty to notify the developer of any email address changes should fall on the user.⁷⁰ The requirement to notify users via email when the parameters of the world are changing does not create a heavy burden on the developer, and the positive effects of this notice are clear. While the ability to change the terms of the agreement may be necessary—within reason—to allow the game creator to improve the game, the refusal to accept responsibility for notifying customers of the changes is unacceptable.

¶39 Another term that should not be allowed is the blanket disclaimer of liability that can be found in most, if not all, virtual world EULAs. It is understandable that virtual worlds may be subject to events that are unforeseeable (or at least unpreventable—such as server crashes) and developers should not be liable for these circumstances. But it

See Bragg, 487 F. Supp. 2d at 596.

⁶⁸ For example, a game owner might advance the same platform with one EULA that provides strong regulation of deceptive practices, and another EULA that explicitly sets out an “anything goes” world. The first world might appeal to customers that desire a more protected experience closer to the physical world, whereas the second would appeal more to nascent virtual pirates and cowboys.

⁶⁹ Alternatively, the developer could provide notice to the user at the time of the next login, and ask for acceptance of the new agreement at that time. This is what Linden Lab did—although not required to by the terms of the customer agreement—when changing the arbitration provision of the agreement. Linden, *supra* note 57 (“You will be asked to agree to these Terms of Service the next time you log into Second Life.”).

⁷⁰ This would be the virtual world counterpart to updating the address on one’s driver’s license—a responsibility that falls on the user, so the state has the ability to provide notice (usually in the form of a citation or requested court appearance).

would be informative to distinguish between those uncontrollable events that should not trigger liability—think of these events as the “force majeure” of the virtual world—and events due to the negligence or malfeasance of the developer, to which liability should attach. It is unclear from a legal standpoint if the developer can actually disclaim any liability for negligence in a form contract—the contract would have to be tested in court—which leads to the same problems discussed in Part IV.1, *supra*, when parties are unclear of their actual rights and responsibilities. It would be better to explicitly determine liability *ex ante* and, in the spirit of Model EULA element one, balance the liability appropriately between the parties, as disclaiming all liability allows developers to escape all responsibility for running their businesses and leaves paying customers out in the cold.

D. Provide a Fast, Low Cost Dispute Resolution Mechanism

¶40 The development of optimal virtual world EULAs will require an iterative process of trial and error. The crafting of EULAs (and the governing of virtual realms in general) is extremely complex and certainly some setbacks are expected along the way. The imposition of oppressive arbitration clauses in EULAs impedes this process by causing complaints to be suppressed and increasing the time and cost to have a dispute heard. Most users will not have the resources and legal expertise that Mark Bragg relied upon when challenging the provisions of *Second Life*. As a consequence, these problems will not be remedied, resulting in unsatisfied, angry customers and suboptimal contract terms.

¶41 Ultimately the *Bragg* case led to a far superior arbitration agreement. In fact, the new *Second Life* arbitration agreement, which allows for inexpensive arbitration through online proceedings (as well as phone and written proceedings), is a model that has great promise for all virtual worlds.⁷¹ It makes terrific sense to have an online dispute resolution mechanism. It is available to all users—every participant already has online capabilities or else they would not be in the game in the first place. It is faster than traditional remedies, and therefore more capable of keeping up with the pace of a virtual world. And it is far more cost effective for all parties. But because the initial version of the *Second Life* arbitration agreement was poorly drafted, the process of disputing any of the terms of the agreement was arduous, and any resultant changes were forestalled.

¶42 The low cost feedback that will be obtained through an efficient dispute mechanism is tremendously valuable. Virtual world developers need this feedback to monitor and continually improve the virtual world experience. The developer is unknowingly shooting himself in the foot when enforcing a high cost dispute mechanism, by effectively choking off user complaints that could potentially be used to evaluate and improve the governing strategy of the virtual realm. And from the user perspective, the

⁷¹ According to Linden Lab:

Our new updated TOS, which are the terms and conditions on which Linden Lab provides access to the Second Life environment, give Residents the option of resolving claims for amounts less than \$10,000.00 USD through a proceeding conducted by telephone, online, or based on written submissions. With this proceeding—called “binding, non-appearance-based arbitration”—we aim to save Residents both time and money by eliminating the need to appear in person at the arbitration hearing to resolve small claims.

Linden, *supra* note 56.

opportunity to simply be heard, instead of stymied by an oppressive and expensive dispute resolution mechanism, will improve the user's virtual world experience. By allowing parties a fast and cheap medium to resolve disputes, the iterative process of refining the EULA can be expedited, resulting in a faster evolution process, better agreements and more satisfied customers.⁷²

E. Expressly Allow Real Money Trade of Virtual Items

¶43 Allowing users to trade in-game assets for cash will provide them the opportunity to cash out and move between virtual worlds. Although this will not fully solve the problem, it will help to mitigate lock-in effects by allowing players the ability to get a return on their time and money invested. This item for cash trade is commonplace, even in games that expressly claim to prohibit it. By changing the policy to allow trades the playing field will be leveled. Companies such as eBay who are now afraid to traffic in virtual goods because of the potential legal complexities would likely reenter and provide a vibrant, accessible virtual market. Providing further support for this claim, eBay currently only allows virtual item trading in regards to *Second Life*, presumably because *Second Life* has expressly sanctioned an open market for in-game cash and goods.⁷³

¶44 By adding the ability to freely trade virtual goods for cash, the developer will benefit by attracting more customers. As an industry, providing this “cash-out” option will provide greater mobility between platforms and allow users to migrate to the best available virtual worlds. Furthermore, users may be willing to pay more upfront costs (for example, a higher monthly subscription) if they are able to recoup some of the costs by selling virtual goods.

¶45 Combining this Model EULA element with the other elements will give developers an opportunity—and incentive—to successfully innovate while providing game customers with a more developed set of rights, creating real choices in the selection of virtual world environments. For example, consider the recent creation of Station Exchange, an online auction system for the EverQuest II game. The game owner has explicitly defined two EverQuest II servers to be compatible with Station Exchange, while the other servers forbid this trading.⁷⁴ By combining a clear statement of usage rights with the ability to make a choice regarding real world trading of in-game equipment, the game owner has created additional value for its users. In fact, users of the world where trading is prohibited will have a more enjoyable gaming experience as real money traders self-select out of their realm, and onto the servers where trading is

⁷² The process can be optimized further by encouraging users to contribute their experiences with the dispute process and collaborate with other users. This will allow information from the dispute resolution process to be disseminated to the user community. Alternatively, the actual transcripts from all online disputes could be posted somewhere on the virtual world server (although user privacy might be a countervailing concern). Providing an open window to the dispute process is important: if the dispute process is completely closed, the developer will gain expertise from its repeated exposure to the process while the users will be novices, thus creating an increasingly unbalanced dispute resolution mechanism over time.

⁷³ Terdiman, *supra* note 27.

⁷⁴ Daniel Terdiman, *Sony Scores with Station Exchange*, CNET NEWS, Aug. 25, 2005, http://www.news.com/Sony-scores-with-Station-Exchange/2100-1043_3-5842791.html.

allowed.⁷⁵ This is a great example of a company combining several of the Model EULA elements to create real choices and a more enriching experience for its customers.⁷⁶

V. CONCLUSIONS

¶46 Because developers have the ability to set the terms of the EULA, and have engineered these terms to give themselves all the power, virtual worlds are saddled with non-optimal license agreements. By improving these agreements, the rights of users can be better delineated while providing a superior market for innovation by developers. As a result, the virtual world economy will continue to grow and flourish as users are more willing to invest when they are better able to understand the rules of the world and what rights they have within that domain. Also, outside investors will be better able to evaluate risk, and the possibility of litigation over EULA terms will be diminished, causing greater investment in the development of virtual worlds and furthering their improvement. And by drafting agreements that customers can understand, the ability to compare products and evaluate substitutes will allow greater competition and better, more creative products. These well-defined agreements will allow exceptional developers to differentiate themselves via their superior product offerings. Overall, this will allow for further successful development of virtual worlds and lay the groundwork for their expansion into areas far beyond gaming.

⁷⁵ “On the role-playing (non-Station Exchange) servers, it’s the best role-playing atmospheres [sic] I’ve ever seen. The theory would be that Station Exchange pulls the non-role-playing people out of the system, and that should purify the game play elsewhere.” *Id.* (quoting Ed Castronova, an expert on MMORPG economies).

⁷⁶ But it would be preferable to see Sony go all the way, and allow trades in any market, rather than trying to force trades through Station Exchange for a higher commission fee. Sony takes a 10% commission plus a listing fee for each sale on Station Exchange. *Id.*