

MMORPGing - The Legalities of Game Play

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Cite as: Barker, K., 'MMORPGing - The Legalities of Game Play', European Journal for Law and Technology, Vol. 3, No. 1, 2012

Abstract

MMORPGs [\[3\]](#) are big business; large numbers of people engage in some form of online gaming experience. Given the prevalence of such virtual spaces there is an increasing awareness that disputes can, and often, do arise about property and rights in online games. Online games and MMORPGs are governed by EULAs. Each user is required to consent to the EULA of the particular game or world they seek to use. EULAs are not the only problem for the users of MMORPGs. Contractual allocation of copyright prevents users selling their in-game property, game accounts and avatars to other users. Users had sought to sell game accounts and in-game assets on online auction sites until developers prevented gamers from doing so.

Gaming and MMORPG disputes are appearing before courts in the real world; *Bragg v Linden Labs*, [\[4\]](#) *BlackSnow v Mythic* [\[5\]](#) and *Hernandez v IGE* [\[6\]](#) are just three examples concerning property rights and contractual issues in Virtual Worlds and MMORPGs. There are a host of legal issues raised in relation to properties and rights in cyber spaces, although the most interesting concern the contractual nature of restricted rights and the limitations on intellectual property granted to users. This paper seeks to explore some of these, and briefly outline the potential options for alternative mechanisms, including consideration of the intellectual property rights of both users and developers in light of the recent US judgement in *MDY Industries v Blizzard Entertainment* [\[7\]](#) concerning copyright infringement.

1. Introduction

MMORPGs or Massively Multiplayer Online Role Playing Games have exploded in development and popularity in recent years. Online gaming is no longer a niche market. It is now a mainstream form of popular entertainment. The gaming market worldwide is now worth more than the global film industry in terms of annual revenue. [\[8\]](#) This is unsurprising when online games such as *World of Warcraft* [\[9\]](#) - the most popular online game in history - record subscriber bases numbering twelve million. [\[10\]](#) This is by far the most popular game, but a number of other games record subscriber bases in the millions; *Aion*, [\[11\]](#) *Lineage II* [\[12\]](#) and *EverQuest II* [\[13\]](#) all record subscriber bases of over one million people. [\[14\]](#) Given the widespread use of, and interaction with online gaming, it is time to examine the legalities of such interaction more closely. These entities can no longer be left to their own devices simply because they are virtual spaces and there is no virtual law.

Issues relating to online gaming have often been overshadowed in comparison to piracy and peer-to-peer file-sharing, which have recently been addressed to some extent through legislation. [\[15\]](#) This is perhaps because traditionally the film and music industries have had larger market shares and greater influence. However, the market is shifting and gaming disputes are becoming an area requiring legal attention. The disputes in online gaming and Virtual Worlds tend to focus on the issue of property rights. There have been a number of cases in the USA since 2007 concerned with gaming disputes. In the UK, there have been hardly any recorded cases to date. However, this is beginning to change, especially given that the first judicial recognition of 'virtual property' in games took place in February 2011 in Exeter Crown Court. [\[16\]](#) Mitchell - the defendant - had been creating false Facebook accounts in order to generate virtual currency in social games provided by Zynga. [\[17\]](#) Through this activity he was able to - amongst other things - hack into

accounts and steal virtual wealth. He then proceeded to convert this stolen virtual currency into real currency. Mitchell was convicted of computer misuse offences rather than virtual theft. Significantly however, the judge, explicitly referred to virtual property in his judgment.

Online games and Virtual Worlds are governed by two separate but related areas of law. Copyright serves to protect the expression of ideas [18] and is therefore used to protect software. Contract law governs the licenses and relationships between parties. Specifically in the gaming context, contracts seek to assign and allocate copyright and other intellectual property rights. As such, contract and copyright are relied upon to form a governing mechanism over online gaming. This relationship is dramatically weighted in favour of the game developer, as is to be expected. However, that is beginning to change as users are seeking to challenge the dominance of the contractual agreement they are required to consent to. The issues that arise out of the relationship between copyright law and contract law will be discussed below.

2. Software and Copyright

Computer games are classified as software under the current legislation. The Copyright, Designs and Patents Act 1988, categorises computer software as a literary work. [19] The classification of computer software as a literary work means that the software code is protected rather than the program in its entirety. It is also entirely possible that another copyright will subsist in the same work. For example, in the case of a computer program, it is likely that music, graphics and even video will also be present. Each of these would also be protected by copyright. Some commentators have explored the potential for a single protective category of multimedia work, which could potentially dispel some concerns about the suitability of copyright. [20] Accordingly then, the whole of the computer software is likely to be protected by copyright in parts rather than as a whole. Nevertheless it is still protected.

Equally, for online games, the in-game creations such as avatars, properties and items may also be protected by copyright. Again, the literary work categorisation will protect them. Under the terms of the contractual agreement, the in-game creations will not necessarily belong to the user who controls them. Most standard contractual agreements indicate that users are not entitled to property rights. [21] Therefore, the copyright system protects the game developers' interest in the software, and contract takes away any interest the users may have in the creations in-game. This is obviously far from a perfect situation for users and creators.

3. The MMORPGing Model

Whilst online gaming disputes have not yet become prevalent in the UK, there is evidence to suggest that it is only a matter of time until this does happen. Gaming cases have appeared before the courts in the USA, the Netherlands, China and South Korea to date. Whilst the numbers have not been particularly large in the Western countries involved, South Korea has considerably more experience. Studies have compared the UK gaming developments with South Korea. [22] South Korea has one of the largest gaming markets in the world. The UK is following the pattern that was set by the South Koreans on their way to becoming the largest gaming market. [23] This is surprising but also indicates that the UK can learn from other countries if it wishes to do so. South Korea have embraced the gaming culture and developed ways to deal with disputes that can arise in the online gaming context. South Korea not only has its own dedicated police force to deal exclusively with disputes relating to online gaming property, but it has also established a special contractual review committee. [24] The Contracts Review Committee of South Korea deals only with End User License Agreements [25] relating to online games and virtual worlds. The fact that South Korea has established a committee to deal with the contractual aspects of online game interaction highlights just how problematic gaming can be. [26] Nevertheless, there are ways to deal with the kinds of issues that can appear. The UK should learn from South Korea's model and prepare for the gaming disputes that are bound to arise sooner rather than later.

4. What is a MMORPG?

A MMORPG is an online game that involves interaction with a vast number of other players spread across the world. A precise definition of online games is difficult to agree upon because each game has different

characteristics. Nevertheless, commentators have attempted to define these interactive platforms. Kennedy [27] suggests that there are a number of characteristics which online games have, and that these include persistence and scarcity. Bell adds to this by suggesting that these games are synchronised and facilitated by the internet. [28] It seems that a MMORPG is defined by generally shared characteristics. MMORPGs are games whereby players are able to access the world and leave at will. The world will continue without them whilst they are not present. [29] In this sense, online games are a form of online world. The real physical world continues whilst people sleep. Similarly, online games continue whilst users are not logged in.

Equally, some items are more valuable than others because they are rare. [30] Added to this, is the fact that these games can only be accessed through an internet connection and they are more than multiplayer - they are not games for four to eight players for example, but for 400 000 to millions all online at the same time and networked through the internet; they are massively multiplayer. These characteristics make MMORPGs vastly different and more complex entities than the average PC game. The average computer game which is purchased on the high-street may feature a multiplayer mode but the game does not continue if it is not running on your PC. In this sense, traditional computer games are not persistent or continuous.

Due to the complex characteristics of MMORPGs, they are proving to challenge the law in several ways. MMORPGs necessarily involve the use and even abuse of property in a virtual space. However, they also usually involve the use of virtual currency. [31] As such, users can 'buy' and 'sell' items in online games. However, what rights do users have to the property that they are 'selling'? [32] Moreover, how do users protect items that they have developed in the online world? Can users rely on copyright to protect their items? Can gamers rely upon traditional intellectual property rights such as design rights and trademarks to protect distinctive characters? What role does the contractual assignment of property rights play? All of these are questions that are being posed by online games. Users are also beginning to challenge the contractual arrangements and hitherto accepted norms of regulating online games.

5. Types of Game

There are several types of online game. The distinctions are important in that they relate to property rights. MMOG or Massively Multiplayer Online Game is the generic term given to online games. This heading is all-inclusive and makes no attempt to distinguish between the different categories of game. MMORPGs - as discussed above - are one kind of online game. The other main category is Virtual Worlds. Whilst these are both categories of online game, they are distinct from one another. MMORPGs and Virtual Worlds share most of the main characteristics but need to be differentiated from one another. The most important distinction rests on the nature of a virtual world. MMORPGs are scripted environments whereas Virtual Worlds are unscripted environments. [33][34]

5.1 Scripted environments

A scripted environment is one in which the user has little or no freedom to create items of his own. The user is required to complete certain tasks and accomplish set standards of achievement in order to progress through the levels of the game. In this way, the user is following a script set out by the game developer. However, instead of hiring actors to perform on a stage, the script has been written into game code with parameters set for allowing users to progress to the next level. In this sense, MMORPGs are scripted environments. The best example of a scripted MMORPG is the popular online game *World of Warcraft*.

5.2 Unscripted environments

In contrast, an unscripted environment is one in which users are free to roam and do as they please. There are no set levels or predetermined tasks for the users to complete. In fact, given that these environments tend to be considered Virtual Worlds, rather than classified as games, the correct term for users ought to be residents. [35] Additionally, users or residents are able to 'script' or to create their own code, which will create items to add to their virtual environment. An unscripted environment refers to the lack of challenges and levels, rather than to the lack of code which can be added to through the process of scripting. The best example of an unscripted environment is the Virtual World *Second Life*.

5.3 The scripting boundary and casual games

The distinction between an unscripted environment and a scripted environment is important because it can have implications for the property rights granted to users. [36] However, simply because an environment like *Second Life* is unscripted, does not mean that it will not contain areas that are scripted. It is entirely possible that a user or resident in *Second Life* could script his own role playing game or a game which requires other residents to perform certain tasks and complete certain challenges within an island in *Second Life*.

Similarly, it is entirely possible that within unscripted environments residents or users may generate casual games for other users and residents to play. [37] It is for example possible for users to engage in a casual game of chess within *Second Life*'s Luskwood area. [38] Casual games have no element of role playing and usually refer to the kinds of game that can be located on game websites that do not require specific game-related software downloads or subscriptions. [39] It is therefore important to identify the type of game environment because the type could have implications for the property rights users may benefit from.

6. End User License Agreements [40]

Regardless of whether a virtual environment falls within the category of MMORPG or Virtual World, it will be regulated by an End User License Agreement. The End User License Agreements will necessarily differ slightly from each other so as to be platform or game specific. Despite this, these contractual agreements are almost identical in terms of their contents. They deal with almost every aspect of the relationship between a user and a platform provider. Typically such agreements will contain clauses dealing expressly with property and intellectual property rights, liability, dispute resolution, applicable law and termination. [41]

The EULAs, whilst being the common regulatory mechanism are not free of controversy. These contractual agreements are 'click-wrap' [42] agreements requiring a user only to agree to the terms. There is no way of ensuring a user has read the contents, or if he has, whether he understands what it means. Studies suggest that very few users ever read the contractual documents they are signing. [43] GameStation have even conducted an April fool to show how poor the readership of contractual agreements is. [44] GameStation changed their standard terms and recorded the number of transactions that were processed until someone noticed the change in their conditions in April 2010. This 'prank' revealed that out of the 7500 customers who made purchases on April Fool's day, not one read the terms and conditions closely enough, if at all.

Given that EULAs are binding agreements, such reports are disturbing as it suggests users are entering into the contracts without any knowledge of the contents and potential implications. EULAs are adhesion contracts; [45] they are none negotiable standard form agreements that can be issued to multiple parties simultaneously. No user can attempt to negotiate any of the terms with the developer. [46] Quite simply, if a user wishes to access a particular MMORPG or Virtual World he must assent to the terms of the EULA or go elsewhere.

Perhaps one of the most problematic aspects of the EULA is the clause dealing with property and intellectual property rights. EULAs are contracts that seek to - amongst other things - assign property and intellectual property interests in potentially valuable items without any possibility of negotiation. In *Second Life* for example, there have been reports of virtual millionaires, [47] with their wealth being generated solely from their interaction and activity within a given environment. If such reports are accurate, and there are other users with large amounts of virtual wealth, what rights do such users have to it? If a standard clause in a EULA states that all property rights, title and interests vest in the game developer or platform provider, that implies that users only have a right to use the items and wealth i.e. in a license form, rather than an absolute right to own them. Such a situation is far from satisfactory. It is even more morally unconscionable. If you have invested time and money into something, it seems only fair that you should be entitled to reap at least some of the reward as Locke's theory of labour suggests. [48]

Other difficulties arise in the approach that developers have adopted by using the EULA as a 'one stop shop' for all matters relating to their relationship with users. The majority of MMORPGs and Virtual Worlds seek to contain all of their license arrangements and other details within one contractual agreement. However, due to the nature of online gaming, often a user is required to purchase or download a piece of software to access the game i.e. for users of *Second Life* it is necessary to download the *Second Life Viewer* which is the software through which virtual interaction is obtained. Equally, for users of the MMORPG *World of Warcraft* they are required to purchase software and install it in order to access the game. Through these

subsequent downloads, users are accessing additional licensed material. Developers however, attempt to bind users in the first contractual agreement to licenses for all of the materials, including such things as Viewers which may be subsequently downloaded. In this way, developers attempt to secure all of their contractual protections in one document.

The use of one contractual agreement to cover both the rights and obligations of the parties and the license agreements for using online content is another difficult area. Kim suggests that there should be a split approach, recognising that part of the agreement relates to the sale, download and license of software whereas the other agreement relates to the rights and obligations of the parties involved with the MMORPG or Virtual World. [49] Splitting the contractual document into two would be a step forward. There is a difference between the license to use software and the rights and obligations under a contract. It is perhaps practical to compile the two into one document. However, they should at the very least be split so that users are able to recognise that they are contracting for two different things. This would simplify the situation somewhat and allow for greater clarity.

Further difficulties arise when adhesion contracts are agreements between the user and the developer. As such, they are one-to-one contracts rather than one-to-many or many-to-many agreements. This would not necessarily prove to be problematic but the doctrine of privity of contract (subject to its many exceptions) states that a contract can only be binding upon those that are a party to it. Moreover the freedom to contract [50] also presents difficulties in this area because people cannot be stopped from entering into agreements, even if agreements are bad bargains. [51] Given that users are free to contract with whoever they like, and only parties to a contract are bound by its terms, users can only rely upon a EULA against a game developer or platform provider. [52] There is no express contractual agreement between one user and all other users of a MMORPG or Virtual World. As such, if a user has a dispute with another, reliance will have to be placed on third party rights, rather than the EULA. This is far from desirable when it is likely that a dispute between users could arise more easily than between a user and developer. Moreover, given that most EULAs expressly state users have no property rights, how can a user enter a dispute to something he is contractually stated not to own? These difficulties highlight the unsatisfactory nature of property rights and the interdependence of copyright and contract in EULAs.

7. The Contractual Agreements - Property Clauses

In examining issues relating to property rights and their implications as a result of game interaction, it is necessary to examine the EULA and its provisions because it is the document from which rights seem to stem. The EULA clauses that are to be discussed in detail below are taken from the contractual agreements of the most popular online game in history [53] - *World of Warcraft* - and the most well-known Virtual World; *Second Life*. These EULAs will be compared to one another because of the distinction between scripted and unscripted environments and the potential impact on the property rights of users. [54]

7.1 World of Warcraft

The EULA for the *World of Warcraft* MMORPG is not a standalone EULA. It is supplemented by the Terms of Use Agreement. In these two contractual documents, there are clauses relating to property ownership and title in the interests arising out of interaction with the game. The first clause is taken from the End User License Agreement and equivocally states that the game developers - Blizzard Entertainment - are the title and rights holders. This clause states quite clearly that the user does not have any right to any of the property arising out of the game.

World of Warcraft EULA:

‘Ownership.

All rights and title in and to the Service (including without limitation any user accounts, titles, computer code, themes, objects, characters, character names, stories, dialogue, catch phrases, locations, concepts, artwork, animations, sounds, musical compositions, audio-visual effects, methods of operation, moral rights, any related documentation, ‘applets,’ transcripts of the chat rooms, character profile information, recordings of games) are owned by Blizzard or its licensors. The Game and the Service are protected by United States and international laws, and may contain certain licensed materials in which Blizzard’s licensors may enforce their rights in the event of any violation of this Agreement.’ [55]

The second clause relating to property in the MMORPG *World of Warcraft* is taken from the Terms of Use Agreement. [56] It too clearly states that the game developers will not recognise any transfer or sale of game property or items. This clause repeats that the users are not entitled to any of the property rights arising from the game play.

World of Warcraft Terms of Use Agreement:

‘Ownership/Selling of the Account or Virtual Items.

Blizzard does not recognize the transfer of World of Warcraft Accounts or BNET Accounts (each an Account’).

You may not purchase, sell, gift or trade any Account, or offer to purchase, sell, gift or trade any Account, and any such attempt shall be null and void. Blizzard owns, has licensed, or otherwise has rights to all of the content that appears in the Game. You agree that you have no right or title in or to any such content, including without limitation the virtual goods or currency appearing or originating in the Game, or any other attributes associated with any Account.’ [57]

The two clauses from the contractual documents of *World of Warcraft* clearly indicate that as far as the developers are concerned, there are no rights or property interests in the game content that will belong to the users. These clauses are contained within the contractual documents that each and every user must consent to in order to access the full game. Whilst this position protects the investment and infrastructure that the developers have created, it does little to recognise the effort, commitment and investment made by users.

7.1.1 Real Money Trading and Gold Farming

Whilst the clause from the Terms of Use Agreement equivocally states that Blizzard will not recognise any form of transfer of an account or items, Blizzard does not actively prevent such transfers happening. Such activity is known as Real Money Trading. [58] If a user has invested time, effort and money into generating a character and account that is desired by other users and then ceases his subscription to the game, why should he not attempt to recover some of his investment? In the physical world, if X purchases a car, when he seeks to replace it he is likely to seek to sell his existing vehicle and recoup some of the expense. It would seem strange if the car manufacturer made him sign a contract which states that the manufacturer will not recognise any transfer or sale of the car subsequent to the initial purchase.

Equally, this clause causes some difficulty for users who engage in gold farming. Gold farming is the process whereby an organisation employs people to repeatedly perform menial tasks at the lowest levels of games such as *World of Warcraft*. This process allows users to amass virtual currency and other items that can then be sold to other users for real currency. This is one method of short-circuiting the lowest levels and menial tasks in games. This practice is seemingly outlawed by the Terms of Use Agreement. However, even then Blizzard does very little to actively stop such activity. This suggests that whilst Blizzard will not actively say so, it does not condemn RMT or Gold Farming. Blizzard is unlikely to seek to ban users from playing the game because each user represents revenue. Therefore, there is an inconsistency in what the EULA and Terms of Use state and actual practice, suggesting users can engage in RMT without any repercussions. In addition to this, the actions by users apparently have endorsement by Blizzard. This also highlights the inherent contradiction and tension in allowing developers to also police the environments which they created. Their vested interests make them unsuitable referees and adjudicators.

The issue of gold farming is a controversial one because of the associated human rights implications and has been in the headlines recently. [59] It has also been the subject of litigation in the USA. In the case of *Hernandez v IGE*, [60] both parties were users of *World of Warcraft*. However, whilst Hernandez sought to play the game properly, Internet Gaming Entertainment Ltd [61] was one of the organisations which encouraged gold farming operations. IGE operated an online website providing a marketplace exclusively for gaming items and accounts; much like eBay does for other goods. The suit lodged by Hernandez claimed that the activity conducted by IGE caused irrevocable damage due to ‘illicit marketing and sales.’ Hernandez also stated in his claim that IGE were in breach of their contractual arrangement with Blizzard because by agreeing to the EULA and Terms of Service, users agree not to engage in the selling, gifting or trading of accounts or items. [62] He claimed that by doing so, IGE had breached the terms to which they agreed when they joined the *World of Warcraft* subscriber base. The case eventually settled, with IGE agreeing not to engage in the trade of items or currency from *World of Warcraft* for a period of five years.

It seems that despite what the clauses in the EULA and Terms of Use Agreement state, the reality of the situation is vastly different. What is clear is that the documents state the users have no rights to property. If the users have no rights, how can they trade their accounts and items? Blizzard Entertainment is not acting

to stop such activity so it would appear that they are endorsing the claims of users that they do have property rights. Sony however, did take action to prevent its *EverQuest II* users engaging in such activity by listing items on eBay. Sony entered into an agreement with eBay that no listings of game property would appear. [63] Sony instead established its own online exchange that deals exclusively in *EverQuest* items. [64] Accordingly, the actions of users and inaction of Blizzard Entertainment seemingly supersede the provisions of the EULA to which both are parties, and can be rectified easily as demonstrated by Sony.

It is clear from the two clauses taken from the contractual agreements that the scripted environment [65] standardised position is that users are not entitled to property rights in the game or game property. Scripted environments do not allow for user creation and therefore seek to retain all property rights. This position is in stark contrast to some of the unscripted environments. [66]

7.2 Second Life

The Terms of Service for the Virtual World *Second Life* is not a standalone EULA either. It works in conjunction with the *Second Life* Community Standards. [67] The Community Standards set out the behaviour that will and will not be accepted by users of *Second Life*. Nevertheless, the EULA contains clauses that deal with similar matters to those found within the EULA of the MMORPG *World of Warcraft*. The clause below differs to the clause - and position - of the MMORPG above.

Second Life Terms of Service:

‘You retain any and all Intellectual Property Rights in Content you submit to the Service.

You retain any and all Intellectual Property Rights you already hold under applicable law in Content you upload, publish, and submit to or through the Servers, Websites, and other areas of the Service, subject to the rights, licenses, and other terms of this Agreement, including any underlying rights of other users or Linden Lab in Content that you may use or modify.’ [68]

The *Second Life* clause clearly states that users retain the rights in content that is used in and submitted to the world. In addition to this, it also expressly contradicts clauses that appear in some online games which require users to waive their rights to property that they have generated outside of a game and uploaded into a game. By doing so in *Second Life*, users will retain their rights rather than lose them, which would occur in *Lineage II* for example. [69] This position reflects the unscripted nature of the Virtual World which encourages users to create their own objects and add to the virtual environment with which they interact.

Equally, there are no restrictions on the sale of content to other users for either real currency or for the currency of *Second Life*; the Linden Dollar. If users have created items through the process of scripting, they are free to set limits on the object and reproduce or sell them as they please. Equally, users are able to lock the items to specific areas or users. This freedom to create reflects the fact that unscripted environments have no restrictions on what users are able to do.

The contents of the EULA reflect the litigation commenced by Marc Bragg in 2007 in the USA. [70] Bragg had a *Second Life* account and had been accessing an auction website where he was able to purchase virtual land at a fraction of the price it would fetch on the market in *Second Life*. His account was subsequently suspended, blocked and his property lost. Bragg had been developing fireworks that he could sell to other avatars within *Second Life*. [71] He filed suit in the USA to regain access to his property under the clause in the EULA stating that property rests with users. [72] The case was never heard in court; the parties reached a settlement, the contents of which are kept private but it resulted in Marc Bragg having his game account and property restored to him.

The Terms of Service Agreement of *Second Life* differs to the EULA of *World of Warcraft* but this is unsurprising because the two EULAs reflect the differences between unscripted and scripted environments. They also reflect the relationship between contract and intellectual property rights.

8. Interdependence of Contract and Copyright

As already mentioned, the End User License Agreement provides the basis for the governance of online games and Virtual Worlds, creating a relationship in which copyright and contract are inter-dependent for regulating online interactive spaces. The advisory board on intellectual property even produced a report which examined the relationship between copyright and contract. [73] The EULA provides the basis for the inter-dependence of copyright and contract. These are the two dominant mechanisms that are used in the regulation of online interactive spaces. Copyright and other intellectual property rights are contractually assigned and provided for under the EULAs. This essentially means that the EULA provides the contract-copyright basis and one cannot work without the other.

In the context of virtual worlds and MMORPGs - given that they both fall squarely into the categories of software and software is protected by copyright under the CDPA [74] - copyright is the dominant intellectual property right used to protect the software and creative works of game studios. The game developers use contracts to control how their copyright products and outputs are accessed, used and even regulated. Part of the problematic nature of governing such spaces falls squarely into the copyright - contract relationship. A fundamental tenet of contract law is the freedom to contract. [75] This freedom to contract is what allows - and even requires users - to enter into and assent to EULAs. Once done, the courts will follow precedent and not look into a bad bargain as long as it was freely agreed to. [76] This is a moot point where EULAs are concerned because they are usually presented on a 'take it or leave it basis.' Accordingly therefore, freedom of contract does not necessarily appear with adhesion contracts, and in fact seems to be strikingly contradictory.

8.1 MDY v Blizzard

The recent US case of *MDY Industries v Blizzard Entertainment Inc* [77] is just one example of the inter-reliance of copyright and contract and how they appear to act against the interests of users. The case surrounded the installation of a cheat called 'Glider' which was developed by MDY. Glider is essentially a small scale autopilot designed to carry out repetitive tasks. The cheat was specifically designed to work in *World of Warcraft*. Blizzard Entertainment contended that the installation and use of such an application was a breach of the Terms of Use. However, *World of Warcraft (WoW)* has a separate Terms of Use Agreement and EULA. [78] The critical question in this case was therefore whether or not the breach of the Terms of Use constituted a breach of license too. The WoW EULA requires the users to obey the Terms of Use but does not state that a breach of the Terms is also a breach of license. [79]

Blizzard contended that not only were MDY in breach of the Terms of Use and therefore the license, but were also infringing copyright. [80] In addition to this, Blizzard claimed that MDY were liable for secondary copyright infringement because each user that was installing Glider was also in breach of their license. MDY won on appeal with the court stating:

'Although the conduct may violate contractual covenants with Blizzard, it would not violate Blizzard's exclusive rights of copyright.' [81]

This case is a clear example of developers attempting to claim rights that are not theirs to claim: in this case, Blizzard tried to claim the right to prohibit cheating. The case is very important for showing the relationship and reliance of contract and copyright on one another. It also highlights the potential problems with this area of law, and how the users are often disadvantaged.

9. Alternatives to EULAs?

Given the dominance of EULAs, and the extent to which they are favoured as regulatory mechanisms by platform providers, it is potentially difficult to foresee a suitable alternative that will be well received by developers. Equally, given the interdependence of copyright and contract in providing EULAs to regulate rights, responsibilities and interaction of online interactive spaces, developers have almost free reign as to the contents of their terms and conditions providing they are legal.

There are potential alternatives; the main one being Creative Commons style licensing. [82] This is highly unlikely to be of an acceptable nature for developers in protecting their creative - and business - endeavours.

Equally, there is potential for users and developers to be accorded collective rights in their joint endeavours in creating a character or game items in a particular online environment. Again, it is probably unlikely that this will be acceptable to developers because allocating collaborative rights between developers and users would go against the standardised position presently adopted in EULAs.

Alongside the potential for altering the allocation of rights and licensing is the less extreme, but equally radical option of providing for amended EULAs. There are - as has already been discussed - several problematic clauses within the current EULAs. These could be redrafted and reconsidered so that they reflect the input and creative efforts of users. The EULAs could also be reconsidered so as to contain amendments that would allow detailed provisions for activities such as 'nerfing', 'wizarding', 'sinking' and altering the levels of scarcity and so on. Of course, these game activities are incredibly difficult to regulate because once the developers set out the game rules, they become suited to the environment. If the law seeks to change the game by regulating gaming interaction where the rules state certain acts are acceptable but the law disagrees, which should prevail? Such a problem is compounded by the issue of the contractual governance. It is easy to say that such spaces are just games and should be left alone to be just games. However, when users are investing time and money into developing their online experiences they are seeking redress for what they consider to be unfair. Such users are turning to the law. The law is however, unprepared for the questions and therefore the situation remains unsatisfactory.

In conjunction with redrafting or reconsidering some of the terms and conditions in the EULAs, the UK could follow the example set by South Korea and adopt a Contracts Review Commission to deal with aspects of EULAs that are unsatisfactory. Whilst this is one option, and it may prove cheaper than litigation for the parties involved, there remains a question mark over the potential costs implications, and who would bear the burden of such a system. Such a commission could also potentially be tasked with alternative dispute resolution roles so as to alleviate the litigious nature of contractual disputes, or the potentially unconscionable terms requiring users to consent to prescribed forms of mediation. [\[83\]](#)

There is one other potential alternative that ought to be mentioned: virtual law. At present there are rules, regulations and even statutes that apply to elements of online interactivity and virtual existences. However, this does not encompass a body of virtual law. Equally, each game and virtual world also has its own sets of rules and terms and conditions, which may be referred to as 'the law of the game.' This is also not virtual law. To attempt to circumvent the EULA problem, a system of virtual law can be considered. This is obviously a significant consideration to make, and includes problems of its own but may be worth contemplating given the ways in which modern life relies upon the internet and digital interaction, especially in light of the apparent dissatisfaction with, and unsuitability of analogue intellectual property rights when applied to virtual interactivity and productivity. [\[84\]](#)

10. Conclusion

Many of the issues relating to online games and virtual worlds are concerned with the adhesion contracts which are heavily relied upon by the game developers and platform providers. Other issues relate to the inherent tensions in property rights and how they are divided between users and developers. The interrelationship between copyright and contract works heavily in favour of game developers, as is to be expected. However, users are beginning to challenge what has long been the status quo with regards to property rights.

The role of copyright as the dominant intellectual property right is adequate for developers. However, given the pressures on it from technology and the ever greater demands it is expected to meet, it would be prudent to examine alternative rights that could be deployed to protect rights in cyberspace. The distinction between MMORPGs and Virtual Worlds is quite clear and needs recognition before reform is contemplated.

These issues are part of a wider problem. Online gaming has long been overshadowed by other industries that have been able to gain greater attention. The law is not yet prepared for the challenges online games and Virtual Worlds will bring. It is prudent to give gaming the attention - and respect - it deserves. Changing the inter-reliance of copyright and contract will change the sphere of gaming, and perhaps even reflect the reality of RMT instead of the alleged position according to the EULAs. Change for the sake of change ought to be discouraged; change for the better ought to be considered.

- [1] First draft presented at the 26th BILETA Conference, April 2011, Manchester Metropolitan University.
- [2] LLB (Hons), LLM, PhD Candidate, Aberystwyth University. E-mail: kjb09@aber.ac.uk
- [3] Massively Multiplayer Online Role Playing Games
- [4] *Bragg v Linden Research Inc.* (487 F.Supp 2d 593 E.D. Penn) [2007]
- [5] *BlackSnow Interactive v Mythic Entertainment Inc.*, No 02-00112 (C.D. Calif.) [2002]
- [6] *Hernandez v Internet Gaming Entertainment*, U.S. Dist. Ct. Southern District of Florida, Case No:07-CIV-21403-COHN/SELTZER [2007]
- [7] *MDY Indus., LLC v. Blizzard Entertainment, Inc.*, 2010 WL 5141269, 97 U.S.P.Q.2d (BNA) 1001 (9th Cir. Dec. 14, 2010).
- [8] Department for Culture, Media and Sport, 'Skills Review of Video Game and Visual Effects Industries' (DCMS News) 1 February 2011, available online: http://www.culture.gov.uk/news/news_stories/7754.aspx accessed 13 March 2011
- [9] Blizzard Entertainment, 'World of Warcraft' available online at: <http://eu.battle.net/wow/en/> accessed 12 June 2010
- [10] Blizzard Entertainment, 'World of Warcraft subscriber base reaches 12 million worldwide' (Blizzard Entertainment Press Release) 7 October 2010, available online: <http://us.blizzard.com/en-us/company/press/pressreleases.html?101007> accessed 9 March 2011
- [11] NC Interactive, 'Aion,' available online at: <http://www.aiononline.com/> accessed 27 May 2011
- [12] NC Interactive, 'Lineage II - Chaotic Thrones' available online at: <http://www.lineage2.com/> accessed 27 May 2011
- [13] Sony Entertainment, 'EverQuest II' available online at: <http://everquest2.com/> accessed 27 May 2011
- [14] I van Geel, 'MMODData Charts v3.2' (MMODData.net) 25 December 2010, available online: <http://mmodata.net> accessed 9 March 2011
- [15] See for example, the Digital Economy Act 2010 provisions relating to illegal file-sharing
- [16] *R v Mitchell* (unreported), February 2011, Herald Express, 'Zynga hacker faces jail for \$12 million theft' available online: <http://www.thisissouthdevon.co.uk/news/HACKER-ADMITS-STEALING-12m-POKER-CHIPS/article-3170994-detail/article.html> accessed 20 February 2011, see below
- [17] Zynga, 'FactSheet - About Zynga' available online: <http://www.zynga.com/about/facts.php> accessed 27 May 2011
- [18] i.e. the idea-expression dichotomy; S Ang, 'The Idea-Expression Dichotomy and Merger Doctrine in the Copyright Laws of the US and the UK' (1994) 2 Int'l J.L. & Info Tech Vol 2(2) 111
- [19] Copyright, Designs and Patents Act 1988 s3(1)(b)
- [20] See I Stamatoudi, *Copyright and Multimedia Works* (CUP, Cambridge 2002)
- [21] See below at 6; 'End User License Agreements'
- [22] Jeremy Vine, BBC Panorama, 'Addicted to Games?' First broadcast 6 December 2010.
- [23] Jeremy Vine, BBC Panorama, 'Addicted to Games?' First broadcast 6 December 2010.
- [24] Ung-Gi Yoon, 'Real Money Trading in MMORPG Items From a Legal and Policy Perspective' Journal of Korean Judicature, Vol. 1, pp. 418, 2008
- [25] Or EULAs
- [26] See below at 6; 'End User License Agreements'
- [27] R Kennedy, 'Virtual Rights? Property in Online Game objects and Characters' (June 2008) Information & Communication Technology Law Vol 17(2), 95
- [28] M Bell, 'Toward a Definition of 'Virtual Worlds' JVWResearch 1(1) 2008

- [29] i.e. MMORPGs are persistent and continuous
- [30] Or scarce.
- [31] E.g. the Linden Dollar is the currency of the Virtual World *Second Life*
- [32] i.e. engage in RMT. See below at 7; 'The Contractual Agreements - Property Clauses'
- [33] F Alemi, 'An Avatar's Day In Court: A Proposal for Obtaining Relief and Resolving Disputes in Virtual World Games' [2007] UCLA J.L. & Tech 6 [20]
- [34] F Alemi, 'An Avatar's Day In Court: A Proposal for Obtaining Relief and Resolving Disputes in Virtual World Games' [2007] UCLA J.L. & Tech 6[20]
- [35] S Robbins and M Bell, *Second Life for Dummies* (John Wiley & Sons, Oxford 2008) 10
- [36] See below at 7; 'The Contractual Agreements - Property Clauses'
- [37] C Thompson, 'The Game Within the Game' (Wired Magazine, 22 May 2006) <http://www.wired.com/print/gaming/gamingreviews/commentary/games/2006/05/70945> accessed 29 July 2010
- [38] Luskwood is one of the areas of *Second Life* which has been created by residents for residents to enjoy.
- [39] See for example <http://www.agame.com>
- [40] EULA
- [41] See for example the EULA of *World of Warcraft*: World of Warcraft EULA, 29 October 2010, available online: <http://us.blizzard.com/en-us/company/legal/eula.html> accessed 20 February 2011
- [42] W J Condon, 'Electronic Assent to Online Contracts: Do Courts Consistently Enforce Click-Wrap Agreements?' 16 Regent U. L. Rev. 433 (2003-2004), 435
- [43] Bakos, Yannis, Marotta-Wurgler, Florencia and Trossen and R David, Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts (October 6, 2009). CELS 2009 4th Annual Conference on Empirical Legal Studies Paper; NYU Law and Economics Research Paper No. 09-40. Available at SSRN: <http://ssrn.com/abstract=1443256>
- [44] OUT-LAW News, 'Nobody Reads Terms and Conditions: Its Official' (19 April 2010) <http://www.out-law.com/page-10929> accessed 20 April 2010.
- [45] B Goodman, 'Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract,' 21 Cardozo L. Rev. 319 (1999-2000); 320
- [46] R Warner, 'Turned on its Head?: Norms, Freedom, and Acceptable Terms in Internet Contracting' (2008) 11 Tul. J. Tech & Intell. Prop 1, 3
- [47] Anshe Chung Studios, 'Anshe Chung Becomes First Virtual World Millionaire' (ACS Press Release, 26 November 2006), available online at: http://www.anshechung.com/include/press/press_release251106.html accessed 29 August 2011.
- [48] S J Horowitz, 'Competing Lockean Claims to Virtual Property' (2007) 20 Harv J.L & Tech 443, 450
- [49] N S Kim, 'The Software Licensing Dilemma' [2008] B Y U L Rev 1103
- [50] *Printing and Numerical Registering Co v Sampson* (1875) LR 19 EQ 462 per Sir George Jessel
- [51] *C & P Haulage v Middleton* [1983] 3 All ER 94; P Richards, Law of Contract (3rd edn, Pearson Education Ltd, Harlow) 2009 p389
- [52] Subject to the provisions of the Contracts (Rights of Third Parties) Act 1999
- [53] Jeremy Vine, BBC Panorama, 'Addicted to Games?' First broadcast 6 December 2010.
- [54] See earlier at 5; 'Types of Game'
- [55] World of Warcraft EULA, Clause 4, 29 October 2010, available online: <http://us.blizzard.com/en-us/company/legal/eula.html> accessed 20 February 2011

- [56] *World of Warcraft* Terms of Use, (Blizzard Entertainment, 9 December 2010) Clause 1; available online at: http://us.blizzard.com/en-us/company/legal/WoW_tou.html accessed 29 August 2011.
- [57] *World of Warcraft* Terms of Use Agreement, Clause 8, 9 December 2010, available online: http://us.blizzard.com/en-us/company/legal/wow_tou.html accessed 20 February 2011
- [58] Or Gray Markets; hereafter RMT
- [59] D Vincent, 'China used prisoners in lucrative internet gaming work' (25 May 2011) *The Guardian*, available online at: <http://www.guardian.co.uk/world/2011/may/25/china-prisoners-internet-gaming-scam> accessed 30 May 2011
- [60] *Hernandez v Internet Gaming Entertainment*, U.S. Dist. Ct. Southern District of Florida, Case No:07-CIV-21403-COHN/SELTZER [2007]
- [61] Hereafter IGE
- [62] *World of Warcraft* Terms of Use Agreement, Clause 8, 9 December 2010, available online: http://us.blizzard.com/en-us/company/legal/wow_tou.html accessed 20 February 2011
- [63] D Terdiman, 'eBay Bans Auctions of Virtual Goods' (29 January 2007) CNET News http://news.cnet.com/2100-1043_3-6154372.html accessed 12 May 2010
- [64] Sony StationExchange, available online at: <http://stationexchange.station.sony.com/livegamer.vm> accessed 27 May 2011
- [65] See earlier at 5; 'Types of Game'
- [66] See earlier at 5; 'Types of Game'
- [67] Linden Labs Inc, 'Second Life Community Standards' available online at: <http://secondlife.com/corporate/cs.php> accessed 27 May 2011
- [68] Second Life Terms of Service, Clause 7.1. 15 December 2010, available online: <http://secondlife.com/corporate/tos.php#tos12> accessed 20 February 2011
- [69] NC Interactive, 'Lineage II - Chaotic Thrones' EULA, Clause 4b, available online at: <http://www.lineage2.com/> accessed 27 May 2011
- [70] *Bragg v Linden Research Inc.* (487 F.Supp 2d 593 E.D. Penn) [2007]
- [71] B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (ABA Publishing, Chicago 2008) 368
- [72] Second Life Terms of Service, Clause 7.1. 15 December 2010, available online: <http://secondlife.com/corporate/tos.php#tos12> accessed 20 February 2011
- [73] SABIP, 'The Relationship between Copyright and Contract Law' (July 2010) available online <http://www.sabip.org.uk>
- [74] Copyright, Designs and Patent Act 1988
- [75] *Printing and Numerical Registering Co v Sampson* (1875) LR 19 EQ 462 per Sir George Jessel
- [76] *C & P Haulage v Middleton* [1983] 3 All ER 94; P Richards, *Law of Contract* (3rd edn, Pearson Education Ltd, Harlow) 2009 p389
- [77] *MDY Indus., LLC v. Blizzard Entertainment, Inc.*, 2010 WL 5141269, 97 U.S.P.Q.2d (BNA) 1001 (9th Cir. Dec. 14, 2010).
- [78] See above at 7; 'The Contractual Agreements - Property Clauses'
- [79] *World of Warcraft* EULA, Preamble, (Blizzard Entertainment, 29 October 2010) Clause 1; available online at: http://us.blizzard.com/en-us/company/legal/WoW_eula.html accessed 29 August 2011
- [80] *MDY Indus., LLC v. Blizzard Entertainment, Inc.*, 2010 WL 5141269, 97 U.S.P.Q.2d (BNA) 1001 (9th Cir. Dec. 14, 2010), 19986
- [81] *MDY Indus., LLC v. Blizzard Entertainment, Inc.*, 2010 WL 5141269, 97 U.S.P.Q.2d (BNA) 1001 (9th Cir. Dec. 14, 2010).

[82] 'Creative Commons', available online at: <http://www.creativecommons.org> accessed 27 May 2011

[83] *Bragg v Linden Research Inc.* (487 F.Supp 2d 593 E.D. Penn) [2007]

[84] E.g. Gowers Review of 2006, Hargreaves Review of 2011 etc.