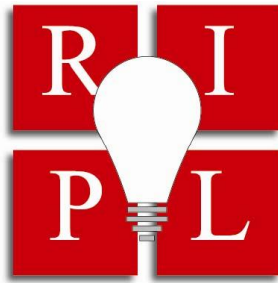


THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



COMMERCIAL CREATIONS: THE ROLE OF END USER LICENSE AGREEMENTS IN CONTROLLING THE EXPLOITATION OF USER GENERATED CONTENT

NEHA AHUJA

ABSTRACT

This article considers the current licensing regime used to control the exploitation of copyright protected works within the online interactive entertainment sector—particularly virtual worlds including multiplayer online games—to further author new copyrightable works. This article aims to identify the gaps that have arisen on account of the nature of these subsequently authored works and the potential for their exploitation under the said licensing regime. Users and the proprietors of virtual worlds often end up in conflict over the monetization and commercialization of user generated content on account of contradictory yet overlapping rights created by copyright law when controlled by contract law. This article briefly looks at the reasons behind these conflicts and the extent to which, if at all, the practice of law regulates them, for better or for worse.

To facilitate this, after a detailed introduction to virtual worlds, the related intellectual property rights laws contained in them and user generated content, a study of copyright law and contract law in relation to works falling within the realm of these two principles has been used to deliberate the role of End User License Agreements in curtailing and controlling user generated content. The resulting analysis will be used to arrive at possible resolutions, in the form of consumer protection laws, for the issues inherent in this licensing regime. Research for the above theory has focused on the laws of and practices in the United Kingdom while drawing inspiration from a more active jurisdiction in this field of law and commerce, the United States of America, wherever the author deemed fit and relevant. There has also been a personal, in-depth discussion with a well-known former video game developer to understand the evolution of the industry and its impact on the development of the laws surrounding it.

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Cite as Neha Ahuja, *Commercial Creations: The Role of End User License Agreements in Controlling the Exploitation of User Generated Content*, 16 J. MARSHALL REV. INTELL.

PROP. L. 382 (2017).

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NEHA AHUJA*

I. INTRODUCTION

Caveat emptor: Let the buyer beware. Or, more appropriately in this context, let the virtual space participant take care. The act of creation does not presumptively give rise to ownership claims; it is constrained by copyright and licensing agreements. Participants in virtual space would be wise to know the significance of each and to recognize their impact within different contexts.¹

With the above observation in mind, Part II will give an overview of what is a virtual world and consider why it challenges traditional legal concepts. It will then describe user generated content, including a discussion on a few illustrative forms with a specific focus on those that are created within a particular virtual world using the tools provided by the developer of the virtual world, i.e. in-game assets or virtual objects.

In Part III, we will then briefly go through the necessity as well as the forms of control and governance that are put in place (or adopted, in certain circumstances) by the interactive gaming industry such as intellectual property rights laws, the self-governance model and contracts of adhesion like End User License Agreements. The analysis of the forms of control is essential to understand that practice across the interactive gaming industry is not standard in relation to ownership of user generated content, discussed in further detail in Part IV. While some game owners and publishers welcome, others deploy very stringent and unilateral controls over this user generated content (through End User License Agreements).

Part IV will also go through the End User License Agreement model, detailing its dominant nature within the interactive gaming industry, its salient features, benefits, criticisms, limitations, uncertain future, and contemplate possible resolutions to its alleged tyrannical personality in the form of consumer protection laws and unfair trading terms. The discussion will take into consideration a few illustrative cases and we will aim to see how, though the End User License Agreement is a dominant form of controlling a virtual world, it has an unpredictable future owing, in part, to the limitation of its enforceability and an unfair vantage point. To this extent, potential resolutions in the form of consumer protection laws will be proposed as methods of overcoming the limitations inherent in these.

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¹ Daniel C. Miller, *Determining Ownership in Virtual Worlds: Copyright and License Agreements*, 22 REV. LITIG. 435, 471 (2003).

In conclusion, we will discuss a possible harmonization of the two primary issues of governance and control of virtual worlds, namely, protection and power,² i.e. a balance between what is protectable under intellectual property rights laws and what should (and should not) be controlled by contract law, despite being capable of protection. This will also conclude the various contentions and theories considered, deliberated, and examined in this article.

Finally, for the sake of clarity, we will refer to owners and users of a virtual world by using all terms that signify the different roles that each may portray, namely, creators/publishers/owners and players/users/participants (as explained in Part IV.E, below).

II. VIRTUAL WORLDS AND USER GENERATED CONTENT: OVERVIEW

A. What is a Virtual World?

“Virtual worlds offer the user a much richer experience than a website.”³

For the sake of the uninitiated reader, it is worthwhile spending some time understanding the elements that make up a virtual world so that the intellectual property rights issues emerging from those elements can be fully appreciated.

While there is no definition of a “virtual world” in the Oxford or Cambridge dictionaries, both of them define “virtual reality” as “[a] computer-generated simulation of a lifelike environment that can be interacted with in a seemingly real or physical way by a person, esp[ecially] by means of responsive hardware such as a visor with screen or gloves with sensors; such environments or the associated technology as a medium of activity or field of study; cyberspace”⁴ and as “a set of images and sounds, produced by a computer, that seem to represent a place or a situation that a person can take part in,”⁵ respectively.

It is not far-fetched to then understand a virtual world to mean a world made up and existing in a virtual reality. Given the player/user/participant centric nature of our subject matter, it would seem appropriate to consider the modern and equally ‘user based’ definition of a virtual world as compiled in Wikipedia, namely:

A virtual world or massively multiplayer online world (MMOW) is a computer-based simulated environment populated by many users who can create a personal avatar, and simultaneously and independently explore the virtual world, participate in its activities and communicate with others.

² *Id.* at 470.

³ ANDREW SPARROW, *THE LAW OF VIRTUAL WORLDS AND INTERNET SOCIAL NETWORKS* 6 (Gower Publishing Limited 2010).

⁴ *Virtual Reality*, OXFORD ENGLISH DICTIONARY ONLINE (OED Online, OUP December 2013) available at <http://www.oed.com/view/Entry/328583?redirectedFrom=virtual+reality&> (last visited June 16, 2016).

⁵ *Virtual Reality*, CAMBRIDGE DICTIONARY (Cambridge Dictionaries, Cambridge University Press 2016) available at <http://www.dictionary.cambridge.org/dictionary/english/virtual-reality> (last visited June 16, 2016).

These avatars can be textual, two or three-dimensional graphical representations, or live video avatars with auditory and touch sensations. In general, virtual worlds allow for multiple users.⁶

The boundless reach of virtual worlds to players/users/participants has led them to be considered as “precursors of new societies freed from geography or as revolutionary new forums for communication.”⁷

In fact, Benjamin Tyson Duranske, made an astute observation when he said that if one were to ask ten different people what is meant by a virtual world, one would get ten different answers due to a difference in each “user experience.”⁸ Therefore, when Duranske concludes that a virtual world will always have the following flagpoles (regardless of differing user-experiences),⁹ it seems like an acceptable definition, even though there is no real industrial consensus on it as such:

1. They are computer-based simulated environments;
2. They are designed to be populated by multiple users;
3. They allow for communication between these multiple users through computer-generated characters (known as avatars);
4. Most of them make provision for user generated content; and
5. Most of them make provision for functional economies.

The first element crucial to the understanding of a virtual world then is that it is a virtual reality generated by a computer program (a ‘habitat’ rather than just the binary code of a computer program). This leads us to the first observation: elements of virtual worlds are protected under copyright law as literary works (computer programs), artistic works (visuals generated by the computer programs) and musical works and sound recordings (music and sound recordings generated by the computer program) in the United Kingdom¹⁰ and United States of America.¹¹

This Part will assume that the works that comprise a virtual world meet the additional criterion for being protected by copyright under the United Kingdom and United States of America laws – original works of authorship¹² fixed in any tangible medium of expression¹³—in order to retain the core focus in the impact of the control of End User License Agreements on user generated content.

The second element crucial to the understanding of a virtual world is that it operates on the back of a multiplicity of users thereby leading us to the second observation: the enjoyment of or participation in a virtual world is determined on an

⁶ *Virtual World*, WIKIPEDIA THE FREE ENCYCLOPEDIA, https://en.wikipedia.org/wiki/Virtual_world (last visited June 16, 2016).

⁷ Andrew Jankowich, *EULAw: The Complex Web of Corporate Rule-Making in Virtual Worlds*, 8 TULANE J. OF TECH. AND INTELL. PROP. 1 (2006).

⁸ BENJAMIN TYSON DURANSKE, VIRTUAL LAW NAVIGATING THE LEGAL LANDSCAPE OF VIRTUAL WORLDS 3 (American Bar Association 2008). The “user experience” is the unique experience of each user while playing a game or participating in a virtual world.

⁹ *Id.*

¹⁰ Copyright, Designs and Patents Act, 1988, 36 Eliz. 2, c.48, § 1.

¹¹ 17 U.S.C. § 102.

¹² Copyright, Designs and Patents Act, 1988, 36 Eliz. 2, c.48, § 1.

¹³ 17 U.S.C. § 102.

individual basis thus making user generated content highly pertinent (this is the ‘user experience’ mentioned above).

Some academicians believe that it is the combination of the above two elements that “requires courts and legislators to apply copyright protection to the virtual-space creations of virtual-world participants and to reexamine copyright and contract law as applied to virtual-world developers and players alike”.¹⁴ Erez Reuveni finds basis for this argument in the fact that the involvement of a large number of participants in virtual worlds makes them more composite than simple (online) games.

It might be useful at this stage to introduce examples of the two main types of virtual worlds to put in perspective the legal principles that will be discussed in the following paragraphs. There are mainly three categories of online interactive games or virtual worlds that host within them content created by players/users/participants, namely:

- i. Where the game or virtual world technically facilitates the creation of content but does not permit it;
- ii. Where the game or virtual world evolves through gameplay and creation of content but the player/user/participant still remains primarily a consumer of the tools provided by the creator/publisher/owner; and
- iii. Where the game or virtual world not only facilitates but also encourages the creation of content that effectively builds the core of the game or virtual world.¹⁵

A well-known virtual world currently dominating the market, called Second Life,¹⁶ serves as an excellent example for category (iii) and for understanding the core issues relating to user generated content that are discussed here. Users of Second Life (also referred to as ‘residents’) create virtual or online representations of themselves, called avatars¹⁷ and the virtual world allows the avatar to explore its boundaries (or the lack of them) with other avatars or alone.¹⁸ While there has been some debate on whether Second Life should qualify as a game at all (primarily on account of the fact that it is devoid of the traditional conflict and end objective theories behind a traditional game), it is without doubt a virtual world, one where the user creates all the content.¹⁹ It is, in fact, advertised as: “The largest-ever 3D virtual world created entirely by its users”.²⁰

¹⁴ Erez Reuveni, *On Virtual Worlds: Copyright and Contract Law at the Dawn of the Virtual Age* (2007) 82 IND. L.J. 261 (2007).

¹⁵ Mira Burri-Nenova, *User-created content in virtual worlds and cultural diversity*, TRADE REGULATION RESEARCH PAPER SERIES 1/2009 (Jan. 1, 2009), available at <http://ssrn.com/abstract=1316847> (last visited July 12, 2016).

¹⁶ SECOND LIFE, <http://secondlife.com> (last visited Feb. 16, 2016).

¹⁷ DURANSKER, *supra* note 8, at 7-10.

¹⁸ SECOND LIFE, <http://secondlife.com/whatis/> accessed (last visited July 31, 2016).

¹⁹ Kristin Kalning, *If Second Life isn't a game, what is it?*, NBCNEWS.COM (Dec. 3, 2007) http://www.nbcnews.com/id/17538999/ns/technology_and_science-games/t/if-second-life-isnt-game-what-it/#.V53zGYuzDzI (last visited July 31, 2016).

²⁰ SECOND LIFE, <http://secondlife.com/?campaignid> (last visited July 28, 2016).

Another good example, one of a massively multiplayer online role playing game (“MMORPG”) based in a virtual world, would be World of Warcraft²¹ where players/users/participants begin by creating an avatar (the first act of creating user generated content) and follow through the various levels of the game, at each stage creating something new (such as a sword) by using the tools provided by the creators/publishers/owners of the game, category (ii) above. The fact that World of Warcraft has the elements of a traditional game, such as conflict and end objective theories, makes it categorically different from Second Life,²² a difference that will be crucial in understanding the premise discussed in Part IV.

Time and money invested by players/users/participants (encouraged by creators/publishers/owners) in a virtual world results in economic and emotional value in the form of characters and properties created and built within the virtual world. Creators/publishers/owners also invest time and money in the same virtual world. In fact, they do so well before the players/users/participants. Where interests of players/users/participants and creators/publishers/owners meet is where there is a common desire to succeed. However, this is also the point where conflicts of some of those interests arise, highlighting the importance of governance and control of virtual worlds (by their operators) as discussed in Part III, below.

Virtual worlds challenge traditional legal concepts because they combine individual elements of various intellectual property rights laws (as discussed in Part C.1.3, below) with a novel and unique medium thereby leading to arguably ambiguous decisions in relation to established principles of law such as the ‘idea-expression dichotomy’ in copyright law and the ‘badge of origin’ principle in trademark law. However, before we spend time understanding the intellectual property arena within a virtual world, it would be useful to also understand user generated content and its significance as the subject matter of the present theory.

B. User Generated Content

“Interactive media is remarkable in the scope of control the user has over the work. In many cases, the user verges on being an author himself.”²³

A method used by creators/publishers/owners of virtual worlds to promote loyalty amongst players/users/participants is to facilitate the creation of expressive artwork within the virtual world by the players/users/participants using tools provided by the creators/publishers/owners—expressive artwork that is the product of “original thought and intellectual effort”²⁴ and resulting in a “huge pool of intellectual property which resides”²⁵ in these virtual worlds—leading to the urgent question of how intellectual property in the form of user generated content is to be treated. Who owns

²¹ *World of Warcraft Digital Download*, WORLD OF WARCRAFT, <https://eu.battle.net/shop/en-https://eu.battle.net/shop/en-us/product/world-of-warcraft> (July 28, 2016).

²² Kalning, *supra* note 19.

²³ GREG LASTOWKA, VIRTUAL JUSTICE: THE NEW LAWS OF ONLINE WORLDS 183 (Yale University Press 2010).

²⁴ SPARROW, *supra* note 3, at 95.

²⁵ *Id.*

it? Who benefits from its ownership? How is the benefit to be derived?²⁶ In order to understand the various implications of the various governing or controlling models applied (or potentially applicable) to virtual worlds, it is important first to understand the nature of this user generated content.

There exist, in virtual world environments, either tools in the form of creation engines that are provided to players/users/participants (by the creators/publishers/owners themselves) which permit him/her to work as a composer, composing new works or there are independent software programs²⁷ which facilitate communication with interactive games, including virtual worlds, in an unapproved (and therefore unlawful) way and although both may attract infringement claims, they are both instances where players/users/participants are more authors and composers than unauthorized readers or observers.²⁸ Virtual objects can be objects that are built, through a “process of atomistic construction”²⁹, by players/users/participants from the ground up or be simple additions to existing objects, as we will see in Part C.1.3, below.

Thus, where a player/user/participant creates an avatar in order to participate in the game or the virtual world, be it Second Life or World of Warcraft, it is content created by the user and hence, user generated content. Where a player/user/participant creates in-game assets such as a sword in World of Warcraft (in order to beat his opponent and progress to the next level in the game play) or a virtual object such as a house in Second Life (in order to continue his participation), it is content created by the user and hence, user generated content. Therefore, user generated content emerges in various forms ranging from content which is the outcome of simply playing the game or which is created using tools provided to the user by and within the game³⁰ to content that may alter the game itself³¹, or using the game to create an entirely independent expressive project.³² This article will look at user generated content which is created within a particular virtual world using the tools provided by the developer of that world, i.e. in-game assets or virtual objects. While End User License Agreements have almost equal implications for all forms of user generated content, it would not be a time efficient exercise to discuss all forms in equal detail in one article.

²⁶ *Id.*

²⁷ See LASTOWKA, *supra* note 23, at 183. The Glider program allows users to interact with World of Warcraft in an unauthorized way.

²⁸ *Id.* at 184.

²⁹ Burri-Nenova, *supra* note 15.

³⁰ John Baldrice, *Mod as Heck: Frameworks for Examining Ownership Rights in User-Contributed Content to Videogames, and a More Principled Evaluation of Expressive Appropriation in User-Modified Videogame Projects*, 8 MINN. J.L. SCI. & TECH. (ISSUE 2) 681, 686-687 (2007). An example is a simple investment of playtime in order to earn an in-game reward like in Second Life.

³¹ Molly Stephens, *Sales of In-Game Assets: An Illustration of the Continuing Failure of Intellectual Property Law to Protect Digital-Content Creators*, 80 TEX. L. REV. 1513 (2001-2002). An example of content that may alter itself is a ‘sword’ in World of Warcraft.

³² See Dr. John Carroll and David Cameron, *Machinima: digital performance and emergent authorship*

https://www.academia.edu/7676327/Machinima_digital_performance_and_emergent_authorship

(last visited Oct. 23, 2015). “It describes the use of computer game technology to produce animated movies in real time.” *Id.* “Machinima” is one example of using the game to create an entirely independent expressive project.

Virtual worlds such as Second Life and World of Warcraft have, advertently or inadvertently, provided the perfect impetus for the creation, promotion and propagation of user generated content in the form of the ‘house’ in Second Life or the ‘sword’ in World of Warcraft. However, these worlds struggle to harmonize law and the expectations of the user community in relation to such metaphorical ‘houses’ and ‘swords’ and with efforts of resolving the legal complexities that arise out of the compounding of this power (of the player/user/participant) to create (on the basis of the tools provide by the creator/publisher/owner) on non-traditional media models.³³

The reason for this is because regardless of what players/users/participants consider their work to be, copyright law grants protection to that authorial work (as discussed in detail in Part C.1, below) whereas the creators/ publishers/owners of the virtual world, for obvious commercial reasons, want to control this right as it will extend the exclusive right to reproduce and exploit that work—work which exists in the virtual world. Some academicians believe that virtual worlds are merely intermediaries in that they reproduce and distribute the content created by their users³⁴ which would beg the question then whether it is legally, or morally, correct for virtual world owners to want to control the rights created by this content.

The approach that players/users/participants of interactive computer software including virtual worlds may be considered as authors was recognized in a decades old case³⁵ in the United States where the court affirmed the position that even though users could be authors of sorts within an interactive online gaming environment, the developer/publisher could claim copyright because the user had little, if any, stake in such composition of work since “they were not selling or distributing videos of their game play for profit.”³⁶

This ‘not selling for profit’ was the most crucial premise on which the potential authorial right of players/users/participants in the content that they ‘authored’ had been denied. However, this premise has itself shifted drastically since the 1980s. In particular, virtual worlds today entice and encourage users to be creative using tools provided for that purpose starting with the basics of user generated content such as avatars and progressing to complex virtual objects.

In fact, Yochai Benkler has commented on changing evolution of the way in which users exploit an interactive online game as follows:

The individual contributions of the users/coauthors of the story line are literally done for fun—they are playing a game. However, they are spending real economic goods—their attention and substantial subscription fees—on a form of entertainment that uses a platform for active coproduction of a story line to displace what was once passive reception of a finished, commercially and professionally manufactured good.³⁷

³³ LASTOWKA, *supra* note 23, at 186.

³⁴ *Id.*

³⁵ Williams Electronics, Inc. v. Arctic International, Inc., 685 F 2d 870 (3d Cir 1982).

³⁶ LASTOWKA, *supra* note 23, at 185.

³⁷ YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 74 (Yale University Press 2006).

This notation was very perceptive of the change that had come about in the quality of user generated content in the early 21st century and appears to have been the setting stone for the wave of perceptions that have followed through the years since.

The continued and progressive existence of user generated content has led to the conviction that it is an integral aspect of all virtual worlds in that it endures despite the creator having exited the virtual world and also alters the experience of other users (on account of that very existence).³⁸ This has far reaching implications on the resultant legal issues that arise, discussed in detail in Part IV, below.

Virtual world operators control user generated content through various forms of governance. The most relevant and debated forms of such control are briefly discussed in Part III, before discussing the dominant form of control – End User License Agreements – in Part IV.

Before delving into the above discussion, it would be useful to briefly go through the intellectual property arena of a virtual world so that we can better understand the issues arising from the control of these aspects.

C. Protectable Intellectual Property Rights within a Virtual World

1. Copyright in Virtual Worlds

Copyright law protects the original expression, i.e. original work of authorship of an idea, but not the idea itself.

The United Kingdom uses an exhaustive list of subject matters and a ‘work’ (literary, dramatic, musical, artistic works, sound recordings, films or broadcasts and the typographical arrangement of published editions)³⁹ need only fall within that list and be ‘original’ in order to be protectable under copyright law.

In the United States, the list is longer but still limited to literary works, musical works including any accompanying words, dramatic works including any accompanying music, pantomimes and choreographic works, pictorial, graphic, and sculptural works, motion pictures and other audiovisual works, sound recordings and architectural works.⁴⁰ However, in contrast with the United Kingdom, the United States has an additional requirement to originality—the work must be fixed in a tangible medium of expression.

Virtual worlds being, essentially, online interactive gaming environments have various copyright protectable elements, in particular:

1. The computer program that is at that source of every online game is protectable as a literary work which includes the source code and object code, the primary game engine or engines, the ancillary code, the plug-ins & add-ons (including third-party subroutines);

³⁸ DURANSKE, *supra* note 8, at 3.

³⁹ Copyright, Designs and Patents Act, 1988, 36 Eliz. 2, c.48, § 1.

⁴⁰ 17 U.S.C. § 102.

2. Musical compositions within a virtual world are protectable as musical works;
3. Sound recordings incorporated in a virtual world are protectable as such; and
4. Images and animations used in a virtual world are protectable as artistic works, to name a few.

Of course, there are other elements that are eligible for copyright protection, such as game script and game plot as literary works, and well-developed characters as artistic works.

The owner of the copyright in a virtual world is entitled to certain exclusive rights of copying and reproducing, both in the United Kingdom and the United States.⁴¹ A person who, without the license of the copyright owner, does or authorizes another to do any of the acts that are restricted by copyright, infringes copyright in the said work.⁴²

Copyright law protects the software code of a virtual world in the same manner as it would protect the text of a poem despite the popular belief that such a rule is far from normal given that software is primarily functional expression rather than creative writing.⁴³ As owner of the computer program that effectively runs the virtual world, the creator/publisher/owner, is protected against unauthorized copying or reproduction of the source code under copyright law. However, if an individual was to use the same game mechanics and make a visually dissimilar virtual world, then there would not be a claim to copyright infringement because what has been taken is the idea and not the protected expression of that idea.⁴⁴ This is the idea-expression dichotomy that courts would often struggle with, which is amplified in relation to virtual worlds making them defy traditional concepts of copyright law.

Similarly, where a person uses the existing copyrighted works in a virtual world as tools to create something within the virtual world, they need to do so under authorization from the owner of the virtual world through a license agreement governing the play of the game so that such creations can be explicitly legitimized. However, this again challenges the traditional concepts of copyright law in that it gives precedence to contractual agreements between private parties without according due attention to the effect of such exclusions in copyright law.

In *Second Life* and *World of Warcraft* the original computer software that underlines the entire game will be protected by copyright as literary works as well as every element/item created within the game such as a 'house' or a 'sword' will be protected by copyright as an artistic work. However, while the computer software is unequivocally owned by the creator/publisher/owner, ownership of subsequent elements (such as the 'house' in *Second Life* and the 'sword' in *World of Warcraft*) that are created by the players/users/participants also ends up residing with the creator/publisher/owner by virtue of a unilateral contractual arrangement between the

⁴¹ Copyright, Designs and Patents Act, 1988, 36 Eliz. 2, c.48; 17 U.S.C. § 106.

⁴² *Id.*

⁴³ LASTOWKA, *supra* note 23, at 179.

⁴⁴ 17 U.S.C. § 102(b). The United States Copyright Act specifically excludes any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied from copyright.

creator/publisher/owner and players/users/participants—a pre-condition to playing the game or participating in the virtual world—even though by operation of copyright law, such ownership resides with the players/users/participants and need not be automatically transferred.

It is this contest, fueled by the End User License Agreement, between rights of owners of virtual worlds under copyright law and ‘subsequent authors’ of user generated content within that same virtual world that this article focuses on henceforth.

While the prime focus of this article is to compare the balance of power as disseminated by contract law and by copyright law in relation to the user generated content within virtual worlds, it is important to note a few other features of intellectual property rights law that partake in the management of virtual worlds. These are discussed briefly below.

2. Trademarks in Virtual Worlds

Another topic of intellectual property law that is applicable to a virtual world is trademarks. These are different from copyright in that they need to be original and can distinguish the owner’s goods or services from those of others.

Trademarks are of relevance to virtual world owners not only for the sake of their own brand integrity⁴⁵ but also because where a virtual world allows unrestricted designing and software architectural freedom, there can be an overwhelming draw of using real world trade marks without authorization.⁴⁶ Thus trademark law operates to protect a virtual world’s branding⁴⁷ and the virtual objects created within those virtual worlds and so where virtual worlds do not monitor use of third-party intellectual property rights in brands and logos, trademark infringement is rampant.⁴⁸

Looking at our examples of Second Life and World of Warcraft, the names ‘Second Life’ and ‘World of Warcraft’ are themselves trademarks, i.e. badges of origin signifying that these names are owned by the respective creators/publishers/owners. However, there is a second layer of trademarks as well in the form of names that might be given to the ‘house’ in Second Life or the ‘sword’ in World of Warcraft, which could belong to third parties and if used without appropriate clearances from such third parties, could

⁴⁵ SPARROW, *supra* note 3, at 94.

⁴⁶ DURANSKE, *supra* note 8, at 149.

⁴⁷ See Verified Complaint, *Mythic Entertainment, Inc., v. Microsoft Corp.*, 03cv1425-A (E.D. Va. 2003) WL 25626091. A classic example of such an instance is when Microsoft Inc. disclosed its intention to create a game called “Mythica” which turned out to have the same theme as a game called “Dark Age of Camelot” developed by a software company called Mythic Entertainment Inc. Mythic Entertainment Inc. sued for trade mark infringement and while Microsoft shelved plans for “Mythica” subsequent to the law suit for apparent reasons that had nothing to do with the suit, the settlement terms between the companies showed strong importance given to the prior trade mark rights asserted by Mythic Entertainment Inc. In particular, Microsoft agreed never to use the word MYTHICA (or its variation) in relation to online games; to abandon its pending application for MYTHICA and to assign any existing registrations or goodwill owned by it in MYTHICA to Mythic Entertainment Inc. For further information.

⁴⁸ There are many examples of such infringements such as a player creating sun glasses under the “PRADA” brand name and selling them in a virtual world but the said player has no association with or authorization from PRADA to use the brand name.

result in exposing the creators/publishers/owners to infringement actions. For example, if players/users/participants created a publishing business in Second Life and decides to name it “Playboy” without the explicit approval of the owners of the well-known magazine “playboy”, it could very well amount to trademark infringement. Similarly, the owner of an avatar or the ‘sword’ in World of Warcraft could potentially look at registering the avatar itself or the sword itself as a trade mark—if such avatar or sword could be assigned the function of designating origin within the spectrum of the game—which is where the distinction or the conflict between who owns the house or the avatar or the sword comes into play.

It is noted by some academics that there is now a great increase in trademark registrations being sought for virtual world user generated content such as avatars (being computer generated characters created for communication between multiple users) and company logos⁴⁹ because of the increased awareness in relation to the use and misuse of trademarks within virtual worlds.

3. Patents in Virtual Worlds

Patents are exclusive rights granted for the exploitation, for a fixed period of time, of an invention that is new, involves an inventive step, is capable of industrial application and the grant of which is not excluded by the legislative provisions⁵⁰ in the United Kingdom or in the United States if it is new, useful, and nonobvious.⁵¹

In the United Kingdom, schemes, rules or methods for performing a mental act, playing a game or doing business, or programs for computers are specifically excluded from being patented⁵² and in the United States, it has long been held that laws of nature, natural phenomena, and abstract ideas are not patentable by patent law.⁵³

Although this article will not go into great detail on patent law protection to video games, it is pertinent to mention that video games in general are only protected by patent law in as far as the computer program that runs them can satisfy the relevant criteria of patentability and go beyond the mere rules of the game being played⁵⁴ as well as not be an abstract idea.⁵⁵

4. Trade Secrets and Personality Rights in Virtual Worlds

It would also be proper to mention two satellite laws that have a role to play within virtual worlds, namely trade secrets and personality rights. A trade secret “can be any formula, pattern, physical device, idea, process, or compilation of information that both

⁴⁹ DURANSKE, *supra* note 8, at 152.

⁵⁰ Patents Act, 1977, 25 Eliz. 2, c.37, § 1.

⁵¹ 35 U.S.C. §§ 101–103.

⁵² Patents Act, 1977, 25 Eliz. 2, c.37, § 1(2)(c).

⁵³ Ass’n for Molecular Pathology v. Myriad Genetics, Inc., 133 S. Ct. 2107 (2013).

⁵⁴ Konami Co., Ltd., European Patent Office (EPO) T 0928/03-3.5.01 (2006).

⁵⁵ Alice Corp. Pty. v. CLS Bank Int’l, 134 S. Ct. 2347 (2014).

(1) provides a competitive advantage in the market place, and (2) is created in a way that can reasonably be expected to prevent its disclosure”.⁵⁶

This law is applicable not to user generated content but to information being exchanged in the virtual world and since virtual worlds are very poor at keeping secrets, maintaining the status of a piece of information in such a way that it can be reasonably expected to not be disclosed becomes very difficult. Since a detailed discussion on the role of trade secrets and personality rights would be outside the scope of this article, it is sufficient for the present purposes to note that these laws have a relevant place in the governance and operation of virtual worlds.

III. CONTROLLING AND GOVERNING VIRTUAL WORLDS

A. Need for Controlling Virtual Worlds

The idea of restricting 3rd party vendors is one of the primary design considerations when creating a system. Atari sought legal relief in the courts for the invasion by other companies (software trespass if you will) but they were unsuccessful. However, these cases probably formed the basis of thinking for licensing laws and precedent in the IP arena.⁵⁷

These are the words of Howard Scott Warshaw, the legendary video game developer of the most controversial video game in history, *ET the Extra-Terrestrial*, published by the world’s most revolutionizing video game company, Atari Inc.⁵⁸ He was there at the beginning of it all and has witnessed the industry mature into what it is today. That could be why he has, knowingly or unknowingly, led us to what was probably the point at which control mechanisms for virtual worlds (and everything within them) were deemed necessary—the point of inception, if you will.

As with any form of society, a virtual world also requires governance and control, not least because of its inherent nature of continuity. Players/users/participants are continuously either playing or using or participating in the virtual world which automatically raises the question of who is governing or controlling these systems and how.

Virtual worlds tend to operate under their own systems of private laws or, more appropriately, ‘rules,’ which repeatedly depart distinctly from those of the real world. Virtual worlds, primarily existing only in the worldwide web, seek to ‘legally link’ the online world and the physical world through the agreements that create private rules in the absence of effective jurisdiction by real world governments and the potential development of “self-regulatory structures on the net.”⁵⁹

⁵⁶ DURANSKE, *supra* note 8, at 157.

⁵⁷ E-mail from Howard Scott Warshaw to author (Nov. 20, 2015) (on file with author).

⁵⁸ Richard Hooper, *The man who made “the worst video game in history,”* BBC WORLD SERVICE (February 22, 2016), <http://www.bbc.co.uk/news/magazine-35560458> (last visited Aug. 1, 2016).

⁵⁹ Jankowich, *supra* note 7, at 1.

Creators/publishers/owners have traditionally taken it upon themselves to govern virtual world environments created by them, and rightfully so since it is their investment and effort that has resulted in the existence of the virtual world in the first place.

However, these creators/publishers/owners design rules with little, if any, consideration for the negotiating powers of prospective players/users/participants. Such players/users/participants must either agree to the terms written by the creators/publishers/owners or decline to participate.⁶⁰ The primary issue with the control of virtual worlds appears to be on account of their complex nature in terms of the creative interactivity they promote and propagate—the very creativity that is the essence of the virtual world and also the root cause of conflicting interests.

B. Forms of Control or Governance

1. Intellectual Property Rights Law

Publishers and developers have generally been successful in using contractual provisions, including EULAs, to opt out of otherwise prevailing legal balances.⁶¹

As discussed above, virtual worlds vary in the degree of freedom and tools that they provide players/users/participants with to be creative and generate content. This degree of freedom and facilitation is a huge contributor to the type and extent of intellectual property protection that will control the virtual world.

In our examples, the ‘house’ that is created in Second Life will be created with the tools provided by the creator/publisher/owner but will be the original expression of the player/user/participant whereas the ‘sword’ that is created in World of Warcraft will be primarily produced by the creator/publisher/owner and the player/user/participant can build on it or alongside it but with highly limited ability to generate original new expressive work.⁶²

Copyright law will necessarily protect the author of the original expressive work which is likely to be the player/user/participant in the case of user generated content in the example of Second Life, but not in case of content created by player/user/participant in the World of Warcraft, especially given the heavy reliance on the private legal avenues utilized by creators/publishers/owners in defining their relationship with the player/user/participant, such as the End User License Agreement even though Second Life is also controlled by Terms of Service which clearly lay out the legal status of user generated content.

Therefore, intellectual property laws make for poor forms of control and governance since contractual law can override them.

⁶⁰ *Id.* at 7.

⁶¹ JON FESTINGER ET AL., VIDEO GAME LAW 158 (Second Edition, LexisNexis Canada Inc. 2012).

⁶² Burri-Nenova, *supra* note 15.

2. Self-Governance

Fueled by a surge of people participating in virtual worlds, we argue that real-world lawmakers will wish to extend the reach of national legal frameworks into virtual worlds.⁶³

The above premise is put to a strict test when it comes to virtual worlds since all virtual world environments are private spaces and do not correspond to national borders.⁶⁴ This, however, does not imply that the Internet cannot be regulated.⁶⁵ In fact, through the years, many nations have attempted to regulate different aspects of online behavior and practices including the treatment of user generated content.⁶⁶

Sadly, the issue that arises in this case is that regulators are unsure of how exactly to proceed. This uncertainty is due in part to the pressure exercised by exiting unregulated industries and in part “because of the incredible complexity and fluidity of digital environments,” including virtual worlds.⁶⁷ In other words, these regulators struggle with making the transition from the policymaking culture for traditional media formats, “as the audiovisual sector moves from being a separable and quarantined domain of governance to its enactment as part of a whole-of-government modeling in which it emerges as a service industry in a ‘digital economy’”.⁶⁸

Thus, while virtual worlds do not currently have elected governments reflecting the real-world governance models, they appear to be controlled by “Gods” who are none other than the developers themselves.⁶⁹ These virtual world creators/publishers/owners may prefer establishing self-governance models to avoid the predicaments that come with responsible governing. However, on account of the lack of corresponding real national borders for virtual world environments as discussed in the preceding paragraphs, self-governance is likely to fail resulting in large-scale disbandment of users leading to economic misfortune for the creators/publishers/owners. In the backdrop of this dilemma, creators/publishers/owners usually chose to retain control through the deployment of the End User License Agreement (discussed in Part IV, below).⁷⁰

⁶³ Viktor Mayer-Schönberger & John Crowley, *Napster's Second Life?: The Regulatory Challenges Of Virtual Worlds*, 100 NW. U. L. REV. 1775, 1780 (2006).

⁶⁴ Burri-Nenova, *supra* note 15.

⁶⁵ JACK GOLDSMITH AND TIM WU, WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD (Oxford University Press 2006).

⁶⁶ RONALD J. DEIBERT ET AL., ACCESS DENIED: THE PRACTICE AND POLICY OF GLOBAL INTERNET FILTERING (MIT Press 2007).

⁶⁷ Burri-Nenova, *supra* note 15.

⁶⁸ Tom O'Regan and Ben Goldsmith, *Making Cultural Policy: Meeting Cultural Objectives in a Digital Environment*, 7 TELEVISION AND NEW MEDIA 68, 88 (2006).

⁶⁹ Caroline Bradley and A. Michael Froomkin, *Virtual Worlds, Real Rules: Using Virtual Worlds to Test Legal Rules*, in THE STATE OF PLAY: LAW, GAMES, AND VIRTUAL WORLDS 227, 237 (Jack M. Balkin and Beth Simone Noveck eds. N.Y. Univ. Press 2006).

⁷⁰ Mayer-Schönberger & Crowley, *supra* note 63, at 1775.

IV. END USER LICENSE AGREEMENTS

A. Nature and Salient Features of End User License Agreement as a Form of Controlling Virtual Worlds

There is no denying the economic usefulness of the corporate form of governance.⁷¹

This statement bears a great significance in reference to the most dominant form of controlling an online environment – the End User License Agreement.

An End User License Agreement is a contractual relationship between players/users/participants and creators/publishers/owners that governs the result of utilization of the gaming tools provided by these creators/publishers/owners to the players/users/participants whether it be the natural course of playing the game or the creation of original expressive work or the unoriginal ancillary works.

It is a universally accepted means of gaining access into virtual worlds done at some point during the installation of the software on to the hard drive of the players/users/participants' computer. It defines the terms of service as well as the terms of licensing of the computer software that makes up the virtual world. It is, the tool that controls the exploitation, by players/users/participants, not only of the base copyrighted work that makes up the virtual world but also the ownership, and subsequent exploitation, rights to any user generated content that results from such exploitation.

Every new player/user/participant must accept these non-negotiable terms or must decline to participate and every exiting player/user/participant must accept them or reclude themselves from the virtual world environment and cease to be its member. In that sense, the End User License Agreement operates as gatekeeper of the virtual world and a strong contender for a type of 'self-governance' model as discussed in the preceding Part.

However, one of the most salient features of an End User License Agreement is that while it does purport to control the relationship and resulting rights between creators/publishers/owners and players/users/participants, it does so in a chiefly indirect manner. While it cannot make an act impossible, for obvious reasons, it can forbid certain acts and impose strict implications in the form of punishments for breach of those forbidden conditions. For instance, creators/publishers/owners can banish a player/user/participant for no reason, with no warning, and without offering any compensation. In these circumstances, the only legally guaranteed recourse available to players/users/participants is to quit the game, leaving behind whatever accomplishments that they have built up there. An End User License Agreement, if properly enforced makes each world "its own parallel universe."⁷²

⁷¹ Edward Castronova, *The Right to Play*, 49 N.Y.L. SCH. L. REV. 185, 188 (2004–05).

⁷² Julian Dibbell, *Owned!: Intellectual Property in the Age of eBayers, Gold Farmers, and Other Enemies of the Virtual State Or, How I Learned to Stop Worrying and Love the End-User License Agreement*, in *THE STATE OF PLAY: LAW, GAMES, AND VIRTUAL WORLDS* 137, 144 (Jack M. Balkin and Beth Simone Noveck eds., N.Y. Univ. Press 2006).

B. End User License Agreements and User Generated Content

Rights in user generated content are, in the first instance, retained by creators/publishers/owners through the operation of the terms and conditions in the End User License Agreement, as we will see Part IV.C, below, almost always in contravention to the natural course of rights that would be granted under the intellectual property rights system.

However, some virtual worlds, such as World of Warcraft, which necessitates and facilitates the creation of user generated content in order to be able to progress through the game play, stipulate in their End User License Agreements that, if the publisher gives permission, then the user generated content can be sold on World of Warcraft platform and revenues can be split between the developers of World of Warcraft, the publisher and the player and the underlying rights owned by the publisher which, in the absence of explicit authorization to be used, do not give any exclusive rights to players/users/participants as owners of copyright. This is a refined and dignified way of resolving the conflict between rights vested in players/users/participants, by virtue of being authors of original expressive work under copyright law. In other words, the contract that dictates the terms and conditions of play between players/users/participants and creators/publishers/owners has the power to pre-empt any possible right created by copyright law. The End User License Agreement, some argue, “is an imperfect special contract guaranteeing democratic accountability of players and game developers” where its imperfections are considered a small opportunity cost for the accountability that it injects into the governance of virtual worlds.⁷³

Unlike world of Warcraft, the success of, and within, certain games like Second Life relies on players/users/participants actually owning the content that they create because, as some academicians believe, ownership gives incentive to create by establishing an attachment to tools and players ownership and opportunity to profit from efforts “will homestead a new frontier.”⁷⁴ Therefore, the Terms of Service of Second Life⁷⁵ give away a lot more rights to players/users/participants than that of World of Warcraft,⁷⁶ discussed in greater detail in Part IV.C, below.

C. Benefits & Criticism of End User License Agreements

In essence, End User License Agreements are tools employed by virtual world creators/publishers/owners to manage the risk inherent in the licensing of video games to players/users/participants who are, at the end of the day, consumers of the product that is the virtual world.

⁷³ JACK M. BALKIN AND BETH SIMONE NOVECK, *Introduction*, in THE STATE OF PLAY: LAW, GAMES, AND VIRTUAL WORLDS 1, 8 (N.Y. Univ. Press 2006).

⁷⁴ *Id.* at 9.

⁷⁵ *Clause 2.3*, LINDEN LAB TERMS OF SERVICE (2015), <http://www.lindenlab.com/tos#tos2> (last visited July 19, 2016).

⁷⁶ Battle.net, *Clauses C(i) and (iii)*, END USER LICENSE AGREEMENT (2015), <http://us.blizzard.com/en-us/company/legal/eula> (last visited on July 18, 2016).

Above all, they protect the interest of the creator/publisher/owner and help in limiting their liability.⁷⁷ While many spend considerable resources in drafting these End User License Agreements in order to have the strongest rights in their virtual worlds, there are others that allow a great deal, of the intellectual property in the content created by players/users/participants to reside *with* those players/users/participants.

Coming back to our examples, World of Warcraft would fall in the earlier category where the publishers of the game have taken a strong stand via their End User License Agreement⁷⁸ to exclude any potential rights that players/users/participants may have legally accruing to them by taking out the user generated content from the realm of being expressive works in order to even qualify as original works.

Second Life, on the other hand, explicitly permits players/users/participants to “retain all intellectual property rights in items that they create in the virtual world”⁷⁹ showing the stark difference in approach adopted by creators/publishers/owners using the same mechanism or device to control their virtual worlds.

Notwithstanding the motives that steer End User License Agreements, it is a potent and robust means for controlling ownership in virtual space. Some note that actually and purposefully reviewing a software licensing agreement can not only be a horrific experience but also result in a full stripping of ownership in any user generated content such as in the avatar space.⁸⁰ Some statistics show that 33.33% of surveyed virtual have legal provisions that have creators/publishers/owners unilaterally asserting intellectual property rights in the gross virtual world, completely ignoring even the prospect or likelihood (leave alone the plausibility) that user generated content could rightfully belong to the players/users/participants.⁸¹ Similar statistics further show that creators/publishers/owners of 14.58% of the surveyed virtual worlds require a comprehensive assignment from players/users/participants of all rights that could reside in user generated content.⁸² Critics argue that while most agreements would call for a license rather than an assignment, clauses requiring assignment “effectively restrict participants from using their own creations after their participation in the virtual world to the larger detriment of the public good.”⁸³

While many proprietors restrict participant property rights, a number of proprietors are recognizing the importance of participant derivative works in the decentralized communities of virtual worlds where significant portions of the environment are the products of participants’ labor. End User License Agreements have begun to address derivative worlds like fan fiction⁸⁴ such as Machinima.⁸⁵

While it is an agreement between the players/users/participants and the creators/publishers/owners in relation to the Dos and the Don’ts and provides the enforcement mechanism in terms of the laying down the implications of social and

⁷⁷ FESTINGER ET AL., *supra* note 61.

⁷⁸ Battle.net, *Clauses C(i) and (iii)*, END USER LICENSE AGREEMENT (2015), <http://us.blizzard.com/en-us/company/legal/eula> (last visited on July 18, 2016).

⁷⁹ FESTINGER ET AL., *supra* note 61, at 162.

⁸⁰ Miller, *supra* note 1, at 463.

⁸¹ Jankowich, *supra* note 7, at 37.

⁸² *Id.* at 38.

⁸³ *Id.* at 1.

⁸⁴ *Id.* at 40.

⁸⁵ See Carroll and Cameron, *supra* note 32.

financial costs in case of a breach of those terms, its main advantage is that it has the power to render legitimacy to acts which, other than for the End User License Agreement, would be illegal actions. However, what admittedly makes the End User License Agreement a forceful and valuable tool in the hands of the creators/publishers/owners is that even though some of the terms or conditions in them would be legally void if challenged, they serve as steady deterrent.⁸⁶

Proponents of End User License Agreements contend that despite appearing draconian to the interests of players/users/participants in relation to original expressive works, such as in *Second Life*, or derivative works, such as in *World of Warcraft*, created by them in the course of participating in virtual worlds, these license agreements present the genuine benefit of “offering efficiency, information, and a variety of rights”⁸⁷ to the players/users/participants. They do this by offering contracts, that though may be contracts of adhesion, have become fairly common in products that are bought and sold as mass market transactions because “most consumers, ‘rather than relying on their own negotiating skills or knowledge of the relevant law,’ would be ‘better served by relying’ on various contract principles to protect their interests.”⁸⁸

Further, players/users/participants are not necessarily totally familiar with copyright laws and other intellectual property rights laws that may be protecting their interest and are, at the end of the day, only interested in the experience of the virtual world through residing in it (*Second Life*) or by playing it (*World of Warcraft*). Thus, the End User License Agreement furnishes extremely useful information to these players/users/participants in the form of a record of terms and conditions educating the end user of the relationship between the parties and the range of rights available to each party.⁸⁹ Having said that, if the players/users/participants do not in fact read these documents, they are neither better nor worse off regarding their rights.⁹⁰

Therefore, while End User License Agreements may arguably curtail rights accruing to players/users/participants, they also provide players/users/participants with more rights than they would have had under traditional intellectual property laws: Many licensing agreements allow the consumer to ‘make and use a second copy of a licensed program’ which would be infringing activity under copyright law.⁹¹

Finally, even the arguable “denial of rights” to players/users/participants arises out of commercially sound reasons, i.e. the intended protection of the investment made by creators/publishers/owners. In fact, some argue that the rights that are denied are more often those that most players/users/participants as consumers would probably “never exercise: The law should not force mass market software publishers to burden the price of their software by requiring publishers to offer rights which most users are not interested in acquiring.”⁹²

⁸⁶ Battle.net, *Clauses C(i) and (iii)*, END USER LICENSE AGREEMENT (2015), <http://us.blizzard.com/en-us/company/legal/eula> (last visited on July 18, 2016); Funcom, *End User License Agreement*, AGE OF CONAN—HYBORIAN ADVENTURES AND AGE OF CONAN—RISE OF THE GODSLAYER (April 19, 2010) http://www.funcom.com/corporate/eula_english (last accessed July 18, 2016) at Page 2.

⁸⁷ Miller, *supra* note 1, at 461.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Miller, *supra* note 1, at 462.

The End User License Agreement has some obvious benefits and some possibly more obvious drawbacks. The End User License Agreement is heavily criticized because it strictly controls the ownership and exploitation of user generated content by vesting any rights in such works back in the creators/publishers/owners regardless of whether the players/users/participants are entitled to these rights. However, most virtual world operators that facilitate the creation of content by players/users/participants, such as Second Life, would find it hard to uphold an End User License Agreement that then purports to exclude those players/users/participants from owning any rights in that content notwithstanding that those operators may still prohibit commercial exploitation out of that ownership. Virtual world operators “cannot have it both ways.”⁹³

Thus, the criticism of the End User License Agreement as overly favoring game creators with regard to controlling and governing the ownership and subsequent exploitative capabilities of user generated content, possibly makes for a lesser argument once put in perspective of the investment made by the ‘governors’ or ‘controllers’ and the potential non-relevance of the rights from the point of view of the ‘consumers,’ a proposal discussed in greater detail in Part IV.E, below.

D. Limitations and Unpredictable Future of End User License Agreements

Despite the above yin-yang nature of the End User License Agreement, such forms of governance and control are not without valid limitations. These limitations make it uncertain whether End User License Agreements will remain the dominant form of controlling virtual worlds and the intellectual property that resides in them. We will discuss the most crucial of these limitations briefly in order to have a basic understanding of its impact on the future of the End User License Agreement as a form of governance and control over virtual worlds and the rights that are created within them.

The most relevant limitation is whether the End User License Agreement is itself enforceable as a contract or not. The End User License Agreement is essentially a contract of adhesion where, as discussed above, a new user must accept its terms and conditions in order to play/participate in the virtual world and existing users must accept any updates or changes made to it if they want to continue playing or participating or quit the virtual world, losing everything that they have built or created therein. While there has been no case yet in the United Kingdom on the validity of such a contract, there is some ambiguity on whether a challenge on the validity of an end User License Agreement could be successfully defended given that it is a result of unfair bargaining processes where players/users/participants have no negotiating opportunity and lead to unfair results.

This uncertain future of End User License Agreements indicates a potential move by the industry towards a thoughtful reduction in the variance of the terms of these agreements.⁹⁴

⁹³ JACK M. BALKIN, *Law and Liberty in Virtual Worlds*, THE STATE OF PLAY: LAW, GAMES, AND VIRTUAL WORLDS 86, 95 (N.Y. Univ. Press 2006).

⁹⁴ Mayer-Schneberger & Crowley, *supra* note 63, at 1775.

E. Possible Resolution to the Oppressive Nature of End User License Agreements

The industry and the legislature have, over time, responded to the potential oppressive perception of an End User License Agreement.⁹⁵

Virtual worlds are considered communities despite their sometimes competitive nature and it is not unimaginable that both sides within the industry would want to exercise voluntary revisions to the End User License Agreements. While this may be the best solution to reduce the evil of the End User License Agreement, it is unlikely to succeed due to the conflicts of ownership of user generated content and the potential of its commercial exploitation.

Players/users/participants within a virtual world have two roles: competitor and participants/users. Creators/publishers/owners share two distinct personalities: entrepreneur and governor.⁹⁶ It is in their capacity as participants/users that players can be understood to be consumers.

Further, whereas the United States has a clear First Amendment Right available for creators/publishers/owners to exercise in order to protect “spaces devoted to expression,”⁹⁷ the United Kingdom has no such clear protection – although it has a freedom of speech right, which does not cover this aspect of creativity or original expression.

If the virtual space is treated like a collective work of art, it will warrant artistic protection. But if the players/users/participants are treated as consumers, then they will demand consumer protection⁹⁸ and End User License Agreements do not protect creators/publishers/owners from laws whose purpose is unrelated to suppression of free expression such as consumer protection law.⁹⁹

Therefore, while the industry response may not be a practical one, a number of countries have responded legislatively and enacted laws to protect consumers of goods and services retailed in the open market by implying certain conditions, representations and warranties that govern the purchase of such goods and services and “restrict the enforceability of exclusionary clauses.”¹⁰⁰

Alliances between creators/publishers/owners and players/users/participants are primarily the result of governance of ownership rights in virtual world creations, aimed at managing the interaction between the property in these creations and the freedom to create them.¹⁰¹ Although many countries have created laws to protect consumers, for virtual worlds where these protections are must be enforced within their intellectual property contexts a wide variety of issues crop up, the dominant issue is fitting a player/user/participant to the definition of a ‘consumer’ and his/her creation

⁹⁵ Dibbell, *supra* note 72, at 143.

⁹⁶ BALKIN, *supra* note 93, at 102.

⁹⁷ *Id.* at 96.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ FESTINGER ET AL., *supra* note 61, at 178.

¹⁰¹ Andrea Stazi and Maximiliano Marzetti, *Synergetic Interaction Between Intellectual Property and Consumer Protection: A Pragmatic Proposal to Rebalance Incentives and Access*, in ACCESS TO INFORMATION AND KNOWLEDGE 21ST CENTURY CHALLENGES IN INTELLECTUAL PROPERTY AND KNOWLEDGE GOVERNANCE 189, 195 (Dana Beldiman ed., Edward Elgar Publishing Ltd. 2013).

to the definition of ‘consumption.’¹⁰² Consumption of information provided in virtual worlds is not performed in the same manner as those of tangible goods and the form in which players/users/participants involve with and experience virtual worlds results in the production of new content.¹⁰³

In this regard, the United Kingdom as recently as in October 2015 enacted the Consumer Rights Act 2015 (the “Act”) granting ‘consumers’ the strongest rights seen historically especially in relation to ‘digital content’ products of which virtual worlds are a sub-set.¹⁰⁴

Since the Act applies only to transactions between a business and a consumer, it has clear implications for the purposes of the present discussion.

The relevance is that it not only requires a virtual world to be (i) of satisfactory quality, (ii) fit for purpose, and (iii) as described, failing which, players/users/participants can exercise their consumer rights of repair, replacements and refund but also that it replaces and supplements the existing rules concerning unfair contract terms in consumer and business contracts.¹⁰⁵ The Act supersedes the UK’s Unfair Terms in Consumer Contracts Regulations 1999¹⁰⁶ and the Unfair Contract Terms Act 1977¹⁰⁷ but the salient features of the new rules remain mostly same and relevant laws can now be found in:

1. The Act, which covers unfair terms in consumer contracts;¹⁰⁸
2. the Consumer Protection from Unfair Trading Regulations 2008,¹⁰⁹ which deal with activities prior to the consumer entering into contract such as advertising and marketing; and
3. The Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, which outlines certain information that must be provided to customers before contracting.¹¹⁰

For the purposes of this article, it is the Act’s rules on unfair contract terms which are the most pertinent. In particular, there are two categories of clauses that can be determined to be unfair: (1) those that will always be concluded as unfair for instance those that exclude or restrict statutory rights and remedies or liability for death or personal injury through negligence; and (2) those that are considered unfair and unenforceable on a subjective basis, namely, if they fail the ‘fairness test’.¹¹¹

¹⁰² *Id.* at 196.

¹⁰³ *Id.* at 197.

¹⁰⁴ Consumer Rights Act, 2015, 63 Eliz. 2, c.3, available at http://www.legislation.gov.uk/ukpga/2015/15/pdfs/ukpga_20150015_en.pdf.

¹⁰⁵ *See id.*

¹⁰⁶ Unfair Terms in Consumer Contracts Regulations, 1999, S.I. 2083.

¹⁰⁷ Unfair Contract Terms Act, 1977, 25 Eliz. 2, c.50.

¹⁰⁸ Consumer Rights Act, 2015, 63 Eliz. 2, c.2.

¹⁰⁹ Consumer Protection, 2008, No. 1277, available at <http://www.legislation.gov.uk/uksi/2008/1277/made>.

¹¹⁰ Consumer Contracts Regulations 2013, THE LAW SOCIETY (2014), available at <http://www.lawsociety.org.uk/support-services/advice/practice-notes/consumer-contracts-regulations-2013/>.

¹¹¹ Unfair Contract Terms Act, 1977, 25 Eliz. 2, c.50, § 47.

Thus, the following type of clauses in a general consumer contract may be deemed unfair and, therefore, unenforceable:

1. legal terms such as “consequential” or “indirect” loss whose implications a lay man or a non-lawyer is unlikely to understand;
2. a clause providing unreasonably less number of days for allowing complaints or granting remedies;
3. a clause calling for customer to pay an unjustifiably high amount in compensation if he/she fails to fulfill a term in the contract.

All virtual worlds are subject to the above rules by virtue of being governed by End User License Agreements in respect of the synergies that are developed and maintained between the creators/publishers/owners and players/users/participants within these worlds. This means that a player/user/participant who can prove the legitimacy of their copyright ownership in an original expressive work can challenge the standard clauses in an End User License Agreement that asserts an involuntary assignment or licensing of content that is created by the players/users/participants within the virtual world, so long as he is doing so in the role of a consumer, for the purposes of enforcing consumer protection laws, rather than a user, for the purposes of copyright law. It is this integration of consumer laws with intellectual property laws that allows for a fighting chance against the user-(un)friendly effects of End User License Agreements.¹¹²

The above prospect becomes important and relevant because copyright law can be pre-empted by contract law, as the latter allows private parties to agree to whatever terms they mutually agree to. However, since the End User License Agreement is a contract of adhesion rather than one that is negotiated by both sides, once open to challenge on the grounds of being unfair, its alleged issues can be reduced and it can be made more favorable to players/users/participants.

In fact, the Directive 2011/83/EU¹¹³ specifically deals with digital content and with the issues that arise in its regulation. Article 5(g) and (h) and Article 6 (h) and (s) make binding of a consumer to a contract of sale dependent on certain specific information that has to be provided by the seller or trader and for digital content, this information is to include the details of functionality and interoperability of the content. However, even though the Directive itself gives precedence to other European Union acts thereby potentially reducing its own relevance, it is still a positive step towards an integrated owner/user paradigm within the intellectual property universe.¹¹⁴

F. Illustrative Cases

Although the United Kingdom courts have not had an opportunity to hear and decide a case specifically on virtual worlds and related copyright and contractual

¹¹² *Id.* at 205.

¹¹³ Council Directive 2011/83, art. 114, 2011 O.J. (L 304/64) 1. Laying down specific provisions on consumer rights.

¹¹⁴ Stazi and Marzetti, *supra* note 101, at 206.

issues, there have been a few cases in the United States on the aspect of an End User License Agreement that we have been discussing so far.

1. *Davidson & Associates v. Internet Gateway*

*Davidson & Associates v. Internet Gateway*¹¹⁵ was crucial in that it affirmed that End User License Agreements and Terms of Use contracts trumped copyright law and were not pre-empted by it because the contractual restriction created by End User License Agreements and Terms of Use contracts created rights that do not exist under copyright law and therefore cannot be preempted by copyright law.¹¹⁶

The case involved a fair use defense to the reverse engineering infringement claim by the plaintiff where the defense was accepted.¹¹⁷ But it was still established that an End User License Agreement “can functionally negate other legal considerations.”¹¹⁸ The United States District Court affirmed that End User License Agreements and Terms of Use contracts were enforceable even though a prohibition on reverse engineering would violate the fair use doctrine because even though reverse engineering as a fair use exception was an established copyright concept, “private parties were free to contractually forego the limited ability to reverse engineer a software product under the exemptions of the Copyright Act”.¹¹⁹ This case brought to the forefront the extent to which contractual terms can be used to overcome well-established intellectual property laws,¹²⁰ giving End User License Agreements their draconian reputation.

The following case is a perfect example of why consumer protection law should and how they can help in reducing the potential ill effects of End User License Agreements.

2. *Smallwood v. NCSOFT Corp.*

An excellent example of the above proposition is *Smallwood v. NCSOFT Corp.*¹²¹ where the courts showed how, even though the End User License Agreement was an effective way for creators/publishers/owners to “manage the risks”¹²² inherent in the licensing of virtual worlds for the purpose of their use by players/users/participants and to protect their own interests, the extent to which creators/publishers/owners can limit their liability through the End User License Agreement can be significantly curtailed by consumer protection laws.¹²³ In *Smallwood*, the creators/publishers/owners sought to rely on a clause in the End User License

¹¹⁵ *Davidson & Assocs., Inc. v. Internet Gateway, Inc.*, 334 F. Supp. 2d 1164 (E.D. Mo. 2004), *aff’d sub nom*, *Davidson & Assocs. v. Jung*, 422 F.3d 630 (8th Cir. 2005).

¹¹⁶ FESTINGER ET AL., *supra* note 61, at 94.

¹¹⁷ *Davidson & Assoc.*, 334 F. Supp. at 1181.

¹¹⁸ FESTINGER ET AL., *supra* note 61, at 93.

¹¹⁹ *Id.* at 94.

¹²⁰ *Id.* at 96.

¹²¹ *Smallwood v. NCSOFT Corp.*, 730 F.Supp.2d 1213 (D. Haw. 2010).

¹²² FESTINGER ET AL., *supra* note 61, at 178.

¹²³ *Id.*

Agreement limiting their liability to the subscription fees paid by the plaintiff but the court held that claims for gross negligence and fraud could not be excluded by contract.¹²⁴

3. *Bragg v. Linden Research Inc.*

In fact, the two examples that we have been following through in this article (Second Life and World of Warcraft) have also had their day in court in relation to the nature and extent of protection granted by the End User License Agreement. *Bragg v. Linden Research Inc.*,¹²⁵ although a decision of the Eastern District of Pennsylvania, a United States court, it has relevance to the issue of what rights and obligations arise out of the relationship between creators/publishers/owners of virtual worlds and the players/users/participants that inhabit it in the United Kingdom, as well.

The plaintiff in *Bragg* had acquired a large piece of land and paid for it in game currency, which was bought with real currency.¹²⁶ He alleged that the creators/publishers/owners had wrongfully confiscated his virtual property and unlawfully denied him access to Second Life even though the creators/publishers/owners recognized players'/users'/participants' intellectual property in the content that they created or otherwise owned in Second Life.¹²⁷ The court reviewed the Terms of Service that required the plaintiff's adherence in order to play/use/participate in Second Life and concluded that, when taken together, the lack of mutuality, the costs of arbitration, the forum selection clause and other provisions unilaterally enforced by the defendant made it impossible for the plaintiff to obtain effective resolution of a dispute as a player/user/participant.¹²⁸ Thus it is clear that while creators/publishers/owners can place a high level of dependence on a contract of adhesion such as an End User License Agreement, Term of Use, or Terms of Service in connection with most internet based consumer products, the extent to which courts will uphold such contracts is not without limit.

4. *MDY Industries v. Blizzard Entertainment and Vivendi Games Inc.*

In *MDY Industries v. Blizzard Entertainment and Vivendi Games Inc.*, the court held that for a software licensee's breach of a contract to amount to copyright infringement, there needs to be a strong connection between the breached condition in the contract and the licensor's exclusive rights of copyright.¹²⁹ The Ninth Circuit reversed the trial court's decision holding MDY liable for vicarious and contributory copyright infringement.¹³⁰

¹²⁴ *Id.* at 179; *NCSOFT Corp.*, 730 F.Supp.2d at 1227.

¹²⁵ *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593 (E.D. Pa. 2007).

¹²⁶ *Id.* at 597.

¹²⁷ SPARROW, *supra* note 3, at 112.

¹²⁸ *Id.* at 115.

¹²⁹ *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 940 (9th Cir. 2010), *as amended on denial of reh'g* (Feb. 17, 2011), *opinion amended and superseded on denial of reh'g* (9th Cir. Feb. 17, 2011).

¹³⁰ *Id.* at 941-42.

Blizzard Entertainment, is the creator/owner of World of Warcraft, an MMORPG where a player/user/participant controls characters and completes different types of tasks, including performing quests by creating weapons and avatars through the use of tools provided by the creator/publisher/owner. In the game, as players/users/participants succeed in these set tasks, their avatars acquire different talents and skills.

MDY Industries developed a computer software called Glider, which basically played the game for players/users/participants allowing their avatars to progress even though they are unattended.¹³¹ Blizzard claimed copyright infringement of its computer software including contributory copyright infringement, vicarious copyright infringement and violation of the Digital Millennium Copyright Act (“DMCA”).¹³² While the United Kingdom doesn’t have a law equivalent to the DMCA, the issues of copyright infringement arising out of contractual breach have relevance in the jurisdiction nonetheless. MDY Industries sought a declaratory judgment that the Glider program did not infringe Blizzard’s copyright.

The District Court found that players/users/participants have only a license to play/use/participate in the virtual world.¹³³ Their play/use/participation was controlled by the terms in the End User License Agreement and Terms of Service.¹³⁴ Since the prohibition on using software such a Glider would violate Blizzard’s copyright interest in World of Warcraft by virtue of the license, users of Glider infringed Blizzard’s copyright.¹³⁵ The court further held that MDY not only favored such violation of license terms but also commercially profited from this copyright infringement, and was therefore liable for secondary infringement.¹³⁶ On MDY Industries’ appeal, the Court of Appeals reversed the finding of contributory infringement on the ground that there was no nexus between the condition of the license and the exclusive copyright in order to give rise to a claim of copyright infringement.¹³⁷

This case is an unequivocal example of how the effects of an End User License Agreement can be limited using established legal principles creating the possibility that the entire agreement could be open to challenges not only on unfair terms relating to use but also ownership of user generated content.

Thus, while creators/publishers/owners “may rely on End User License Agreements as a powerful tool to limit liability and restrict the rights of players, the extent to which such agreements may be employed to achieve such ends is not without limits.”¹³⁸

¹³¹ *Id.* at 935.

¹³² *Id.* at 942.

¹³³ *Id.* at 941.

¹³⁴ *Id.*

¹³⁵ *Id.* at 958.

¹³⁶ SPARROW, *supra* note 3, at 117.

¹³⁷ *MDY Indus.*, 629 F.3d at 941-42.

¹³⁸ FESTINGER ET AL., *supra* note 61, at 179.

V. A VIA MEDIA BETWEEN PROTECTION AND POWER

The EULA is here to stay, but its boundaries continue to be left unresolved—especially within virtual space. While some suggest that the boundaries should be circumscribed within current intellectual property law, others suggest that the boundaries should extend to the full protection allowed by contract.¹³⁹

As we have seen, copyright law, on the one hand, does not protect creation through collaboration and modification of prior existing virtual objects and, on the other hand, controlling models of licensing structures (such as End User License Agreements) dealing with user based creations are vague as to the residual status of these creations leading, inevitably, to a plethora of “unclear rights and potentially infringing activities.”¹⁴⁰ In particular, not only does the law recognize the exclusive right of creators/publishers/owners to control their software, most vital part of their virtual worlds, it more often than not honors contractual arrangements drafted solely by these creators/publishers/owners thereby placing significant control of the player/user/participant experience in their hands.¹⁴¹

The Glider litigation¹⁴² revealed the abyss created by the juxtaposition of theoretical aims of copyright law on the practical approach of contract law to virtual worlds.¹⁴³ In particular, copyright law is supposed to promote monetary incentives so that authors are encouraged to create original expressive works and contract law is supposed to promote mutually beneficial bargains. But in *MDY Indus.*, despite being an original work of authorship, the Glider program was held to be infringing and despite being a potentially unenforceable unilateral contract of adhesion, the End User License Agreement was held to expose users of the virtual world to copyright infringement if they went beyond the scope of the license.¹⁴⁴

Thus, the linkage of copyright law with contractual rules needs to be looked at with extreme caution as it has the serious potential of permitting creators/publishers/owners exceptionally strong set of controls over user behavior¹⁴⁵ including the treatment of user generated content.

The End User License Agreement, which effectively requires the player/user/participant to give up all and any claim to any original expressive authorial work created by the player/user/participant in the course of their play, use, or participation first and foremost acknowledges that there is an exclusive right that is created in user generated content. However, it then goes on to unilaterally acquire rights in those works. This is an aspect of the contract that has come into the forefront of many heated debates in the recent past mainly because of the massive “shift from professionally created content to user or interactive and ‘user generated’ content.”¹⁴⁶

¹³⁹ Miller, *supra* note 1, at 469.

¹⁴⁰ Todd David Marcus, *Fostering Creativity In Virtual Worlds: Easing The Restrictiveness Of Copyright For User-Created Content*, 55 J. COPYRIGHT SOC'Y USA 469, 471 (2007–08).

¹⁴¹ LASTOWKA, *supra* note 23, at 179.

¹⁴² See SPARROW, *supra* note 3.

¹⁴³ LASTOWKA, *supra* note 23, at 182.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 183.

¹⁴⁶ *Id.* at 186.

Proponents of End User License Agreements have also suggested that the reason for the extreme nature of such agreements is to prevent the creators/publishers/owners of virtual worlds from inadvertently infringing on the copyright of players/users/participants while operating virtual worlds.¹⁴⁷ While this is an amicable way of looking at the exploitative nature of an End User License Agreement, it isn't the true motivation behind it. The true motivation behind the End User License Agreement's antagonistic approach is the golden rule that creators/publishers/owners insist adherence to (simply because they *can*), namely, 'don't try and make money off of it, although you can create as much content as you want.' End User License Agreements are acknowledged not to be perfect but to say that they are about creation and invention, just the way virtual worlds are about these elements¹⁴⁸, is in the view of this author, treading slightly beyond reasonable interpretation.

In fact, in our example of World of Warcraft, after *MDY Indus.*, Blizzard started to compel players/users/participants who produce user generated content and want to profit from such creations to obtain a copyright license from Blizzard thereby avoiding the entire issue of having an entity or individual's legal right to profit from their creation (based on an existing work) to be legitimately and independently recognized.¹⁴⁹

It would appear that in order for a virtual world to be fair and to honor legal doctrines accepted and implemented in most jurisdictions, there needs to be compatibility between what is protectable and what has the power to protect it and to what extent. First, contract law should not be permitted to ignore laws of copyright and deprive rightful owners their copyright—especially since contracts used in the governance of virtual worlds are vague contracts of adhesion—and play/use/participation should not be made dependent on a non-negotiated transfer of interest in the content created in the course of this play/use/participation—especially since this requirement inherently acknowledges the ownership of copyright by players/users/participants.¹⁵⁰ Second, the extent to which contract law is empowered to effectively mediate the creation of copyrightable works needs to be addressed seriously – be it in the form of an estoppel placed on the nature of contracts or the additional consumer protections made available to players/users/participants within respective jurisdictions—in order to allow copyright to continue to foster creativity¹⁵¹ by “expanding access to creative works.”¹⁵²

In other words, the issue that needs addressing is that although the rules that control virtual worlds are not recognized as laws under legal doctrines, since they are set using these doctrines (be they contract law, intellectual property laws, property laws etc.) they effectively legitimize acts done under their control: even acts that would, in the absence of these one-sided rules, provide greater freedom to players/users/participants—which, it appears, can only be done by harmonizing the theoretical aims of copyright law and practical implications of contract law.¹⁵³

¹⁴⁷ *Id.* at 187.

¹⁴⁸ Dibbell, *supra* note 72, at 145.

¹⁴⁹ LASTOWKA, *supra* note 23, at 191.

¹⁵⁰ Miller, *supra* note 1, at 470.

¹⁵¹ *Id.*

¹⁵² Stazi and Marzetti, *supra* note 101, at 197.

¹⁵³ LASTOWKA, *supra* note 23, at 195.

VI. CONCLUSION

The interactive entertainment industry has seen a volte-face evolution over the years, moving from traditional board games to electronic games to console games to home television video games to online games to interactive online games now to, what is termed as, 'augmented reality' games like the latest Pokémon Go game that has taken the United States and the United Kingdom by storm.¹⁵⁴ Given that this evolution is further accelerated by fast paced developments in technology, the issue of controlling user generated content through the current licensing regimes needs to be examined and adjusted.

One wonders if the best way to do so would be to ask if *we*, as creators and authors in virtual world environments, can justify taking the reins from the creators/publishers/owners, in relation to the content created by *us*, under principles of consumer protection and unfair contract terms?

The above notwithstanding, it is clear that if the digital age is to continue to evolve and grow, it is imperative that the balance of protection and power in relation to user generated content, between owners and users, accorded by copyright law but controlled by contracts of adhesion is appropriately realigned¹⁵⁵ by integrating copyright laws with consumer laws to defend against the End User License Agreement.¹⁵⁶

¹⁵⁴ Kalev Leetaru, *How Pokémon And Location-Based Augmented Reality Could Save The Planet*, FORBES, (July 30, 2016), <http://www.forbes.com/sites/kalevleetaru/2016/07/30/how-pokemon-and-location-based-augmented-reality-could-save-the-planet/#19c2272b66cc> (last visited Aug. 1, 2016).

¹⁵⁵ LASTOWKA, *supra* note 23, at 195.

¹⁵⁶ See Stazi and Marzetti, *supra* note 101.