

COMMENT

REGULATING VIRTUAL PROPERTY WITH EULAS

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INTRODUCTION

Online games like *World of Warcraft* and *Second Life* are intensely successful products that have changed the face of modern entertainment. Part of their appeal is that they are as much social networks as video games: players create online identities (or avatars) to complete quests, collect items, and interact with other avatars in a fully realized digital world. As such, a large share of their value to prospective gamers comes from what other users are doing.¹ In

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1. One only has to look to failed games of this genre with huge budgets and familiar licenses to see how easy it is for games dependent on an online user-base to be relegated to history. See, e.g., Neil Herndon, *The Resounding Whimper of the ‘Elder Scrolls Online’ Release*, FORBES (July 20, 2015, 9:32 AM), <http://www.forbes.com/sites/archenemy/2015/07/20/the-resounding-whimper-of-the-elder-scrolls-online-release/> (discussing the slow start of a game based in the popular *Elder Scrolls* universe); Matt Purslow, *Marvel Heroes: How Gazillion Reversed the Fate of their Comic Book MMO*, PCGAMESN (Apr. 3, 2015), <http://www.pcgamesn.com/marvel-heroes-2015/marvel-heroes-how-gazillion-reversed-the-fate-of-their-comic-book-mmo> (explaining how the online game based on Marvel Comics characters—perhaps the hottest license around—reversed its disastrous launch by focusing more on its community).

addition, these games often host online markets where players can buy items, land, and even characters from one another using virtual currency (which can be exchanged for real money). Contracts between the user and the publisher, called end-user license agreements (EULAs), control these online interactions—and entire virtual worlds. Players must agree to a given game’s EULA before starting the game.

This comment argues that EULAs, which purport to control all facets of the user’s in-game experience, are a poor shield for users of these alternate realities—especially in situations where players have large monetary investments. Part I explores the property interests at stake in these massively multiplayer online role-playing games (MMORPGs) by looking at *World of Warcraft*, specifically. Part II then explores issues that have arisen with the *World of Warcraft* and other EULAs in terms of who they bind, what they allow software developers to do to users who exploit flaws in programming, and what they regulate. Finally, Part III questions whether these agreements are enforceable contracts and whether contract law is the appropriate mechanism for regulating virtual property by exploring the alternative enforcement mechanisms of property law, consumer protection law, and criminal law.

I. THE VIRTUAL PROPERTY AT STAKE IN MMORPGS

Since its release in 2004, the MMORPG *World of Warcraft* has become one of the most popular video games of all time, with more than one hundred million unique users by 2014.² Over the last forty years, playing video games has become more complicated than inserting a quarter into a machine, and this is especially true with MMORPGs like *World of Warcraft*. In addition to buying the game, users must pay a monthly subscription fee.³ But there is also a separate economy that exists in the game wherein players can exchange real money with other players for better items and characters.⁴ Most MMORPGs prohibit the exchange of real money for in-game currency or items (*Second Life*, mentioned below, is an important exception), but

2. In addition, over 500 million characters had been created, significantly more than the approximately 316 million people living in the United States at the time. Blizzard Entertainment, *World of Warcraft: Azeroth by the Numbers*, WORLD WARCRAFT (Jan. 28, 2014), <http://us.battle.net/wow/en/blog/12346804>.

3. See *Subscription*, WORLD WARCRAFT, <https://us.battle.net/shop/en/product/world-of-warcraft-subscription> (last visited Apr. 5, 2016); *World of Warcraft*, WORLD WARCRAFT, <https://us.battle.net/shop/en/product/world-of-warcraft> (last visited Apr. 5, 2016).

4. Danny Vincent, *China Used Prisoners in Lucrative Internet Gaming Work*, GUARDIAN (May 25, 2011, 14:49 EDT), <http://gu.com/p/2pbtz/stw>.

this has done little to discourage a secondary market that nearly one-quarter of all users rely upon for what has become a \$1 billion-per-year economy.⁵

This is apparently a lucrative enough side-industry to have led to the creation of a practice known as “gold farming,” where the tedious in-game activities one must perform to obtain special items or characters are outsourced to developing countries (including to Chinese labor camps).⁶ Blizzard Entertainment—the creator and developer of *World of Warcraft*—has started to report these farmers to money transfer sites like PayPal for intellectual property violations.⁷ In at least one case, a *World of Warcraft* player sued a company responsible for “gold farming” on the theory that the influx of players merely going through the motions to farm gold and items was greatly harming the social aspect of the game (and thus reducing the value of his investment in the game).⁸ That case was resolved by an unsatisfying settlement: Internet Gaming Entertainment agreed to stop selling *World of Warcraft* items and currency for five years, but the business was purchased by a rival gold-farming outfit shortly after the deadline to add new parties had expired (and thus the restriction had no practical effects).⁹

II. THE END-USER LICENSE AGREEMENT

A. Minor Parties

A EULA governs both the subscription to the game and the in-game economy, and all users who register through Battle.net (the platform that makes online play of Blizzard’s games possible) are assumed to have read the document and agreed to its terms. Accounts may only be established by adults, and parents are responsible for all uses of the account by their children.

5. Brett Burns, Comment, *Level 85 Rogue: When Virtual Theft Merits Criminal Penalties*, 80 UMKC L. Rev. 831, 836 (2012); Christopher J. Cifrino, Note, *Virtual Property, Virtual Rights: Why Contract Law, Not Property Law, Must Be the Governing Paradigm in the Law of Virtual Worlds*, 55 B.C. L. Rev. 235, 242 (2014). Developers have a strong interest in curtailing the trade in secondary markets because fraud in these markets affects the product’s reputation and provides no benefits to the development company itself. Rónán Kennedy, *Law in Virtual Worlds*, J. INTERNET L., Apr. 2009, at 3, 7.

6. Vincent, *supra* note 4.

7. Burns, *supra* note 5, at 838.

8. Kennedy, *supra* note 5, at 4–5.

9. *Case Analysis: Hernandez v. IGE, PATENT ARCADE* (July 9, 2009, 2:04 PM), <http://www.patentarcade.com/2009/07/case-analysis-hernandez-v-ige.html>.

This relieves Blizzard Entertainment from the perils of entering into contracts with minor parties, but it also serves a secondary purpose. Starting as late as the 1980s, some in the federal government have been trying to limit access by minors to overly violent or sexualized media. The move to place warnings on music was spearheaded by Tipper Gore and was ultimately successful.¹⁰ Similar campaigns led to more specific warnings on movies and television shows. The move to label videogames was several years behind other media but was galvanized by games like 1992's *Mortal Kombat*, in which players could disembowel opponents through "finishing moves" at the end of games.¹¹ The Entertainment Software Rating Board, established in 1994, organized games according to six different categories corresponding with how appropriate they were for certain age groups.¹² While these labelling systems quelled the concerns of some parents and politicians, they were largely unenforceable, and children are still able to purchase and enjoy inappropriate music, movies, and games with little more than a wink and a nod from vendors.¹³ With the rise of online streaming, anyone with internet access can simply download almost anything imaginable. Blizzard's agreement, however (representative of most EULAs for such games), imposes an affirmative duty on parents to monitor their children's use of the software.¹⁴

B. "Cheating" the System

In the real world, of course, EULAs that gamers agree to before playing an MMORPG are given about as much attention as the ratings on the games. Unlike the ratings, however, ignoring the EULA carries serious ramifications. A license to play *World of Warcraft* can be revoked if its terms are not adhered to, which results in the forfeiture of the money spent in-game and on unused subscription time.¹⁵ The license

10. Robert Siegel, *Tipper Gore and Family Values*, NPR (Jan. 11, 2005, 12:00 AM), <http://www.npr.org/templates/story/story.php?storyId=4279560>.

11. See MetCout, *Mortal Kombat 1 All Fatalities*, YOUTUBE (Feb. 18, 2012), <https://youtu.be/Pf1K81Afnw>.

12. See *About ESRB*, ESRB, <http://www.esrb.org/about/> (last visited Apr. 8, 2016); *ESRB Ratings Guide*, ESRB, https://www.esrb.org/ratings/ratings_guide.aspx (last visited Apr. 8, 2016).

13. See Brett Molina, *Bill Seeks Stricter Enforcement of Video Game Ratings*, USA TODAY (Jan. 18, 2013, 9:34 AM), <http://usat.ly/105weXR>; see also *Enforcement*, ESRB, <https://www.esrb.org/ratings/enforcement.aspx> (last visited Apr. 8, 2016).

14. *Battle.net® End User License Agreement*, BLIZZARD ENT., <http://us.blizzard.com/en-us/company/legal/eula> (last updated Feb. 28, 2015) [hereinafter *Blizzard EULA*].

15. *Id.*

will also be revoked if amendments to the EULA—which Blizzard can make at any time—are not accepted by the user.¹⁶ Playing the game with external cheating programs can lead to the revocation of a license.¹⁷ Even without these cheating programs, accounts can be revoked if a player is accused of exploiting design flaws in the game, and Blizzard has the sole discretion in making these determinations.¹⁸ This is different from how games on consoles and in arcades used to be played, where players actively tried to find these design flaws or “bugs” to enhance the experience of playing.¹⁹

The difference seems to be the deliberate, *coded* scarcity of land and items in the MMORPG, which creates an in-game demand (and the aforementioned real-world markets). Another program, *Second Life*, “has no objective in and of itself” and sells itself as more of an experience than a game.²⁰ Despite the developers’ contention that “[t]here is no manufactured conflict,” however, items and currency are subject to market fluctuations.²¹

It was this economy that led to two of the most important decisions up to this point on virtual worlds. In *Bragg v. Linden Research, Inc.*,²² Linden Research (the company that created and maintains *Second Life*) seized the digital assets of one user after he discovered a glitch in their land auction system that allowed him to buy land at a steep discount.²³ Marc Bragg, the user, sued, and Linden moved to compel arbitration in accordance with the EULA he had signed.²⁴ Legal observers anticipated a ruling on the status of digital property (and whether users could *own* “real” or “personal” property that solely existed in a company

16. *Id.*

17. *Id.*

18. *Id.*

19. See *Glitchipedia*, WIKIA, http://errors.wikia.com/wiki/Main_Page (last visited Apr. 8, 2016) (“This wiki is devoted to video game glitches and application glitches, as well as debunking mythical ‘glitches’ that obviously don’t work.”).

20. Yen-Shyang Tseng, Note, *Governing Virtual Worlds: Interaction 2.0*, 35 WASH. U. J.L. & POL’Y 547, 554 (2011); see also *The Office: Local Ad* (NBC television broadcast Oct. 25, 2007) (“*Second Life* is not a game. It is a multi-user virtual environment. It doesn’t have points or scores. It doesn’t have winners or losers. . . . I signed up for *Second Life* about a year ago. Back then, my life was so great that I literally wanted a second one. In my second life, I was also a paper salesman, and I was also named Dwight. Absolutely everything was the same, except I could fly.”).

21. Kristin Kalning, *If Second Life Isn’t a Game, What is It?*, NBCNEWS.COM (Mar. 12, 2007, 5:54 PM), http://www.nbcnews.com/id/17538999/ns/technology_and_science-games/t/if-second-life-isnt-game-what-it/; see also L.J. KUTTEN & FREDERIC M. WILF, 4 COMPUTER SOFTWARE § 20:21 (2015).

22. 487 F. Supp. 2d 593 (E.D. Pa. 2007).

23. Tseng, *supra* note 20, at 558.

24. *Id.* at 558–59.

server).²⁵ This never came about, however, because the court held, “Taken together, the lack of mutuality, the costs of arbitration, the forum selection clause, and the confidentiality provision that Linden unilaterally impose[d] through the TOS [Terms of Service] demonstrate[d] . . . a one-sided means which tilt[ed] unfairly, in almost all regards, in Linden’s favor.”²⁶ All of this was enough to qualify the EULA as a contract of adhesion, rendering it procedurally unconscionable under California law (which the court applied pursuant to another section of the EULA).²⁷

Destined for a courtroom—and perhaps worried about creating adverse precedent—Linden settled the case before the issue of whether Bragg had rights in the property could go to trial.²⁸ Linden rewrote the offending parts of their EULA, and it was these new terms that went in front of the same court in the Eastern District of Pennsylvania in *Evans v. Linden Research, Inc.*²⁹ In this case, the court ruled that the new arbitration clause was not unreasonable or unconscionable because it only applied to claims of less than \$10,000 and did not need to be conducted in California, which could put prospective plaintiffs at a huge financial disadvantage.³⁰

C. Who Owns In-Game Property Under the EULA?

The EULA also regulates the in-game economy. Under the *World of Warcraft* EULA, Blizzard reserves the right to set minimum transaction prices for items³¹ and caps the maximum value users can store in their wallets to \$250 U.S.³² This latter restriction increases the movement of currency throughout the economy in the fictional world of Azeroth and prevents stockpiling. This is especially clear given that the limit on transactions in a single day is much higher: \$2,000.³³ In addition, Blizzard owns all content produced in the game or uploaded to the game.³⁴ This last clause is a critical blow to the concept of property

25. *Id.* at 559 n.67.

26. *Bragg*, 487 F. Supp. 2d at 611.

27. *Id.* at 605–06 (“A contract of adhesion . . . is a ‘standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.’” (quoting *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1172 (N.D. Cal. 2002))).

28. Kennedy, *supra* note 5, at 6.

29. 763 F. Supp. 2d 735 (E.D. Pa. 2011).

30. *Id.* at 740–42.

31. *Blizzard EULA*, *supra* note 14.

32. *Id.*

33. *Id.*

34. *Id.*

rights to items in-game, which can take hours of effort or hundreds of dollars to obtain.³⁵ By signing the EULA, players agree to forfeit property rights to any and all items and characters in the game.³⁶ This is different in *Second Life*, where players own anything they create in the game world, which allows them to run in-game businesses selling, for example, home furnishings and articles of clothing.³⁷ Central to *Second Life* is the ability to buy and sell “real” property, all the while paying rents to Linden Research.³⁸

Developers have a strong interest in keeping the question of ownership as abstract as possible. If a user’s interest in a house in *Second Life* or a sword in *World of Warcraft* is tangible, the developer may have a duty to preserve their servers, where this information is stored.³⁹ In addition, once a game is replaced by a sequel or is no longer profitable to maintain, companies could be legally hamstrung and left to decide whether maintaining an empty virtual world or facing barrages of lawsuits would cost them less money.⁴⁰ Brett Burns, addressing this concern, compares joining these communities to buying shares of a company.⁴¹ Companies go bankrupt or make decisions that send stock prices tumbling, just as developers should be able to “pull the plug” on unprofitable or outdated games.⁴² Finally, John William Nelson worries that allowing property law to intrude upon virtual worlds would “wip[e] away the escapism and bring[gamers] back to reality,” essentially destroying all of the benefits of an immersive fantasy experience.⁴³ This perspective potentially errs in ignoring the perceived social cachet that items or high-level characters can have. While it is true that some gamers may be joining these MMORPGS to

35. See *supra* Part I.

36. Burns, *supra* note 5, at 839 (“While the primary purpose of this portion of the EULA appears to be the protection of Blizzard’s intellectual property rights, the inclusion of the phrase ‘ownership rights’ and the mention of ‘character inventories’ indicate that Blizzard is also concerned with maintaining property rights of a non-intellectual variety over the items in question.”).

37. Kennedy, *supra* note 5, at 6–7.

38. *Id.*

39. Cifrino, *supra* note 5, at 257.

40. *Id.* at 257–58. For an example of a largely abandoned MMO that is still being hosted, see Patricia Hernandez, *YouTuber’s Journey into Abandoned MMO Is Creepypasta Material*, KOTAKU (Mar. 16, 2016, 11:50 AM), <http://kotaku.com/youtubers-journey-into-abandoned-mmo-is-creepypasta-mat-1767500088>.

41. See Burns, *supra* note 5, at 844–45.

42. *Id.* (quoting Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047, 1098 (2005))

43. John William Nelson, *The Virtual Property Problem: What Property Rights in Virtual Resources Might Look Like, How They Might Work, and Why They Are a Bad Idea*, 41 MCGEORGE L. REV. 281, 309 (2010).

experience a different reality, the sense of accomplishment that accompanies the acquisition of rare items or the development of powerful characters surely affects the psyche of the user and protecting these accomplishments with property law would not diminish that.

Finally, Blizzard's grip on *World of Warcraft* extends past in-game transactions. The EULA grants gamers the right to organize small community tournaments but caps the total possible prize at \$10,000.⁴⁴ In addition, Blizzard forbids any sponsorship of these tournaments by companies in industries that it feels could be detrimental to its brand, including "[p]ornography (or extremely mature materials); alcohol; tobacco; firearms; competitive online computer games; gambling websites; or any company that is detrimental to Blizzard's business (hacking, gold services, account selling, key sellers)."⁴⁵ Among these are "account sellers," reflecting the company's policy that accounts are permanently tied to their original owners.⁴⁶

III. ARE EULAS THE BEST TOOL FOR REGULATING VIRTUAL WORLDS AND VIRTUAL PROPERTY?

A. Is the EULA an Enforceable Contract?

There has been substantial debate over whether EULAs are enforceable contracts. In the influential 1996 case *ProCD, Inc. v. Zeidenberg*⁴⁷ from the Seventh Circuit, Judge Easterbrook ruled that a "shrinkwrap license" was enough to satisfy section 2-204(1) of the Uniform Commercial Code (UCC) and that giving the purchaser the option to accept the contract or return the product was sufficient.⁴⁸ Similarly, Blizzard's EULA features a limited ninety-day express warranty, under which users who do not agree to the terms of the licensing agreement can receive a full refund.⁴⁹ *ProCD* is almost twenty years old, and a reading of the case today betrays its age.⁵⁰ Despite this, the ruling has been regularly applied to so-called clickwrap EULAs, which users do not have the opportunity to review before buying the

44. *Blizzard EULA*, *supra* note 14.

45. *Id.*

46. *Id.*

47. 86 F.3d 1447 (7th Cir. 1996).

48. *Id.* at 1452-53.

49. *Blizzard EULA*, *supra* note 14.

50. In the facts of that case, Judge Easterbrook describes a product that would not serve much of a use in today's world of near-universal internet connectivity and defines at least one foreign term: the CD-ROM. *ProCD*, 86 F.3d at 1449.

software.⁵¹ Exceptions exist, but EULAs are generally upheld unless the terms of the contract are unconscionable.⁵²

Some have argued that the EULAs for these online games are contracts of adhesion and thus unconscionable, however. This was the court's ruling in the *Second Life Bragg* case above,⁵³ and the prongs for both procedural and substantive unconscionability under section 2-302 of the UCC may be met by the *World of Warcraft* EULA, as well.⁵⁴ *World of Warcraft* EULAs are signed without the ability to negotiate terms, which are almost always weighted heavily in favor of Blizzard.⁵⁵ The *World of Warcraft* EULA, for example, limits liability, restricts damages to "the total fees paid . . . during the six (6) months prior to . . . making a claim,"⁵⁶ and applies the favorable laws of the State of Delaware.⁵⁷ Given that Blizzard has set the cap for money that can circulate through an account in *one day* to more than twenty-two times the limitation on its own liability, this limit seems extremely small.⁵⁸ Finally, Blizzard's "Dispute Resolution Policy" in the EULA simply takes the user to a different site,⁵⁹ which outlines its arbitration policy.⁶⁰

51. Stephen McIntyre, *Game Over for First Sale*, 29 BERKELEY TECH. L.J. 1, 16-19 (2014); Cifrino, *supra* note 5, at 244.

52. For cases holding EULAs unconscionable, see, for example, *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 32-33 (2d Cir. 2002), in which then-Judge Sotomayor held that *ProCD* and similar cases did not apply to EULAs that were inconspicuously displayed once and forced users to arbitrate any claims, and *Bragg*, *see supra* notes 22-27 and accompanying text.

53. *See supra* notes 22-27 and accompanying text.

54. Burns, *supra* note 5, at 843 n.96 ("Procedural unconscionability generally concerns the absence of meaningful choice or bargaining power on the part of one party, while substantive unconscionability concerns the existence of contract terms which unreasonably favor one party." (quoting Erez Reuveni, *On Virtual Worlds: Copyright and Contract Law at the Dawn of the Virtual Age*, 82 IND. L.J. 261, 300 (2007))).

55. *Id.* at 843-44.

56. *Blizzard EULA*, *supra* note 14. Six months' worth of subscription fees is currently \$77.94 to \$89.94, depending on payment method and frequency. *See Subscription*, *supra* note 3. The EULA also says, "Because some jurisdictions do not allow the exclusion or limitation of consequential or incidental damages, Blizzard's liability shall be limited to the fullest extent permitted by law." *Blizzard EULA*, *supra* note 14.

57. *Blizzard EULA*, *supra* note 14. The EULA acknowledges that different laws might apply to Canadian residents, but says, "Such laws shall affect this Agreement only to the extent required by such jurisdiction. If such laws apply, the terms and conditions of this Agreement shall be given their maximum effect." *Id.*

58. *See supra* note 33 and accompanying text.

59. *Blizzard EULA*, *supra* note 14.

60. *Blizzard Entertainment Dispute Resolution Policy*, BLIZZARD ENT., <http://us.blizzard.com/en-us/company/legal/dispute-resolution-policy.html> (last updated May 19, 2015).

This document was last revised on May 19, 2015 and appears subject to change at any time.⁶¹ Like the revised arbitration policy in *Evans*,⁶² Blizzard's policy gives aggrieved parties the option of conducting the arbitration online or over the phone and goes further to allow the arbitration to take place in the user's home county within the United States.⁶³

B. Justifications for Using Contract Law over Property Law

As cases of theft of land and property in virtual universes increase, many have started to ask whether the law or the developers—the creators of these virtual worlds—have any responsibility to protect digital property.⁶⁴ Despite the shortcoming mentioned above, some have argued that EULAs are the appropriate mechanism to regulate digital worlds—while also underestimating their potential for abuse.⁶⁵ In addition, justifications for choosing contract law over property law ignore several realities of online games. Arguing that Lockean labor theory shifts the control of property completely toward developers or makes property law inapplicable ignores the reality that any MMORPG fails instantly without a community willing to invest its time and labor in the game.⁶⁶ *World of Warcraft* has enjoyed such lasting success while other products with better potential gameplay or graphics have fallen into the dust heap because of the strong community associated with the game.

Precedent would also seem to support using the in-game code and the EULA to handle disputes and the violation of these terms as a copyright violation.⁶⁷ Where rules of a game exist, they seem to preempt the “default” standards for the world outside of the game.⁶⁸ This is apparent in several early-twentieth-century criminal cases

61. *Id.*

62. *See supra* notes 29–30 and accompanying text.

63. *Blizzard Entertainment Dispute Resolution Policy, supra* note 60.

64. For an excellent overview of recent real and fictional cases of digital theft and some discussion of existing mechanisms to combat these thefts, see Burns, *supra* note 5, at 833–34.

65. *E.g.*, Cifrino, *supra* note 5.

66. *Id.* at 252.

67. This cause of action is premised upon the fact that most of these programs require the installation of software in order to play, and the copyright violation comes from using this software without following the terms of the EULA. *See* Nicolas Suzor, *Order Supported by Law: The Enforcement of Rules in Online Communities*, 63 *MERCER L. REV.* 523, 568–69 (2012).

68. *See* Orin S. Kerr, *Criminal Law in Virtual Worlds*, 2008 *U. CHI. LEGAL F.* 415, 419.

arising from card games in Texas, during which cheating was alleged.⁶⁹ In these cases, the defendants, “[w]hen charged with robbery or theft, . . . argued that the money belonged to them and therefore they had committed no crime. . . . [T]he courts always deferred to the announced rules of the game to determine who owned what.”⁷⁰

What about using contracts at the point of trade to ensure legitimacy? Timothy Lee Meyer has suggested a system whereby users would trade items through a third-party escrow backed by the game developer.⁷¹ In this format, two users would agree to an exchange of items or currency, review the terms of a digital contract, accept the terms of the contract, and send the items to the developer’s escrow, which would confirm compliance with the terms of the agreement and then distribute the agreed-upon items or currency to their new owners.⁷² This system would go a long way towards legitimizing these virtual markets while removing some of the uncertainty in direct peer-to-peer trading. This system has some flaws as well, however, as it still seems premised on the idea that users have any interest in reading the terms of any agreements that appear on their screens. In addition, consolidating items and currency on a global escrow account could invite greater and more focused cybersecurity risks.

Finally, some have argued that allowing contract law to dictate the terms of ownership allows the market to control the landscape: if the terms are perceived as unfair, the community will abandon the product.⁷³ This market-based control of EULAs ignores several realities of online gaming. First, many of the people playing are legal minors or otherwise unable to determine if the EULA they just clicked through was a fair agreement. Second, players who have invested many hours of time in a game are unlikely to abandon it simply because the EULA has been amended in a way with which they disagree. Finally, “[m]arkets often are not efficient, market actors are not always rational, and market actors have relatively little bargaining power.”⁷⁴

69. *Id.* at 419–21.

70. *Id.* at 420.

71. Timothy Lee Meyer, *A Study on Trading Scams in Massively Multiplayer Online Role-Playing Games and Risk Mitigation Techniques* 22 (2011) (unpublished M.S. thesis, Iowa State University), available at <http://lib.dr.iastate.edu/etd/10051/>.

72. *Id.* at 23.

73. See Julian Dibbell, *Owned! Intellectual Property in the Age of eBayers, Gold Farmers, and Other Enemies of the Virtual State*, in *THE STATE OF PLAY: LAW, GAMES, AND VIRTUAL WORLDS* 137 (Jack M. Balkin & Beth Simone Noveck eds., 2006).

74. Paul Riley, Note, *Litigating Second Life Land Disputes: A Consumer Protection Approach*, 19 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 877, 883–84 (2009).

C. Consumer Protection Laws

In the face of this inherent inequality, some have urged the United States to follow the lead of other countries and classify MMORPG gamers as consumers subject to consumer protection laws.⁷⁵ Consumer protection laws reflect legislative awareness of the fact that some parties have unequal bargaining power or access to information, which seems to be the case with online-gaming EULAs.⁷⁶ In South Korea, a country for which gaming (or “e-sports”) has been called the “national pastime,”⁷⁷ the courts lean heavily on consumer protection laws to allow suits against game designers for failing to prevent thefts, and authorities arrested over ten thousand teenagers in one year for the theft of virtual property.⁷⁸

What happens when the developers decide not to protect their users and the law stands idly by? In 2006, a player of the *Eve Online* MMORPG opened a bank that promised great rates of return in digital currency for its users.⁷⁹ The bank initially did pay off but eventually collapsed, as Ponzi schemes tend to do, leaving its creator with a windfall of virtual currency worth almost \$100,000.⁸⁰ The developers of the game refused to intervene to punish the user running the scam or to help defrauded users get their money back, claiming that the sham banker abided by the terms of the EULA and was thus untouchable (even though evidence existed that the EULA specifically prohibited these types of schemes).⁸¹ Applying consumer protection laws to this rapidly growing industry could prevent these kinds of scams from occurring in the future.

D. Criminal Law

Finally, a brief mention of criminal remedies is appropriate. Since 2012, the Netherlands has promised to punish virtual theft in the same manner and under the same laws as physical theft, but the legal premise for this is shaky.⁸² Applying criminal penalties to the theft of digital property would be impossible under a regime that did not recognize the player’s ability to own the property in the first place; no crimes would

75. *Id.* at 883–85.

76. *Id.*

77. Paul Mozur, *For South Korea, E-Sports Is National Pastime*, N.Y. TIMES (Oct. 19, 2014), <http://nyti.ms/1qUi2P4>.

78. Burns, *supra* note 5, at 846.

79. KUTTEN & WILF, *supra* note 21, § 20:19.

80. *Id.*

81. *Id.*

82. Burns, *supra* note 5, at 848–50.

be committed unless physical servers or hard drives that stored the property were actually stolen.⁸³

The one certainty about virtual worlds is that they are still growing in popularity and making more and more money for the development companies that produce them.⁸⁴ In light of this increasing significance and the inevitability of future lawsuits, it seems almost certain that the law will be shifting away from the *caveat emptor* environment that users now face to a more closely regulated experience.

CONCLUSION

End-user license agreements only ever rise to the level of mild annoyances for most. When rights a customer assumed she had—like the right to sue over a faulty product or the right to prove that she owns her account—vanish in the face of a EULA she agreed to without a second thought, however, these click-through irritants can have grim consequences. For better or worse, communities like *World of Warcraft*'s Azeroth are places where individuals can and do invest a lot of time and real money in furtherance of digital “second” lives. It is unrealistic to rely on developers to police their user-bases alone, particularly in situations where a lot of money is involved, if the only ramifications are second-hand market impacts. Therefore, statutory recognition of gamers as a class of protected consumer may be necessary to safeguard these investments.

83. *Id.* at 839–40.

84. *See supra* Part I.