

THE RIGHT TO PLAY

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I. INTRODUCTION

The virtual worlds now emerging on the Internet manifest themselves with two faces: one invoking fantasy and play, the other merely extending day-to-day existence into a more entertaining circumstance. In this Paper, I argue that the latter aspect of virtual worlds has begun to dominate the former, and will continue to do so, blurring and eventually erasing the “magic circle” that, to now, has allowed these places to render unique and valuable services to their users. Virtual worlds represent a new technology that allows deeper and richer access to the mental states invoked by play, fantasy, myth, and saga. These mental states have immense intrinsic value to the human person, and therefore any threats to the magic circle are also threats to a person’s well-being. The magic circle warrants protection by some means, one of which might be the law. In the past, the law has shown itself to be congenial to the erection of magic circles and fantasy creations, and vigorous in their defense. For example, the corporation is defined in law as a fictional person, and is a fantasy that has indeed been vigorously defended by courts and lawmakers.

Section I of this Article describes the precedent of incorporation as fictional personhood. Section II describes the current ambiguous legal status of virtual worlds as part game, part not-game. In Section III, I argue that while the line between game and not-game has become increasingly difficult to draw, it is increasingly important that we do so. Section IV analyzes efforts to draw the line under current contract law, through End User Licensing Agree-

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ments (“EULA”), and illustrates why these efforts are likely to fail. The essence of the argument is that the play-status of a virtual world is a common property resource, and is therefore subject to long-run erosion effects (the “Tragedy of the Commons”). Section V explicitly proposes the notion of a right to access the common property resources of play in virtual worlds, and describes law that would instantiate that right. Section VI discusses some of the changes in virtual world management that such a law would require, and some of the legal and policy implications it would have. Section VII concludes that an explicit body of law that identifies and defines a play space is necessary in order to preserve the benefits that closed worlds provide to human beings.

II. PRECEDENT: INCORPORATION

INCORPORATE: f. late L. *incorporat-*, ppl. stem of *incorporare* to embody, include, f. *in-* + *corporare* to form into a body

The merchant companies of the early seventeenth century were formed to impose trade monopolies. A charter of the Dutch West India Company from 1621 stated the following:

We have, therefore, and for several other important reasons and considerations as thereunto moving, with mature deliberation of counsel, and for highly necessary causes, found it good, that the navigation, trade, and commerce, in the parts of the West-Indies, and Africa, and other places hereafter described, should not henceforth be carried on any otherwise than by the common united strength of the merchants and inhabitants of these countries; and for that end there shall be erected one General Company, which we out of special regard to their common well-being, and to keep and preserve the inhabitants of those places in good trade and welfare, will maintain and strengthen with our Help, Favour and assistance as far as the present state and condition of this Country will admit.¹

There is no visible reference here to the concept of embodiment; no effort to persuade the reader that the new organization is

1. Charter of the Dutch West India Company, June 3, 1621.

a fictional person. Over time, the early companies became known by the term *corporation*. The Old English Dictionary reveals that the first use of the word in this sense was by one Mr. John Speed in his *History of Great Britain*, 1611: “If there be any, bee hee priuate person, or be he corporation.”² Speed apparently felt that these entities that were able to enter contracts in their own name and to swallow all liability for their own actions, were best thought of as *people*. Virtual people perhaps, but people nonetheless, things whose pronoun was properly “he,” not “them” or “it.”

These incorporated fictional persons were invented by governmental fiat, by declaration of authorities under existing law. Fictional personhood did not just emerge, it was a new power asserted by governments. Once this power was accepted, it became subject to scrutiny, delineation, and due process. Today, all states and countries have a detailed set of laws regulating just who may become an incorporated fictional person.³

Why did incorporation happen? What motivated its appearance as something a state could recognize? Largely, it was just a better way of doing business; by keeping financial responsibility quarantined inside the companies, the state freed individuals to invest without fear of complete ruin. If I loan money to Smith for a trade voyage, and Smith’s ship sinks, I can sue him for everything he owns to get my money back. But if I loan money to Smith’s corporation for the same purpose, and the corporation’s ship sinks, I only have a right to grab whatever the corporation owns; I have no right to go after Smith’s house. The events are exactly the same in both cases, but the financial consequences are different when the state acknowledges that Smith Incorporated is a person in his own right.

When the state certified the existence of Smith Incorporated, everyone played a little game of pretend. Everyone had to pretend that Smith had nothing to do with Smith Inc. beyond the monies that he put into the make-believe person’s hands. Therefore, Smith was safe to invest more money than he might have otherwise. In-

2. JOHN SPEED, *HISTORY OF GREAT BRITAIN* (1611).

3. *See, e.g.*, 1 U.S.C. § 1 (“In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words “person” and “whoever” include corporations.”).

deed, it enabled everyone to invest with less fear of the financial consequences. Take some of the fear out of investing and you will get more investing; increase investing and you will get economic growth. Any meme that increases economic growth will, through the resources it generates, propagate itself more powerfully throughout society. Cultural evolution has thus embedded the notion of incorporation deeply into contemporary economic growth.

There is no denying the economic usefulness of the corporate form of governance. There is, however, also no denying the fact that the practice of treating corporate organizations as fictional people is like playing a little game of make-believe. It is not a game we choose; as of 1600, the law forces us to play. And not only are we forced to play, we must play a certain way. We must treat this fictional person according to the rules the state imposes; for example, we do not have the right to pursue the people who have loaned the fictional person money. And precisely because this game imposes restrictions on our behavior, our decisions, and our rights, it is a strictly delimited game. Not every collective entity is allowed to become a fictional person. Inventing this person is serious business; there are firm rules about it.

There was a moment some 400 years ago when this set of fantastical rules — defining who or what could be a fictional person and how that fictional person would be treated — seemed sensible to large numbers of serious people. Since then, few have been troubled by this collective fantasy.

III. THE LEGAL STATUS OF GAMES

Games are hard to define, but game scholars such as Johan Huizinga and Roger Caillois identify them using the notion of irrelevance. For Huizinga, nothing can be a game if it involves moral consequence.⁴ Whatever is happening, if it really matters in an ethical or moral sense, cannot be a game. Rather, he believes that games are places where we only *act* as if something matters. Indeed, play-acting seriousness can be one of the most important functions in a given game. According to Huizinga, if some consequence really does matter in the end, the game is over. In fact, the

4. See JOHAN HUIZINGA, *HOMO LUDENS: A STUDY IN THE PLAY-ELEMENTS IN CULTURE* (1938).

only act of moral consequence that can happen within a game is the act of ending the game, denying its as-if character, spoiling the fantasy, and thereby breaking the collective illusion that the game matters.

Huizinga also says, without much emphasis, that the collective illusion happens in a specific place, an arena specifically intended to host the game. Games, he says, happen in designated spaces.⁵

We find ourselves in a moment in time when the space in which games may occur has suddenly and unexpectedly expanded beyond any known arena. Games can happen anywhere, everywhere and at any time. Right now there are people hunched over keyboards in Seattle and Seoul who have not seen the light of our Sun in days, perhaps weeks. For them, gaming is living. They have become immersed in play spaces that are permanent, and exhibit the physics of Earth and the object constancy to which we have all been accustomed since infancy. Not only that, but these play spaces are perpetually occupied by other people, sometimes in the dozens, often in the thousands. Serious thinkers now call these spaces *virtual worlds* (although I prefer to call them *synthetic worlds*), a usage that reflects our collective judgment that they are not very different from the Earth at all. They are fantastic, but only in the sense that they are fantastical extensions of the universe into which humanity was born. They are worlds much like our world, and humans are beginning to spend many hours in them, playing games.

As people have come together in synthetic worlds, they have begun to behave like people who come together on Earth: they talk, make agreements, exchange goods, make friendships and have sex. They also cheat, steal and abuse, laugh, cry and yell at one another. The synthetic world is a real-existing humanity, merely transported to a fantastical domain.

Something seems to be getting lost in the translation, however: The status of these places as *arenas*, and the understanding that the activity within them is a *game*. If asked, though, most players will assert, "I don't care, it is just a game." Many people are formally committed to the idea that the events that occur are only game-play, just as Scott Norwood, one-time placekicker for the Buffalo Bills franchise of the National Football League, must have been for-

5. *Id.* at 10.

mally committed to the idea that his potential game-winning field goal in Super Bowl XXV was only game-play. And I am sure that Bill Buckner was formally conscious of the game-play status of his effort to stop the baseball that trickled toward him in the bottom of the tenth inning in game six of the 1986 World Series. After Norwood's kick sailed wide right and Buckner's ball bounced lazily through his legs, however, both men, if queried, would probably have been less inclined to agree that it "doesn't matter."⁶ In the case of large-scale spectator sports, games acquire real consequences as the result of a self-confirming social consensus: If all society says that the World Series matters, then it does. I may not care about Buckner's error, but I do care about other people crying, throwing things, beating strangers or their partners, falling into depression, and driving drunk. I care about it a lot if it is happening to everyone. When sport is shared across society, society validates the seriousness of the consequences of sport, just as it validates the worth of money. It becomes meaningful *only* because society thinks it is meaningful.

It is fairly easy to create conditions under which games do or do not matter. It's a choice we make as a society. For example, we could endow spectator sports with a great deal more consequence by changing their legal status. Suppose the law provided that victims of injurious personal fouls were entitled to compensation from the offender, compensation that could be pursued in courts. The law also could decree that the city that wins the Super Bowl may tax the losing city, and use the funds to reduce its own tax burdens. On the other hand, the law could make spectator sports matter less than they do now. It could disaggregate teams to prevent entire cities and nations of people from becoming emotionally invested in the outcomes. The law could break up monopolies, impose maximum funding levels, limit stadium sizes, and even reduce broadcasting. Of course, some things would be harder to do than others; society pursues a certain level of sport significance on its own. The

6. Let's not forget Andres Escobar, the Colombian soccer star who kicked the ball into his own net and thereby knocked his country out of the 1994 World Cup. A week later he was dead on the street outside a Colombian bar, victim of an enraged fan. See Steve Berkowitz, *Colombian Player's Death Stuns, Angers World Soccer Community*, WASH. POST, July 3, 1994, at A27.

state, however, is not entirely without powers; it can have a great deal of influence on whether a game matters or not.

With synthetic worlds, society seems to have begun an exploration of the dimension of significance that may be attributed to a game. For every player who is content to view the synthetic world as a game, there is another who gleefully buys and sells the game's wands, armor, and gold pieces for U.S. currency on eBay. For every player who does not care if the synthetic world is hacked and accounts are robbed, there is another who views the breach as a computer crime of the highest order. For every player who sleeps soundly after being banished from a guild, there is another who thinks about committing suicide. This broad spectrum of significance and the ensuing emotional reaction that people manifest in synthetic worlds provide an incentive for the state to regulate and prosecute virtual crimes.

Korea is an example of a country that has taken action in the exploration of the potential significance of synthetic worlds. The Korean police actively prosecute people who hack into games, and provide higher punishments in cases where valuable game items are destroyed or transferred. On the face of it, this approach makes sense; the items in the game are valuable items. They take time to acquire, they are observably bought and sold for real money in real markets, and their owners are clearly distressed at their loss. F. Gregory Lastowka and Dan Hunter have given us definitive arguments that the items inside synthetic worlds are just as eligible for property rights-based protections as items outside synthetic worlds.⁷

The theft or destruction of valuable items is usually actionable in courts, with few exceptions. The exceptions, however, are significant. When Allen Iverson steals a basketball, his opponent cannot have him arrested; that theft is part of the game of basketball. Similarly, when Nicky the Thief steals 100 gold pieces in a synthetic world, *that* theft is part of the game, and therefore not actionable; the Government of Korea does not prosecute this type of thief. Yet

7. See F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual World*, 92 CAL. L. REV. 1 (2004) (Lastowka and Hunter do not go on to argue that items inside the worlds must therefore be treated just like items outside the world; their objective, at least in the first half of their paper, is just to point out that there are no *prima facie* grounds for dismissing the putative property rights of people who believe they own magic wands).

when Nicky's owner hacks the world's servers and steals 100 gold pieces, the government of Korea says it *is* actionable.

One suspects that most governments would do the same thing — prosecute theft outside the rules of the game, but not theft inside the rules of the game. One may also suspect that most players would probably view this as a sensible distinction. It would seem then that we are implicitly granting a unique legal status to synthetic world games.

IV. DRAWING LINES AND THE DIRE CONSEQUENCES OF AMBIGUOUS GAMING

The policy of assigning punishment for theft outside the rules of the game raises a fairly serious problem. The problem is that the line between the synthetic world and our world is more difficult to draw than the line between the basketball court and the street outside. It is very easy to tell the difference between a “steal” in a basketball game and a “steal” involving the transport of a basketball from Person A's garage to Person B's garage and its subsequent permanent storage there. It is much harder, however, to distinguish between real and synthetic world crime involving synthetic worlds.

Lastowka and Hunter cite examples from MUDs and graphical synthetic worlds to show that the putatively unreal, game-like environment of a synthetic world seems to produce very real emotional consequences within its users.⁸ In the real world, they remind us, the term “rape” has a specific definition in terms of actions. Yet in cases where those types of actions have been typed (rather than done) in a synthetic environment, the victims seem to have truly suffered.⁹ Who then is to say that there is a difference between real rape and synthetic rape? If there is a difference, what is it? Additionally, how could one persuade all of society to pretend that the activities in the game space that look exactly like the activities outside it do not have any consequences?

8. *Id.* at 59-63.

9. *Id.* See also JULIAN DIBBELL, *MY TINY LIFE* 11-30 (1998), for an account of sexual assault in a synthetic environment (the “rape” occurred when an avatar took control of two female avatars and provided textual depictions of sexual self-mutilation of the two female avatars).

These questions might acquire a great deal of relevance in just a few decades. Synthetic worlds are growing in importance, and the activity taking place within them looks very much like the activity taking place outside of them. If the issues involving their legal status are not handled properly, we face the possibility that a tremendous boon to humankind may be irrevocably lost. The boon in peril is our ability to find refuge from the oppressions of the Earth's economic system inside synthetic worlds that artists build. It is a new ability, just a few years old.¹⁰ Designers of synthetic worlds have already managed to make places that millions of people prefer to Earth, often for a great deal of time.

At the moment, these new worlds are treated as distinct play-spaces, where the normal rules of economics, law, and government do not apply. Their distinctiveness seems to be a large part of the appeal. In synthetic worlds, you *can* be a thief, and you do not have to go to jail.¹¹ You can be a great mogul, and not pay taxes or contribute to the United Way. Most important, you can be your own man, woman or both, as you prefer, a person with a real identity and a self-made history, and someone that is much more than a cog in some other person's machine. You can escape from your boxes, those on the company's organization sheet as well as the cubicles that chillingly evoke them in real-space. In these worlds, you can be whoever you want to be. At the same time, however, even these new synthetic worlds have begun to experience a creeping encroachment of meaning that erodes their claim to special legal treatment, and may thereby eliminate their ability to ennoble and enrich their users.¹²

10. Synthetic worlds may be our only hope to escape from the predations of the work system that we imposed on ourselves in the Industrial Revolution. It is no coincidence that all fantasy worlds fall into one of two types: medieval worlds that depict the Earth before the Industrial Revolution, and post-apocalyptic worlds that depict the Earth after the Industrial Revolution has choked on its own bile.

11. Jennifer Mnookin identified this facet of cyberspace at an early point: "Labeling LambdaMOO a 'mere' game is the easiest way to free what happens in LambdaMOO from external legal oversight." See Jennifer L. Mnookin, *Virtual(bly) Law: The Emergence of Law in LambdaMOO*, in *CRYPTO ANARCHY, CYBERSTATES, AND PIRATE UTOPIAS* 280 (Peter Ludlow ed., 2001).

12. It must seem ironic that the person warning here about the encroaching seriousness of virtual world games is also responsible for a body of work that has contributed to that encroachment. See EDWARD CASTRONOVA, *VIRTUAL WORLDS: A FIRST-HAND ACCOUNT OF MARKET AND SOCIETY ON THE CYBERIAN FRONTIER* (CESifo Working Paper

Meaning has begun to bleed into synthetic worlds in several ways. When players first began buying and selling game items for dollars on eBay, the world owners were shocked, or amused, but in either case they opposed the practice. Now, worlds have come into existence where trading dollars for game items is part of the rules. Although most owners maintain strict rules against trading in the outside world in their user agreements, they also seem to accept this trade as an unavoidable consequence of the large time and value disparities in the player base. Heavy media attention has made synthetic worlds into forums for protest, and also highlighted the psychological effects of participation in those worlds.¹³

Worlds that designers intended to involve medieval or futuristic role-playing have decayed into places where the atmosphere is more like a Middle American shopping mall than the market of Rheims or Space Station Zebra. Enter Star Wars Galaxies and visit the Mos Eisley Cantina — that figured prominently in the first Star Wars film — and you will find robots playing the parts of the patrons, bartenders, and yes, even those flutists whose heads look like someone else's rear end. The people in the place, however, are not likely to be talking about any of that, about Imperial Troopers, Darth Vader or Jabba the Hut. They will be discussing the weather in their home town, the demands of their significant others, or they may even be discussing the fact that Arnold Schwarzenegger is the first governor of a U.S. state to appear nude in a film in the same year he was elected to office. These outside world issues, along with

Series No. 618) (2001). But the irony is only superficial. The top-level argument made in that paper, as well as in the ground-breaking work of Lastowka & Hunter, *supra* note 7, is that these worlds are hosts to important human activity and need to be taken seriously. Given that these worlds are taken seriously, though, one of the important things we must decide about them involves their legal status. If their legal status is "not game," then the worlds are not only important as sites of human activity, they are also important as potential sites of deployment for Earth governmental authority. If their legal status is "game," however, they may remain important as sites of human activity, but just not within the jurisdiction of an Earth government. We should take these worlds quite seriously, and we should engage in serious discussions about their legal status.

13. When Shawn Wooley committed suicide, his mother sued EverQuest, believing the world's design to have been at fault for his emotional state. Everquest is a 3-D multiplayer fantasy role-playing game. The user enters an enormous synthetic environment: an entire world with its own diverse species, economics systems, alliances and politics.

the affairs of the galaxy, are present in the minds of the players of the Star Wars game.

Ironically, by failing to make the distinction between game and life, the players of synthetic world games regularly commit Hui-zinga's One Moral Act: they wreck the illusion that it is all a game. The eBayers, the protesters, the out-of-character shouters, all blur the lines between the game and real life. It is understandable, of course; keeping the lines clear requires quite a bit of mental discipline, especially when the synthetic society seems to act, breathe, and feel just like the outside world. In many ways, the game is more fun when you can talk not only about the odd behavior of the orc you just fought, but also about the odd behavior of voters in certain political jurisdictions on the west coast of certain continents. It is easier and more fun to go ahead and treat rule-breaking as a kind of meta-game, and illusion-breaking as a tool that helps you exploit the synthetic world and its society toward your own ends — whatever they might be.

It is fun so long as those odd voters on Earth keep what *they* are doing, and its consequences, away from what *you* are doing in the game. So long as the Earthlings and their economic, political and legal systems stay safely away, on far-off Earth, it is fun to half-live and half-play a fantastical existence within the confines of a synthetic world that the Earthlings have not yet reached.

As long as the Earthlings stay away from synthetic worlds, residents can indulge in their fantasies of being “really in” the synthetic world as much as they are “really in” Earth. They can go ahead and call Norrath (a world in Everquest) their home, while living in Detroit. They can treat gold pieces and dollars as equivalent currencies, and think of their house in Avalon as equivalent to their house on 8 Mile Road. They can freely blur the line between game and not-game, but if the players can step across blurred lines, so can the Earthlings.

Earth governments can see equivalences between gold pieces and dollars too. The gold piece would lose much of its luster if it were taxed like the dollar. Would the cottage in Avalon seem so charming if it came with a property tax assessment? Why, after all, should the state deploy its officers to protect that house from theft and destruction when its owner makes no contribution to the state

in relation to the house's value? Eventually, the state will make a move into these places.

As meaning seeps into these play spaces, their status as play spaces will erode. As their status as play spaces erodes, the laws, expectations, and norms of contemporary Earth society will increasingly dominate the atmosphere. When Earth's culture dominates, the game will be over, the fantasy will be punctured and the illusion will be ended for good. Taxes will be paid. The rich and poor will dance the same macabre dance of mutual mistrust that they do on Earth, with no relief, no re-writing of beginnings, and no chance to opt out and start over. The art that once framed an immersive imaginary experience will be retracted back to the walls of the space, and the people will go back to looking at it rather than living it. Living *there* will no longer be any different from living *here*, and a great opportunity to play the game of human life under different, fantastical rules will have been lost.¹⁴

V. RESPONSES IN LAW

If blurred lines are a problem, perhaps we can look to the efforts of game companies to clearly delineate the spaces they create. The principle tool used to preserve play spaces is the EULA. Users must accept these agreements to enter the game world. By accepting, the user waives a number of significant rights: rights to own the fruits of labor, rights to assemble, and rights to free speech. It is not clear to anyone outside the legal system whether the EULAs, as currently written, will be robust to the challenges that will likely ensue. If a social club were to require all members to waive their right to be critical of the club's managers, what would be the legal defense? If Jones, Smith, and Miller get together in the club, write a poem using the club's stationery, and then sell it on the

14. The argument here mirrors Lawrence Lessig's lamentations in *CODE AND OTHER LAWS IN CYBERSPACE* (1999). He believes that change is coming; that courts are overburdened and overwhelmed by it; that the courts will therefore kick most issues back to legislatures; and that legislatures are currently so incapable of strong, independent action in the national interest that they will tend to write bad laws. *Id.* at 8. Lastowka and Hunter also see courts as being so overwhelmed by the pace of technological innovation that, at the moment, any effort to make specific suggestions about distinct legal controversies will not have much effect. See Lastowka & Hunter, *supra* note 7. All of this suggests that we really need to start thinking seriously about these issues and come to whatever consensus we can as quickly as possible.

street corner outside for \$10,000, on what grounds can the club enjoin against that practice, and even claim ownership of the poem? I don't know the answers to these legal questions, but these are goals that EULAs try to accomplish. The legitimacy of these clauses is open to question.

Lastowka and Hunter analyze a number of doctrines that may support EULAs, and find all of the following doctrines suspect:

- **PRIVATE PROPERTY:** Virtual worlds are owned by their builders, and the builders are therefore free to restrict users' behavior however they wish. When a private space becomes host to an entire social community, however, its regulations can indeed become so oppressive to members that the State would be justified to intervene. Human rights are enforced within companies, towns and shopping malls, even though these are not public spaces.
- **EXIT:** Because anyone is free to leave a virtual world at any time, restrictions on user behavior cannot be construed as burdensome. Many worlds, however, are designed so that users become deeply vested, not just emotionally and socially, but also financially. Hours of play/work are capitalized into virtual wealth with substantial real dollar values.¹⁵ Exit can be very costly.
- **AUTHORSHIP:** Designers are authors, and should be as free as any author to induce emotions and responses in consumers of the work. In the case of virtual worlds, however, the designer is not the only author. Players and designers collectively write a script unique to that virtual world; ownership must extend to all.¹⁶

Only time will tell how robust EULAs are, but let's assume that courts strike all the EULAs down. Then if Jones, Smith, or Miller use World of Warcraft to make an uber magic wand, they are said to own the wand, free and clear. As owners, they have a right of free disposal. They can sell it for gold pieces in the game or for dollars outside the game. Regardless of the location or currency of trade, if they are U.S. citizens, their wand-related earnings generate a tax liability to the United States government. If the wand is a taxable

15. At this writing, a single Jedi avatar in the world Star Wars Galaxies is worth about \$2000. Not just anyone can become a Jedi in that world; it takes literally hundreds of hours of questing, combat, and production to gain access to Jedi powers.

16. Lastowka & Hunter, *supra* note 7, at 54-59.

asset to the government, however, its theft or destruction must also be treated as a substantive violation of the laws of the United States. Indeed, the wand must be treated like any other economic asset of the nation, and all such assets, in principle, may be admitted as potential national security concerns. Without EULAs, these “games” are not games at all; they are merely extensions of the territory of the Earth, territory that must, in fairness, be defended, regulated, taxed and policed just like the Earth.

Therefore, to accept the EULAs, while also accepting the real value and significance of events that occur inside synthetic worlds, is to consciously apply a double standard. In effect, this is where we stand now: It is apparent to increasing numbers of people that the events of synthetic worlds are significant, both emotionally and economically, and now, in Korea, legally. Yet we do not treat the things and events in synthetic worlds the way we treat events here on Earth. There is no apparent reason for this disparity, other than that there are EULAs that claim to prevent equal treatment. According to the doctrine of the EULA, we can and should have in-world theft without police action, asset accumulation with no taxes and citizenry without speech rights or voting privileges. What’s missing is a justification for the EULA. Why, and when, is this double standard acceptable?¹⁷

Indeed, there seems to be an absence of law here: Synthetic worlds are being treated as special cases, but no law has defined when and how this special treatment should apply. In the absence of specific law pertaining to synthetic worlds, we might expect that this special treatment is only a temporary state of affairs. As the assets and happenings in synthetic worlds grow in importance, more and more people will begin to wonder why dollars are taxed and gold pieces are not. It will seem unfair and things will change. It is important to remember that memes that promote economic growth are the most powerful memes in the cultural evolutionary process. Here the struggle for survival is between these two contestants:

17. This conundrum seems to be the point where the Lastowka & Hunter, *supra* note 7, analysis ends. They argue very strongly that one cannot really see any reliable distinctions between property rights and other claims that happen inside as opposed to outside virtual worlds. But they also argue that the fuzziness of these lines does not lead automatically to a simple normative conclusion about what should be done.

- Meme 1: Synthetic Worlds are Play Spaces
- Meme 2: Synthetic Worlds are Extensions of the Earth

Currently, Meme 1 dominates. As play spaces, synthetic worlds host all kinds of institutions that are entertaining to the user, but are economically anachronistic. For example, players often complained that buying and selling items in EverQuest was cumbersome. Users had to go to a bazaar-type setting and yell what they had to sell and for how much, then haggle with prospective buyers. In mid-2002, however, EverQuest's developers were attentive to the users' objections, and introduced a zone called "The Bazaar." In "The Bazaar" there is no haggling; players set up robots that automatically and anonymously sell lists of goods at fixed prices. It is easy, convenient and incredibly popular. The amount of player to player trade in EverQuest was clearly enhanced. The change clearly promoted economic growth for the game. It also was a step from Meme 1 to Meme 2. Players who faced cumbersome haggling markets in the game increasingly went to the swift and fluid eBay market to do their trading. The competition from eBay as a marketplace has forced most recent worlds to abandon all haggle-based market systems in favor for something more like eBay. In other words, Meme 2 is winning.

It seems certain, in fact, that Meme 2 will win in the long run. As long as the worlds have an ambiguous status — part play, part serious — it behooves every player, developer and outside observer to make individual decisions that push things slightly toward serious and away from play. In relation to the haggling example: if all trade in a world is in a haggle-based market, it profits every user to avoid haggling if possible, and seek more fluid markets. In addition, if there is *no* trade in a world which is haggle-based, it still behooves every user to avoid haggling. Thus, regardless of how many people haggle, every person has an incentive to avoid haggling. Consequently, it follows that haggling is not a long-run equilibrium form of trade when eBay is available. Player by player, trade by trade, the haggling system will gradually be replaced by more fluid systems if they are available. The demand for such systems will push developers toward tacitly allowing eBaying or porting eBay-style trade into the world. Outsiders who can gain (eBay itself) will push for the changes too. Haggling, which is so important to the

medieval flavor of a world, cannot survive in a struggle against eBaying. The play market cannot survive against the invasion of the fluid, cheaper markets of the contemporary Earth.

The evolutionary weakness of Meme 1 stems from the fact that the play status of a world is a *commons*, a shared good that is subject to the tragedy of gradual erosion first identified by H. Scott Gordon in 1954 and popularized by Garrett Hardin in 1968.¹⁸ Huizinga pointed out that the game remains a game only so long as everyone maintains the mental assumption that the game is a game. When someone announces that they no longer believe, the illusion is ruptured. Maintaining play status thus requires the active cooperation of all players. In the case of a game like basketball, this is not a problem, because every player has the incentive to maintain the illusion. No single player can make himself better off by acting against the rules. If a player breaks the rules, he/she gets ejected or the game just ends. Synthetic worlds are different; in most contemporary worlds, if you act against the play spirit of the world (i.e., by importing some of your Earth income) you do not get ejected, the game does not end, and indeed, you are better off. *The Tragedy of the Commons* argument predicts that, in such circumstances, the play status of the worlds will eventually erode completely.

The argument that play status is a commons provides strong conceptual (but not yet legal) support for the game EULAs as currently written. EULAs can be thought of as contracts that restrict the ability of individuals to erode the play-ness of the space, for the good of all users. In other words, the proper EULA can make everyone better off. Under a utilitarian conception of legal policy, if current law does not support the EULA, new law should be written that supports these types of agreements.

VI. DEFENDING PLAY AS COMMONS: THE RIGHT TO PLAY

The missing link in the law is a general statement that play spaces are a unique form of commons, a unique collective good, whose value can only be sustained under certain restrictions on individual behavior. The EULA that attempts to make Dark Age of

18. H. Scott Gordon, *The Economic Theory of a Common Property Resource: The Fishery*, 62 J. POLITICAL ECON. 124 (1954); G. Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

Camelot into a medieval world should have a distinct legal status as a document that instantiates a place of synthetic play.¹⁹ The critical point is that Dark Age of Camelot has *no unique value whatsoever* as a place of play unless the EULA is effective. Without the EULA, Dark Age of Camelot is not a play space, it is a suburb of Newark — a place that used to be swampland, but now has houses, businesses, and athletic fields, all of which are utterly indistinguishable under law from the house, businesses and athletic fields of Newark itself. Yet, in current law, there is nothing said about such instantiations of play. No law declares when and how this can be done.²⁰

EULAs are an assertion of a distinct power to create a play space, but this power does not currently exist. If it did exist, it would certainly not be the power of an individual or a private company. Any declaration that a space is a play space is simultaneously a declaration that many laws of the government do not apply in that space. It is a limitation of governmental sovereignty. In the past, individuals and companies who have made such unilateral assertions — such as “your law does not apply to me!” — usually have found themselves paying taxes again in short order (occasionally to some other government), or if not, then jailed or eventually dead.

To justify the powers asserted by EULAs, new law must appear: a specific Law of Interration that grants EULAs a legal status robust enough to allow them to preserve synthetic worlds as play spaces.²¹ Synthetic worlds created under the terms of interroration law would be considered “closed” worlds; those not created under its terms would be considered “open”:

- Closed worlds: The border between the synthetic world and the real world is considered impermeable. The interests and conditions of users are regulated by the terms of the EULA. Earth

19. Dark Age of Camelot is one of the world’s fastest-growing online role-playing games based on the King Arthur legends, Viking mythology and Celtic lore. *See* www.darkageofcamelot.com (last visited Oct. 13, 2004).

20. Synthetic worlds can be viewed as a specific case of David R. Johnson and David Post’s general argument that cyberspace is unique and separate enough to warrant special legal treatment. *See* David R. Johnson & David Post, *Law and Borders — The Rise of Law in Cyberspace*, 48 *STAN. L. REV.* 1367 (1996).

21. Incorporate is constructed from *in* and *corporis* (body). An analogous word for creating a world would be constructed from *in* and the latin words for world: *terra*, *mundus*, *universitas*. Corresponding forms, none of which really satisfy, are to *interrate*, to *immundusate* and to *inuniversate*.

courts and legislatures have no powers there. Conflicts among or between users and designers or owners are only actionable within the synthetic world, or only through institutions and processes that are at the sole discretion of the owners to devise and implement.

- Open worlds: The border between the synthetic world and the real world is considered completely porous. The interests and conditions of users are regulated by applicable real-world law in whatever jurisdiction the users and world-servers find themselves. Conflicts are actionable in any court or legislative venue with jurisdiction.
- The State intervenes in closed worlds only under conditions defined within interration law. To the extent that outside law applies in closed worlds, it should protect the freedoms of users.

The act of interration — the creation of play space — is properly an act of government. Governments now have both imminent cause and ancient precedent to consider how this act should be structured and defined.

The cause is humanity's fundamental right to play. The recent appearance of massively immersive play spaces (where the ordinary rules of Earth do not apply) is a tremendous gift to us all, a great moment of liberation, and a dramatically powerful reconnection between human beings and the artists who sustain them. The technology to create these play spaces now exists. If deployed properly, it will spread joy and self-esteem across the planet. According to a positive theory of rights, we have a fundamental right to have access to that joy and that self-esteem.²² The urge to play is buried very deeply in our psyches, well below rational thought and somewhat above the urge to eat and have sex. Other mammals do not speak, but they play, and so should we, indeed, so *must* we. How many horrors of history happened only because urges that ordinarily

22. The right to play can be motivated from two articles of the Universal Declaration of Human Rights. Article 27 states, "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits." Moments of play, especially in the case of synthetic worlds, are the result of a fortuitous collusion of science and art, and the article asserts that their benefits should be denied to no one. Article 24 asserts that "Everyone has the right to rest and leisure." Play represents a temporary exclusion, a rest, from the ordinary world and its penalty and reward system; the article asserts a right to this rest. See *Universal Declaration of Human Rights*, G.A. Res 217A (III), U.N. Doc. A/810, at 71 (1948).

would have been exorcised through healthy play instead were diverted into mass politics and war? What *is* Volkisch Nationalism if not a horribly distorted game of make-believe? How unfortunate that our innate desire to be a good member of the team became the Battle of the Somme. Quake Arena might have made a difference, although Plato would have recommended something more erudite, such as *A Tale in the Desert*.²³ When we perceive new opportunities to play in our play-starved world, we have a right to take advantage of these prospects. The cause for interration is imminent because as quickly as these new opportunities to play have emerged, they have begun to erode.²⁴ They need protection, and current law seems unlikely to provide it.

The precedent is the act of incorporation. As previously stated, some 400 years ago, governments began to realize that society would be better off with certain restrictions on individual behavior and rights, restrictions that invoked a tightly-defined and circumscribed game of make-believe about the notion of personhood. Incorporation invented the idea of a fictional person to promote a specific form of human interaction. On its face, the law that instantiates the fictional person and forces everyone into the game of make-believe about him is truly oppressive to living, breathing people. Smith can dwindle away the assets of Smith Incorporated, but Smith is not personally accountable for the loss. Any investment in the company is lost when the corporation goes under. Yet once the law has its effects, all people, including those who are oppressed and denied rights by the face of the law, are better off.

23. "Man is made God's plaything, and that is the best part of him. Therefore every man and woman should live life accordingly, and play the noblest games . . . Life must be lived as play, playing certain games, making sacrifices, singing and dancing . . ." PLATO, *THE LAWS OF PLATO* (Thomas L. Pangle tr. 1980).

24. Here the argument connects to Concetta Stewart and Gisela Gil-Egui's claim that much of the content of the Internet is a common good and therefore deserves State management under public trust doctrines. The status of virtual worlds as fantasy spaces needs to be preserved for the same reason that wilderness areas need to be preserved: if we do nothing, the forces of economic development will simply destroy them, to our great loss. See Concetta Stewart & Gisela Gil-Egui, *Applying the Public Trust Doctrine to the Governance of Content-Related Internet Resources*, Association of Internet Researchers Conference 4.0, available at <http://www.ecommons.net/aoir/aoir2003/index.php?t=17> (last visited Oct. 29, 2004).

The legal act of incorporation creates a fictional person, and is performed when the creation of this person has net social benefits. The analogous legal act of interration would have a similar purpose: to create a fictional place. It would also be performed only when the creation of this fictional world would be socially beneficial. The terms of creation, and the restrictions it imposes on everyone in society would, as with incorporation, be laid down in the synthetic world's Charter of Interration. The charter would define where this place is and how people can go there. It would clarify the legal status of events that happen there, and of assets that accumulate there. The charter would define the rights of people in various roles, such as developers, users or outsiders. The legal status of the interration would be elevated, in the sense that the acts and assets inside it are exempt from most laws of the Earth. Earth law would in fact state that these protections are necessary for the interrated space to provide social benefits. The safeguards are essential for its functioning, and that is why an Act of Interration even exists.

In return for its privileges, the chartered interration would be subject to strict rules. To be preserved as play space under the law, the synthetic world would have to conform to standards of construction and policy, just as corporations must conform to such standards in order to retain their special status. For example, an interration would have to maintain strict separation of the synthetic economy from the economy of the Earth. If players can regularly buy and sell assets from the synthetic world for real dollars, the synthetic world is no longer clearly distinct from the outside world's economy; it is no longer a play space, it is a tax haven. A tax haven has no right to special privileges under the real world's law, and its case for interration is weak. In general, interrations would be subject to scrutiny on real world matters. As a result, lack of good faith efforts to maintain the space as a *play* space could lead to the revocation of the charter.²⁵

25. In the case of eBay and other out-world market-making, most developers seem to feel that they are powerless to insulate their world from external market effects. I disagree. They have more power to seal their borders than any government ever known. For example, every eBay transaction necessarily ends with one avatar in the synthetic world giving items of great value to another avatar, in return for nothing. Surely such trades could be observed, identified, and banned. True, eliminating charity in items is not a feature that most players desire, but that might be one of the restrictions neces-

A body of law would eventually emerge that properly balances the rights and obligations of everyone involved in interrated spaces. Under this law, synthetic worlds would be protected from numerous legal and regulatory sanctions in return for providing society with the benefits of otherworldly play.

VII. MANAGING AN INTERRATED LANDSCAPE

Today, corporations are a popular form of economic organization, but they are not the only form of economic organization. Partnerships and private businesses continue to thrive; economic organization follows certain rationality, and emerges in different forms to serve different ends.

We can hope that interrations will emerge in similar fashion. When it makes sense to preserve a play space as a *play* space, it will be preserved, insulated and protected from the predations of the economic machine that surrounds it (and us). When it does not make sense to seal off a synthetic world, however, it will not be sealed off. Worlds not protected by explicit acts of interrations will be (quite literally) nothing more than mundane extensions of Earth's territories, and will be treated as such under law. Such "open" worlds will provide all kinds of benefits. Even though they will not really be play spaces, they will still allow us to re-write many of the rules of physical interaction (through the construction of avatars, for example). Such spaces will be incredibly useful forms of communication, and will provide exciting new arenas for social interaction. As open worlds, they will host events that really do matter. By definition, these will be places that are *not* play.

As worlds that matter, these open worlds will deserve exactly the same legal treatment as the real world receives. For example, all economic activity inside open worlds will have to be treated as

sary to allow the place to be a play space at all. Better a play space with no gift items than no play space at all. Indeed, it is likely that there would be other, more onerous requirements before interrations would be granted. The State would probably require that owners keep reliable data on the identities of all users, to prevent misuse of the technology by underground organizations and predatory individuals. It might even require restrictions on speech and assembly; owners would not be allowed, for example, to look the other way while players used the technology to raise awareness about Earth issues or products, or while they solicited funds for Earth political campaigns. In short, an interrations law would be a support for EULAs, but only for a certain kind of EULA: one that makes *more* effort, not less, to make the fantasy world into a legitimate fantasy.

equivalent to economic activity in the real world. True, in many cases, it may seem difficult to see the value in a magic wand that has been stolen, but, given that the world is *open*, there will be markets in which the value of the magic wand can be directly observed. Indeed, there are three quite common valuation techniques where direct market valuation is not possible. The theory of *secondary markets* holds that the value of a good is the same in every market, and therefore we can observe this value in whatever market seems most functional. Thus, even if market failures prevent us from observing an accurate price of Cuban cigars in official Cuban markets, we can observe accurate prices in the unregulated black market or in export markets, and infer the actual value of the cigars from them. The theory of *hedonic pricing* holds that the value of an unmarketed good can be measured by the value it contributes to a good that *is* marketed; the value of clean air can thus be measured in house prices. The theory of *time costs* holds that a good's value can be derived from the amount of time people "spend" to obtain it; the value of a highway improvement can thus be measured in the hours that travelers save when it is completed.

Applied to open synthetic worlds, these theories would obtain the value of in-world assets by: (1) observing their dollar values in external markets, such as eBay, (2) measuring their contribution to the observed market value of related goods, such as user accounts, or (3) evaluating the time cost of replacing them. In the first case, one would take the eBay price of a wand at \$100 as the best measure of a wand's value. Under (2), one would regress the prices of user accounts on a vector of inventory variables; the coefficient on "magic wands" would show the contribution of a wand to the account's value. Under (3), one would estimate the number of hours it takes a typical user to replace the wand, and then use the value of the typical user's time (often, the wage rate) to quantify the time cost in terms of dollars.

By these methods, the assets and the activities of people who participate in open worlds can attain the same legal status as assets and activities of people who do not participate there. With this le-

gal treatment, the open worlds can provide society with the benefits that are unique to them as forms of communication.²⁶

“Closed” worlds, by contrast, are intended to provide a different array of benefits, and are subject to a different set of laws, as reflected in the charters that interrate them. Under these charters, the methods of asset valuation for open worlds as discussed above simply do not apply. These are play spaces; nothing matters there. Assets there have no value. Losses there are unimportant. Crimes committed create no claims of redress. Lost hours are simply lost. No act is actionable. The complete lack of consequence is, in fact, a declaration and imposition of the state. Indeed, it is the closed world’s *raison d’etre*.

VIII. A DECLARATION: THIS IS NOT A DECLARATION

In 1996, John Perry Barlow famously (or infamously) proclaimed the sovereignty of Internet communities in his “Declaration of the Independence of Cyberspace.”²⁷ Barlow was reacting to the first widespread attempt by government to regulate the Internet’s content. In retrospect, it has become increasingly evident that the Internet has always been something that would be easy to regulate if anyone took the time. Indeed, no three humans come together without soon wishing there were some overarching authority to take care of matters that are clearly communal in nature. The Internet would not work without some kind of governance. The only issues that need to be resolved are who, what and how to regulate it.

26. It should be said that there is already a continuum of worlds along this open/closed dimension. A world like *There*, which allows all users to charge currency to their credit cards at a fixed rate against the dollar, is an explicitly open world. It would have almost no case for interration. *EverQuest*, by contrast, at least declares that the out-world trade is counter to policy, although it has not effectively enforced this policy. *Camelot* has been aggressive enough against eBayers to have elicited a lawsuit. It also has made design decisions (such as item decay) that hobble the formation of out-world trading patterns. As a result of these policies, *Camelot* would have the best case for interration among the larger worlds. Some smaller worlds, such as *A Tale in the Desert*, are almost completely closed in both policy and in fact and could easily be interrated under an appropriate law.

27. Available at <http://www.eff.org/~barlow/Declaration-final.html> (last visited Feb. 8, 1996).

More recently, Raph Koster somewhat playfully constructed a "Declaration of the Rights of Avatars."²⁸ The declaration expresses the idea that we all understand that communities of people who interact on the Internet are, indeed, communities of people. Internet communities depend on the infrastructure to keep their community alive; that means they exist in a relationship to network administrators that is similar to the relationship between citizens and government. As Lessig has told us, code is law.²⁹ Koster's declaration just reminds everyone that codes, like laws, really ought to promote the general well-being, and respect the dignity of the human person to the greatest extent possible.

This Paper has identified a fundamental right to play that all humans have, and it has argued that governments should develop a legal foundation so that certain opportunities to play are preserved. These opportunities happen to be emerging on the Internet through EULAs. As a result, the argument of this paper might perhaps be identified with either Barlow's or Koster's declarations. It might be said that a right to play is a right to escape into the Internet, where everyone can be free. It might be said that a right to play is a right that the community of gamers have vis-a-vis the developers and world owners.

Neither of these identifications is really appropriate, however. The right to play is essentially just a right to do something enjoyable. When a new play space becomes available, it elevates the human person, adding to her dignity, and allowing her to drink more deeply from the stream of human aesthetic creation. This right is beneficial to society as a whole, and it should be preserved. The glorious new play spaces we have recently discovered are becoming available on the Internet, and unfortunately, they are getting mixed in with lots of other things that are becoming available on the Internet at the same time, such as new currencies, new markets and new social, political, and academic hierarchies. With all of this wonderful undergrowth springing up at once, the status of these spaces as *play spaces* has become ambiguous. As a result, they are in danger of disappearing, of being swallowed up in the turbu-

28. Available at <http://www.legendmud.org/raph/gaming/playerrights.html> (Jan. 26, 2000).

29. See LESSIG, *supra* note 14.

lent rush of ordinary human affairs. It would be a good idea to prevent this from happening, by making an explicit body of law that identifies what a play space is, how a space can qualify for play status, and what rights and obligations this status confers.

Is a call for this kind of new law implicitly a declaration, *a la* Barlow, that all people who wish to do so, *must* be allowed to use these places to escape from the jurisdiction of the governments of Earth? No. On the contrary, we rely on the governments of the Earth to charter these spaces, and develop rules of fair use for them.

Is it implicitly a declaration, *a la* Koster, that communities in synthetic worlds have certain rights with respect to the owners of the world? Well, yes and no. In the case of open worlds — yes, an open world is just an extension of the Earth, and all rights and obligations that people have on Earth carry over to cyberspace. An Internet administrator who shuts off the server of an open world, and destroys \$300,000 of magic wands will face his day in court. The community of avatars has all kinds of rights of redress.

In the case of closed worlds, however, the answer is no. The closed world's charter explicitly nullifies any putative rights of avatars. A closed world is not an extension of the Earth. It is a fictional place, with rules of its own. Whatever rights its users have are the rights that the owners have decreed. Of course, the rules by which such a place receives its charter will, and in fact must, impose restrictions on the decrees of owners; no one can legally interrate a world that is designed to immiserate people or violate their dignity. But that is a matter of the rights of people, not the rights of avatars; it is resolved *a priori*, in the struggle between citizens and governments of Earth nations as they try to define a good interration law. Once that struggle is resolved, and the law of interration is set in place, whatever rights or obligations its internal government decrees are sacrosanct there, and no user has a right to redress under any outside authority.

It may seem strange, but in a very short period of time we humans have been confronted with a tricky problem: How do we design law about fantasy worlds? We should not be too anxious about it; centuries ago, humans like us solved the tricky problem of designing law about fantasy persons. The benefits of having fantasy

corporations soon became apparent to society, and there were no real objections to the suspension of disbelief that the law required. The game of make-believe people was not exactly fun, especially to people who lost the money they gave to corporations, but it was useful: it helped most investors sleep better at night, and it thereby promoted economic growth. A legal framework for make-believe places will not be very fun to create either. It will require numerous creditors, theft victims, tax collectors, protestors, defeated warriors and impoverished wizards to simply go home empty handed, unsatisfied, perhaps distraught. But it will allow everyone, all of us, to spend time in worlds where magic is real. Goodness, we haven't done anything like that in hundreds of years. We miss it.