Anti-social Contracts: The Contractual Governance of Virtual Worlds

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Virtual worlds have seized the imaginations of millions of people who now live, work, and play together in these new environments. But all is not well. These online communities are ruled nearly exclusively by contract law, through end-user licence agreements, terms of service, and codes of conduct. Contracts are a critical means of helping two (or a few) people negotiate their preferences. But online communities are made up of enormous and shifting populations that have no time or ability to negotiate agreements with every other community member. Relying on contracts alone thus threatens the investments and creativity that go into these communities.

This article seeks to demonstrate that contracts cannot, by their very nature, provide for all the legal needs of online communities. Public law needs to be developed to allow these communities to thrive. The author argues that common law, rather than legislation, can be most effective in this task. Courts can draw on existing and familiar areas of common law to provide the private-property, dignitary, and personal protections these communities need according to the specific behavioural norms their creators and users have fostered. The common law method, being iterative, incremental, and experimental, is well suited to modifying these areas where needed. It allows for the more immediate resolution of problems while also being sufficiently flexible to permit rules to be expanded or contained as required.

Les mondes virtuels se sont emparés de l'imagination de millions de personnes, qui aujourd'hui vivent, travaillent et jouent ensemble dans ces nouveaux environnements. Mais tout n'est pas aussi rose qu'on pourrait le croire. En effet, ces communautés en ligne sont presque exclusivement régies par le droit des contrats, à travers des ententes de licences d'utilisateur final, des conditions d'utilisation et des codes de conduite. Les contrats sont des outils primordiaux pour permettre à deux (ou plusieurs) personnes de négocier leurs préférences. Or, les communautés en ligne ont une population importante et changeante, qui n'a ni le temps ni la capacité de négocier des ententes avec chacun des autres membres de la communauté. Dépendre uniquement des contrats menace donc les investissements et les efforts créatifs qui nourrissent ces communautés virtuelles.

Cet article cherche à démontrer que les contrats ne peuvent, par leur nature même, répondre à tous les besoins légaux des communautés en ligne. Un droit public doit être développé afin que ces communautés puissent continuer de prospérer. L'auteur soutient que la *common law* est à cet effet plus efficace que la législation. Les tribunaux peuvent s'appuyer sur des domaines existants du droit pour fournir à ces communautés les protections de la propriété privée, dignitaires et personnelles qui leur sont nécessaires, tout en respectant les normes comportementales que leurs créateurs et leurs utilisateurs ont mises de l'avant. La méthode de la *common law*, étant à la fois itérative, progressive et expérimentale, convient très bien pour modifier ces sphères là où le besoin se fait sentir. Elle permet une résolution plus rapide des problèmes, tout en étant aussi suffisamment flexible pour permettre aux règles d'être étendues ou circonscrites au besoin.

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Introduction

Can the social contract of a virtual world be made up entirely of private law contracts? This article concludes that it cannot.

Virtual worlds are the next generation of the internet: three-dimensional social environments that combine top-of-the-line videogame graphics with latest-generation social-networking technology. Millions of people spend significant portions of their lives playing and working in virtual worlds. Virtual-world inhabitants build multi-million-dollar buildings, run businesses, treat medical ailments, learn foreign languages, and spend large amounts of time interacting with friends and family. As a result, these online communities need all of the normal background, default legal rules that regular communities need. So far that need has gone unmet.

The corporations that create virtual worlds use contracts, called End User Licence Agreements ("EULAs"), to govern the day-to-day interactions of millions of people around the world. These EULAs supplant much of the default law that real-world communities rely on. For example, the drafters of virtual-world EULAs attempt to create pseudoproperty systems (or to eliminate private property altogether within virtual worlds), pseudotort systems, and even pseudoconstitutional and pseudocriminal systems out of a patchwork quilt of contracts.

But using contracts to create background rules is often not possible, and where possible, it is usually not practical. After all, a contract only binds someone who signs it, and thus is by nature not a background rule.[1] Therefore, contracts are often not the best tool for creating default rules for large and shifting populations. Since contracts are currently the most important source of law governing the lives of virtual-world inhabitants, an examination of the limits of contracts makes a serious contribution to that area of study.

This article uses the lens of virtual worlds to reexamine the place of contract law within the larger framework of the common law. Contracts often no longer work hand in hand with other areas of the law; increasingly, contracts supplant those other areas entirely. Contracts can usefully tweak background rules to increase the satisfaction of the contracting parties. But where contracts supplant default rules, or prevent the development of such rules, communities are likely to suffer. Thus, this article not only examines the nature of these community-governing contracts that affect millions—and soon billions—of people in virtual worlds globally, it also reveals something more broadly applicable about how contracts fit into the overall scheme of the law.

Property and tort systems are good examples of the kind of background, default rules that communities need but that contracts cannot cheaply provide. Protection of private property and protection of personal and dignitary interests are so critical to

[1] Although a contract may not *bind* a nonsignatory, it may *benefit* a nonsignatory if that person is an intended third-party beneficiary. This distinction is explored in Part III.B, below.

online communities that cases surrounding these issues have already begun to appear, even though the technology is new. These areas of law are also critical to the proper functioning of contracts themselves. For example, protection of private property is a necessary predicate to contracts conveying property interests. Similarly, contracts cannot be enforced unless contracting parties are protected from force and fraud by the law of torts. Thus, the twin examples of property and tort law will appear at numerous points in the analysis.

Different countries have already responded to the need for law in virtual worlds in different ways. The United States relies on private law contract to govern behaviour in virtual communities.[2] By comparison, South Korea vigorously uses its criminal laws to enforce norms.[3] Chinese courts have used a theory of labour in ruling that a game service provider must return virtual property to the player who has worked to obtain it.[4] At some risk of overgeneralization, one can characterize the Continental approach as favouring public legislation, rather than free-market contract, to supply rules for online activity.[5]

This article focuses on the first of the above approaches, analyzing the contracts that govern virtual worlds from the perspective of U.S. common law. This focus on

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[2] For example, theft of virtual property is a contract matter in the United States, not a crime (John Brewer, "When a Virtual Crook Struck This Gamer, He Called Real Cops" *St. Paul Pioneer Press* (1 February 2008) A1 (discussing the lack of police action when $3800 worth of virtual property was stolen).

[3] Mark Ward, "Does Virtual Crime Need Real Justice?" *BBC News* (29 September 2003), online: BBC News <http://news.bbc.co.uk/2/hi/technology/3138456.stm> (discussing 22,000 complaints relating to online gaming to police in South Korea in the first six months of 2003); Hwa-Gyung Yoo, "Ten Thousand Teenagers 'Game Criminals'" *Munwha-ilpo* (*South Korean Cultural Daily*) (27 February 2004) 10 [copy on file with author]; Unggi Yoon, "Research on Legal Policy of MMORPG-Item Cash Trade" (13 December 2004) [unpublished, copy on file with author]. Unggi Yoon is a judge on the District Court of Pusan, South Korea. Judge Yoon's research examined 480 convictions for theft of virtual property under South Korea's *Enhancement and Protection of Telecommunication Law*, which applies to virtual-property theft (*ibid.*).

[4] See Will Knight, "Gamer Wins Back Virtual Booty in Court Battle" *New Scientist* (23 December 2003), online: New Scientist <http://www.newscientist.com/article/dn4510-gamer-wins-back-virtual-booty-in-court-battle.html> (discussing *Li Hongchen v. Beijing Arctic Ice Technology Development*, a case in which a Chinese court ordered a virtual-world company to return the virtual property to a player whose account had been hacked and looted). Thus, virtual-world law is marked by a multiplicity of approaches in the international arena, but dominated by contract analysis in U.S. courts.

[5] For example, strong EU protection for personal privacy online stands in marked contrast to the U.S. approach, which permits parties to freely waive privacy rights by contract. See Fred C. Cate, "The Changing Face of Privacy Protection in the European Union and the United States" (1999) 33 Ind. L. Rev. 174 at 179 ("[u]nder the EU data protection directive, information privacy is a basic human right; the failure of the U.S. legal system to treat it as such offends European values and has led the EU to threaten to suspend information flows to the United States").

U.S. law is by necessity.[6] Many of the most successful virtual worlds are hosted in the United States.[7] The contracts that govern these worlds contain choice-of-law provisions that select U.S. law.[8] Thus, the U.S. legal system currently has the wide majority of common law cases relating to virtual worlds.

But it is my hope that this discussion will be useful for judges and attorneys across common law jurisdictions, especially Canada, the United Kingdom, and Australia, which have all experienced and contributed to the explosive growth of virtual-world participation.[9] These jurisdictions share much of the common law framework discussed below, but have not yet seen large-scale contract litigation on conflicts arising in virtual worlds.[10] Part III, in which I will discuss contract law's place within the framework of the common law, especially ought to find fertile ground across common law jurisdictions.

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[6] This piece makes no claims about the superiority of U.S. law or the common law system over any other country's method of creating legal arrangements. It does make claims about the advantages of judicial as opposed to legislative decision making in Part IV.D, below, but that dichotomy is not unique to the common law.

[7] See e.g. Seth Schiesel, "An Online Game, Made in America, Seizes the Globe" *The New York Times* (5 September 2006) A10 (discussing the success of World of Warcraft).

[8] See e.g. Blizzard Entertainment, *World of Warcraft Terms of Use Agreement* (29 July 2008), s. 19F, online: World of Warcraft <http://www.worldofwarcraft.com/legal/termsofuse.html> [*World of Warcraft Terms of Use*] [copy on file with author] ("[e]xcept as expressly provided otherwise, this Agreement shall be is [sic] governed by, and will be construed under, the Laws of the United States of America and the law of the State of Delaware, without regard to choice of law principles"). See also Linden Lab, *Second Life Terms of Service*, s. 7.1, online: Second Life <http://secondlife.com/corporate/tos.php> [on file with author] ("[t]his Agreement and the relationship between you and Linden Lab shall be governed in all respects by the laws of the State of California without regard to conflict of law principles or the United Nations Convention on the International Sale of Goods").

[9] See e.g. Luigi Benetton, "Businesses Experiment with Second Life" *CBC News* (20 December 2007), online: CBC News <http://www.cbc.ca/news/background/tech/internet/secondlife.html> (discussing Canadian law firms, businesses, and universities developing a virtual-world presence); "Virtual Worlds are Worth $1Bn" *BBC News* (20 March 2007), online: BBC News <http://news.bbc.co.uk/2/hi/technology/6470433.stm> (discussing growth in subscription fees worldwide for entertainment-oriented virtual worlds); Nick Miller, "Virtual World: Tax Man Cometh" *The Sydney Morning Herald* (31 October 2006), online: The Sydney Morning Herald <http://www.smh.com.au/news/biztech/virtual-world-tax-man-cometh/2006/10/30/1162056925483.html> (discussing an Australian Tax Office statement that income derived from virtual-world sources is taxable).

[10] Indeed, once such cases become commonplace, they are likely to be brought in U.K. courts. Imagine that one person egregiously insults another in a virtual world. This would give rise to breach of contract (for violating the terms of use) and defamation. Claims of third-party beneficiary status are easier to make under U.K. law, thanks to recent revisions. See *Contracts (Rights of Third Parties) Act* (U.K), 1999, c. 1(3) (permitting a party to enforce as third-party beneficiary even if she was not a member of the class at the time the benefit was created). And U.K. law has long been seen as an optimal place for plaintiffs to bring defamation claims. See U.K., Supreme Court Procedure Committee, *Report on Practice and Procedure in Defamation* (July 1991) (rejecting U.S.-style defences for media and comment on public figures).

Finally, many of the problems presented in this article will resonate with civil lawyers. Civil law systems are uniquely situated to resolve some of the issues discussed below,[11] but in resolving others, they may experience greater difficulties than those in the common law world.[12] For civil lawyers, this article therefore may serve as a comparative touch point, first to determine the strengths and weaknesses of the common law approach, and second to identify points of interface between the two systems.

The article will proceed as follows. Part I will introduce the phenomenon of virtual worlds and the contracts that govern them. Part II will discuss the existing legal literature regarding online contracts, contract-governed communities, and virtual worlds. Part III will show why contracts cannot supplant common law when it comes to creating cheap background rules, and Part IV will discuss how courts can go about developing the background rules that online communities need. Part V will examine why markets do not solve the problem on their own. And, finally, the article will close with some broader observations.

I. The Anti-social Contract

Contract law has taken on the task of governing online communities—of creating the new, online "social contracts" for millions of people. Because EULAs govern entire communities, EULA drafters attempt to emulate the background rules (like property law or tort law) that normally provide the default legal obligations for groups of people. But these attempts fail. They do not fail because EULAs are badly written, or because they are oppressive. Instead, they fail because contracts cannot cheaply create default rules that bind large and shifting populations.[13]

For example, virtual-world EULAs either eliminate private property, or emulate private-property rules so badly that investment has withered and litigation blossomed.[14] "Codes of Conduct", which are now often tied to EULAs, create wonderful, tort-like rules that cannot be enforced by the people who are harmed. I term these failed contracts "anti-social contracts", because instead of creating

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[11] For example, much of the discussion below is about the problem of creating private law rights that run horizontally between members of a virtual world. Such horizontal rights pose less of a problem in some civil systems. See e.g. Oliver Gerstenberg, "What Constitutions Can Do (But Courts Sometimes Don't): Property, Speech, and the Influence of Constitutional Norms on Private Law" (2004) 17 Can. J.L. & Jur. 61 (discussing the problem of enforcing public law in privately-owned spaces and *Drittvirkung*, the German doctrine of "horizontal effect", which permits constitutional courts to reform private law contracts to comport with constitutional values).

[12] See generally the discussion of the advantages of iterative and experimental judicial resolution of technology-law issues in Part IV.D, below.

[13] Additionally, even if they could do so, virtual-world creators may not want to create rights between virtual-world inhabitants. See generally Part III.B., below.

[14] See *infra* note 32.

background, default rules that help societies thrive, they create confusion and litigation.

To explain the phenomenon of anti-social contracts, this part begins by discussing what virtual worlds are, and proceeds to discuss the current relationship between contracts and virtual worlds.

A. What are Virtual Worlds?

The internet is about communities. Instant, relatively cheap communication is nothing new—that was the revolution of the telephone. The revolution of the internet is its ability to support the communities—some tiny and some immense—that have gathered in virtual spaces. MySpace and YouTube have become Wall Street legends.[15] Facebook and other social-networking sites have become part of daily parlance.[16]

Virtual worlds are the next generation of both social-networking sites and the internet.[17] A virtual world is an online community occupying a three-dimensional simulated physical space. Imagine an entire city's worth of people living, working, and playing together in a simulated, virtual environment.[18] Citizens of virtual worlds use these worlds to socialize, adventure, network, play, or work.[19] Virtual worlds are used for entertainment, academics, military training, medical treatment, and electronic commerce.[20]

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[15] Stephen Foley, "YouTube goes from zero to $1.65bn in two years" *The Independent* (10 October 2006) 26 ("[t]he twenty-something founders of YouTube have become millionaires hundreds of times over, after their video-sharing website, one of the fastest-growing phenomena on the internet, was sold to Google with a $1.65bn (£880m) price tag"); Stephen Foley & Saeed Shah, "Murdoch gamble pays off as MySpace takes over" *The Independent* (11 August 2006) 50 ("[w]hen Rupert Murdoch bought the MySpace social networking website in July last year, critics scoffed that the $580m price tag was too rich for a loss-making dot.com ... Little more than one year on, and Wall Street thinks the business might already be worth as much as 10 times what Mr. Murdoch paid for it").

[16] Ryan Kim, "Yahoo fumbled on Facebook" *The San Francisco Chronicle* (6 April 2007) C3 ("[i]n just three years since its launch, Facebook has attracted 21 million registered users, 93 percent of whom are 'active,' meaning they log on at least once a month").

[17] Matt Richtel and Brad Stone, "Doll Web Sites Drive Girls to Stay Home and Play" *The New York Times* (6 June 2007), online: The New York Times <http://www.nytimes.com/2007/06/06/technology/06doll.html>.

[18] See F. Gregory Lastowka & Dan Hunter, "The Laws of the Virtual Worlds" (2004) 92 Cal. L. Rev. 1. The authors describe such a virtual world city—Blazing Falls (*ibid.* at 3-5).

[19] See Alison Young, "Virtual CDC spreads like flu: Agency enters Web's cyberspace universes to attract Internet users, market health messages to new audience" *The Atlanta Journal-Constitution* (23 February 2007) 1A ("[v]irtual worlds, sometimes called 'metaverses,' are sites on the Internet where a growing community of people gather, socialize, play and even participate in a virtual economy ... ").

[20] See Joshua A.T. Fairfield, "Virtual Property" (2005) 85 B.U.L. Rev. 1047 at 1059-61 [Fairfield, "Virtual Property"] (discussing various uses of virtual worlds). Throughout, the focus of this article will be on the most developed virtual worlds, those developed for entertainment, which have now become involved in lawsuits.

Some non-virtual, online communities are like virtual worlds in that a company creates and maintains the central infrastructure used by the community. For example, Facebook and YouTube are not just dispersed communities whose members share a common interest; users of these types of networking sites rely on a centralized infrastructure created by a company and are ostensibly bound by the contractual Terms of Use proposed by that company. Thus, although this discussion focuses primarily on virtual worlds, some of the most profitable online communities can also benefit from this analysis.

Another distinction worth exploring is the one between "virtual" worlds and the "real" world. The border between virtual and real worlds is porous. Within virtual worlds, people assume new, electronic identities and develop group identities. Paradoxically, virtual-world inhabitants value the anonymity the new setting brings, but immediately set about establishing real-world friendships and even romantic relationships that require them to reveal real-world information about themselves.[21] Similarly, economic activity within virtual worlds affects real-world economies, and vice versa. Some people simply treat a virtual world like a game. Other people pay real money for virtual items in order to better enjoy the virtual world. Still others work in virtual worlds and convert virtual-world currency into real money in order to make a living.[22]

Although these worlds have sparked academic interest for a decade and a half, virtual worlds have only recently become a mainstream cultural phenomenon.[23] They are growing at startling rates.[24] The virtual world Second Life claims to have attracted an additional six million users in just over half a year, and real-world companies have queued up to advertise to this growing population.[25] The virtual world World of Warcraft, created by Blizzard Entertainment, has well over eleven million paying subscribers worldwide.[26] Recent research indicates that the median time a regular

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[21] Kylee MacLellan, "UK Couple in Real Life Divorce over Virtual Affair" *Reuters* (14 November 2008), online: Reuters <http://www.reuters.com/article/internetNews/idUSTRE4AD39U20081114>.

[22] Kathleen Craig, "Making a Living in Second Life" *Wired* (2 August 2006), online: Wired <http://www.wired.com/gaming/virtualworlds/news/2006/02/70153>.

[23] In addition to widespread news coverage, a recent episode of the popular television show *South Park* focussed on the virtual world World of Warcraft (episode 147, 4 October 2006).

[24] Julian Dibbell, "A Rape in Cyberspace" *The Village Voice* (21 December 1993), online: Julian Dibbell.com <http://www.juliandibbell.com/texts/bungle_vv.html>; "Where You Can Be Yourself, Version 2.0" *The Washington Post* (26 December 2006) A10 ("[t]ens of millions of Internet users participate in virtual worlds … "); Seth Schiesel, "An Online Game, Made in America, Seizes the Globe" *The New York Times* (5 September 2006) A10 ("[l]ess than two years after its introduction, World of Warcraft ... is on pace to generate more than $1 billion in revenue this year with almost seven million paying subscribers … ").

[25] Shona Crabtree, "Finding Religion in Second Life's Virtual Universe" *The Washington Post* (16 June 2007) B09 (noting that Second Life, launched in 2003, now has over 3.7 million users, including a burgeoning religious community of virtual "churches, mosques and synagogues").

[26] Blizzard Entertainment, Press Release, "World of Warcraft Surpasses 11 Million Subscribers Worldwide" (28 October 2008), online: Blizzard Entertainment <http://www.blizzard.com/us/press/

player spends each week in virtual worlds is approximately twenty hours.[27] And these numbers represent just the tip of the iceberg when compared to the reach and penetration of virtual worlds in China, Japan, Taiwan, and South Korea.[28] Recent market studies have suggested that virtual-world expansion is a global phenomenon, and that up to 80 per cent of people who use the internet (about 1.6 billion globally) may work or play in virtual worlds by the year 2011.[29]

B. Contracts and Virtual Worlds

People being people, they defame, harass, and defraud one another even in virtual worlds.[30] Because virtual objects have real-dollar values, people in virtual worlds steal from one another, destroy property, and quarrel over ownership. [31] As a result, with the explosive growth of online communities has come the necessity for courts to decide disputes between members of these communities. Such litigation is uniformly marked by an odd characteristic: questions of property law, tort law, and even criminal law are uniformly construed by the courts as contract disputes.[32] In order to understand these disputes, it is important to understand the nature of the relationship between community-governing contracts and the millions of people that they govern.

The companies that create virtual worlds draft EULAs to govern the behaviour of the people who use their worlds. In order to log in to a virtual world, members are first required to click on and agree to the EULA.[33] Because EULAs govern communities composed of millions of people, they contain terms unlike those in

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081028.html>. See also Tor Thorsen, "World of Warcraft: 8 Million Served" *CNET News.com* (12 January 2007), online: CNET News.com <http://news.cnet.co.uk/gamesgear/0,39029682,49286879,00.htm>.

[27] Nick Yee, "The Demographics, Motivations and Derived Experiences of Users of Massively-Multi-User Online Graphical Environments" (2006) 15 Presence: Teleoperators and Virtual Environments 309 at 316, online: Nick Yee.com <http://nickyee.com/pubs/Yee%20-%20MMORPG%20Demographics%202006.pdf>.

[28] See Fairfield, "Virtual Property", *supra* note 20 at 1084-89 (detailing developing law of virtual worlds in China, Korea, and Taiwan).

[29] Jessica Bennett & Malcolm Beith, "Alternate Universe" *Newsweek* (2007), online: Newsweek.com <http://www.newsweek.com/id/32824>.

[30] Dibbell, *supra* note 24.

[31] Brewer, *supra* note 2 (discussing treatment of theft of virtual property under the U.S. system).

[32] See *Bragg v. Linden Research*, 487 F.Supp.2d 593 at 605-10 (E.D. Pa. 2007) [*Bragg*]. See also Will Knight, "Gamer Wins Back Virtual Booty in Court Battle" *New Scientist* (23 December 2003), online: New Scientist <http://www.newscientist.com/article.ns?id=dn4510> (discussing the case of Li Hongchen).

[33] See *Bragg*, *ibid.* at 603 ("[b]efore a person is permitted to participate in Second Life, she must accept the Terms of Service of Second Life (the 'TOS') by clicking a button indicating acceptance of the TOS. [The plaintiff] concedes that he clicked the 'accept' button before accessing Second Life"). See also Turbine Inc., *The Lord of the Rings Online: Shadows of Angmar End-User License Agreement* (31 March 2007), online: The Lord of the Rings Online <http://www.lotro.com/support/policies/218-eula>.

regular mass-market contracts. Virtual-world EULAs do not merely contain the price and use restrictions that one might expect in a software licence. Rather, EULAs attempt to create background, default rules of social behaviour. Suppose, for example, that when you rented a chainsaw there was a provision in the rental contract that required the renter to refrain from making too much noise and disturbing the renter's neighbours. Such terms may seem odd when placed in a real-world context, but they are standard for the million-member populations of virtual worlds.

In the real world, many of the background, default rules that keep communities running smoothly are provided by the common law. For example, personal and dignitary interests are protected by the law of torts, while private-property interests are protected by property law. Such common law rules bind everyone to respect basic property rights and the bodily and dignitary integrity of fellow citizens.

Virtual worlds need these basic societal safeguards too. Currently, the only source of rules is the EULA. But tort rules and property rules are different from contract rules. Tort and property rules automatically bind everyone in a community cheaply and without need for mutual consent. Contracts simply cannot do that. So virtual-world EULAs have quickly run into trouble.

Two examples will suffice. First, the creators of virtual worlds have attempted to use their EULAs to create default rules regarding private property.[34] Since virtual

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[34] The *World of Warcraft Terms of Use* state that

> Blizzard [the company that produces World of Warcraft] does not recognize the transfer of WoW Accounts or Blizzard Accounts. You may not purchase, sell, gift or trade any Account, or offer to purchase, sell, gift or trade any Account, and any such attempt shall be null and void. ... You agree that you have no right or title in or to any such content, including without limitation the virtual goods or currency appearing or originating in the Game, or any other attributes associated with the Account or stored on the Service. Blizzard does not recognize any purported transfers of virtual property executed outside of the Game, or the purported sale, gift or trade in the 'real world' of anything that appears or originates in the Game. Accordingly, you may not sell in-game items or currency for "real" money or exchange those items or currency for value outside of the Game (*supra* note 8, s. 11).

Electronic Arts has set similar terms for its Dark Age of Camelot Knowledgebase:

> YOU SPECIFICALLY ACKNOWLEDGE THAT THE TIME YOU SPEND PLAYING DARK AGE OF CAMELOT(TM) IS FOR ENTERTAINMENT PURPOSES ONLY, AND THAT YOU CLAIM NO INTEREST IN THE VALUE OF SUCH TIME AS REPRESENTED BY THE BUILDING UP OF THE EXPERIENCE LEVEL OF YOUR CHARACTER AND/OR THE ITEMS YOUR CHARACTER ACCUMULATES DURING YOUR TIME PLAYING DARK AGE OF CAMELOT(TM) (*Dark Age of Camelot End User Access and License Agreement*, online: Dark Age of Camelot Support <http://support.darkageofcamelot.com/kb/article.php?id=072> [emphasis in original]).

See also Electronic Arts, *Ultima Online License Agreement*, s. 5(c), online: Ultima Online <http://www.uo.com/agreement.html> ("[y]ou acknowledge and agree that all characters created, and

worlds are shared simulated physical spaces, virtual land and objects are inevitably features of these worlds. Members of virtual communities thus naturally began to act as though they had private-property interests in the virtual objects and spaces they created and inhabited, and began to buy, sell, and trade virtual objects, land, and developments upon that land in real dollars.[35]

The virtual-world creators attempted to eliminate these emergent private-property interests through contractual means.[36] The companies that created the virtual worlds perceived a conflict between the right of the virtual-world creator to control the world, and the ability of the community member to dispose of or alienate her virtual property.[37] Therefore, according to most virtual-world EULAs, inhabitants could not own the one-off copies of the land or objects that their avatars—their virtual alter egos—possessed within the virtual world.[38] But this was akin to a book publisher arguing that a book buyer has no personal-property interest in a copy of a book because of existing intellectual-property in the work, or to Microsoft claiming an ownership interest in every document created using its software.[39]

Some EULAs were written to achieve the opposite effect: to create a quasi-property system out of a series of contractual licences, sublicences, and "sub-sublicences".[40] But those attempts also engendered confusion and litigation.[41] As a result, even those companies that tried to provide their clients with pseudoproperty interests in virtual objects substantially retreated from their original promises.[42]

A second attempt to create default rules was based on tort law: the drafters of EULAs tried to create tort-like obligations through contract, using Codes of Conduct

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items acquired and developed as a result of game play are part of the Software and Service and are the sole property of EA.com").

[35] Julian Dibbell, "The Unreal Estate Boom" *Wired* (January 2003), online: Wired <http://www.wired.com/wired/archive/11.01/gaming.html>; Rapheal Koster, "Selling Virtual Property for Real World Money" (15 October 2003), online: Raph Koster's Website <http://www.raphkoster.com/gaming/charsell.shtml>; Dave Rickey, "Render Unto Caesar" (7 October 2003), online: Skotos.net <http://www.skotos.net/articles/engines10.phtml>.

[36] See Fairfield, "Virtual Property", *supra* note 20 at 1050 ("holders of intellectual property rights have been systematically eliminating emerging virtual property rights by the use of contracts called End User License Agreements ... ").

[37] *Ibid.*

[38] *Ibid.*

[39] See Fairfield, "Virtual Property", *supra* note 20 at 1059.

[40] See *Bragg*, *supra* note 32 at 595-96. See also Daniel Terdiman, "Real-World Success With Virtual Goods" *CNet news.com* (7 February 2007), online: Cnet news.com <http://news.com/2100-1043_3-6156925.html>; Mike Musgrove, "Virtual Games Create A Real World Market" *The Washington Post* (17 September 2005) A01, online: The Washington Post <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/16/AR2005091602083_pf.html>.

[41] See e.g. *Bragg*, *ibid.*

[42] *Ibid.*

and Terms of Service (also called Terms of Use).[43] In this way, "griefing"—actions within a virtual world that harass and disturb other people—is proscribed by the EULAs. But suppose that party A suffers griefing by party B. Can party A then sue based on the contract that party B signed with the virtual-world creator? The answer is no unless a third-party-beneficiary designation is provided, which never occurs, as will be discussed in Part III.B.

These two examples frame the problem: virtual worlds can only properly function if their members can resort to default rules. However, a combination of resistance on the part of virtual-world creators (expressed through their EULAs) and reticence on the part of courts to take on unfamiliar technologies has left these communities without the legal rules they need to thrive.

The following part will explore how contracts work within communities by discussing the literature on mass-market contracts, real-world subdevelopments and utopian communities, and virtual worlds.

II. The Literature on Contractual Communities

This article seeks to fill significant gaps in both contract and virtual-worlds literature. As discussed below, the literature on mass-market contracts (and by extension, online standardized contracts) has focused on how contracts affect large numbers of people serially, rather than examining the effects of contractual governance on communities as a whole. Moreover, other scholars have examined how communities have used contract law alongside property law, tort law, etc., to create new kinds of communities. This literature runs from nuts-and-bolts real-estate subdivisions to the utopian communities established in the early United States. Such real-world communities rely on a mix of contract and other rules, such as property rules, providing a potential model for the governance of virtual worlds. Finally, the conversation about law and virtual worlds generally proceeds on the presumption that contract law is unlimited in its ability to govern virtual worlds, a presumption that this article disputes. In this part, each of these points is addressed in turn.

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[43] See e.g. *World of Warcraft Terms of Use*, *supra* note 8, s. 9(B)(vi) (laying out the "Code of Conduct" for the game, including the agreement not to "[h]arass, threaten, stalk, embarrass or cause distress, unwanted attention or discomfort to any user of the Game"); Blizzard Entertainment, *World of Warcraft Forums*, online: World of Warcraft <http://forums.worldofwarcraft.com/forum-coc.html?sid=1> (explaining that under the "Code of Conduct" a user may not "[i]nsultingly refer to other characters, players, Blizzard employees, or groups of people" or "[r]efer to violence in any capacity that is not directly related to the game world"); Facebook, *Terms of Use* (15 November 2007), online: Facebook <http://www.facebook.com/terms.php> (providing "User Conduct" guidelines that prohibit users from "intimidat[ing] or harass[ing] [one] another" or "impersonat[ing] any person or entity, or falsely stat[ing] or otherwise misrepresent yourself, your age or your affiliation with any person or entity"). See also David P. Sheldon, "Claiming Ownership, But Getting Owned: Contractual Limitations on Asserting Property Interests in Virtual Goods" (2007) 54 UCLA L. Rev. 751 at 787 (collecting examples).

A. Online Contracts

To date, the literature on mass-market contracts has not focused on problems relating to the contractual governance of communities. Instead, articles about mass-market contracts have focused on the problems of online consent,[44] and on the dynamics of bargaining power and unconscionability.[45] Some scholars condemn the standardization of contracts, while others suggest that mass-market contracts might, in a competitive marketplace, create savings for consumers.[46] Thus, the literature on online contracting has overwhelmingly focused on the individual consumer who is faced with "take it or leave it" deals.

This article deals with a problem of another kind: whether mass-market contracts can efficiently govern the day-to-day workings of million-member communities. If you and I each buy a microwave, we do not become members of a community, even if millions of others like us buy microwaves as well. Your breach of your microwave-purchase contract does not affect me. Nor can I sue you based on your breach. But in virtual worlds, the entire point is to generate rules that govern the relationship not only between a seller and a buyer, but also among all members of the community.

B. Subdivisions and Utopian Communities

The approach closest to the analysis developed in this article has been the academic discussion about residential subdevelopments in which communities are governed by servitudes created by the developer using a mix of contract and property law.[47] Articles on this topic discuss how parties might use the developer as a clearing house for difficult-to-enforce rights that exist between one house owner and another.[48] There is also a developed literature on the fate of early-American, utopian communities that experimented with some form of common property ownership.[49]

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[44] See Margaret Jane Radin, "Humans, Computers, and Binding Commitment" (2000) 75 Ind. L. Rev. 1125 at 1126-28 (discussing basic models of consent online); Margaret Jane Radin, "Online Standardization and the Integration of Text and Machine" (2002) 70 Fordham L. Rev. 1125.

[45] See Susan Randall, "Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability" (2004) 52 Buff. L. Rev. 185 at 189-98 (discussing history and development of unconscionability).

[46] See Marcel Kahan & Michael Klausner, "Standardization and Innovation in Corporate Contracting (or 'The Economics of Boilerplate')" (1997) 83 Va. L. Rev. 713; Joshua A.T. Fairfield, "The Search Interest in Contract" (2007) 92 Iowa L. Rev. 1237 [Fairfield, "Search Interest"].

[47] See Lee Anne Fennell, "Contracting Communities" [2004] U. Ill. L. Rev. 829; Stephen E. Barton & Carol Silverman, *Common Interest Communities: Private Government and the Public Interest* (Berkeley, Cal.: Institute of Governmental Studies Press, 1994); David L. Callies, Paula A. Franzese & Heidi Kai Goth, "Ramapo Looking Forward: Gated Communities, Covenants, and Concerns" (2003) 35 Urb. Law. 177.

[48] Fennell, *ibid.* at 831-32.

[49] Robert C. Ellickson, "Property in Land" (1993) 102 Yale L.J. 1315 (discussing early land use in Colonial United States). See also Mark D. Rosen, "The Outer Limits of Community Self-Governance

Both real-estate developers and early utopian communities relied on a mix of property and contract law to achieve their desired results.[50] For example, utopian communities were able to enforce their distinctive property arrangements against third parties precisely because property law binds everyone, not just signatories to the contract that created the utopian community.[51]

Similarly, a residential developer might facilitate the creation of, for example, a crosscutting "no lawn gnome" rule that permits each house owner to enforce it against all other house owners.[52] Such crosscutting rules are created by using a mix of contract and property law: they are directly attached to the property interests of the house owners, and run horizontally between property owners in a subdivision.[53] One neighbour may therefore enforce the rule against another without having to first complain to the developer and request that he take action on the house owner's behalf.

The difficulty with using contracts to govern online communities is that virtual-world EULAs have no "other law" to fall back on. Court recognition of virtual property has lagged in the United States, largely because most EULAs try to eliminate private-property interests.[54] Tort suits for injuries that occur in virtual worlds are difficult to pursue because courts have not yet determined what is a sufficient violation of social convention to merit sanction. For example, the amount or degree of griefing necessary to establish a cause of action for intentional infliction of emotional distress is still an open question. Thus, while developer-originated covenants rely on background property and tort rules (or both together, as in the tort of nuisance) to function successfully, online EULAs do not have a developed theory of virtual property or tort law to draw on.[55] This article attempts to fill this gap by providing a

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in Residential Associations, Municipalities, and Indian Country: A Liberal Theory" (1998) 84 Va. L. Rev. 1053 at 1056 (discussing communal property arrangements in the Oneida, Amana, and Harmony Society communities).

[50] See Fennell, *supra* note 47 at 835 (discussing servitudes as hybrid contract–property arrangements).

[51] *Schwartz v. Duss*, 187 U.S. 8, 23 S. Ct. 4 (1902) [*Schwartz*] (Harmony Society property arrangements binding on heirs and assigns of society members). See also Rosen, *supra* note 49 at 1056, citing *Schwartz*, *ibid.*; *Burt v. Oneida Community*, 33 N.E. 307, 137 N.Y. 346 (N.Y. 1893); *Iowa v. Amana Society*, 109 N.W. 894, 11 American Annotated Cases 231 (Iowa 1906)).

[52] Fennell, *supra* note 47 at 836-37.

[53] *Ibid.* at 839-41.

[54] *Ibid.* at 835-36. Fennell states that "[s]ervitudes differ from contracts in that they bind successors of the original parties ... 'Promissory servitudes restricting land use ... came to enjoy recognition in the service of an expanded, modern market in which land-related contract obligations (alternatively conceived of as fractionated property rights) were recognized as transferable commodities'" (*ibid.* [references omitted], quoting James L. Winokur, "The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity" [1989] Wis. L. Rev 1 at 13-14).

[55] *Ibid.* at 857 ("[a]n obvious response ... is to invoke the availability 'exit,' which includes decisions not to enter a particular private development, as well as decisions to leave").

framework for developing those areas of the law in the context of online communities.

C. The Conversation About Virtual Worlds

Virtual-worlds scholars are only now beginning to address the effects of private law contractual governance on virtual worlds. Most governance discussions to date have been along the lines of traditional democratic models.[56] Yet rules in virtual worlds are, save for a few experiments, not generated by democratic process, but are instead created by private law contract. The question of whether these private law contracts can deliver the public goods they promise is the centrepiece of this article.

The conversation about the role of private law in virtual worlds has made for some strange bedfellows. Many virtual-world inhabitants do not want law to intrude on virtual worlds at all, because they fear reactionary legislation based on unverified claims that all video games are destructive. This position is an extension of the cyberseparatist arguments made about the internet in the 1990s.[57] Thus, these inhabitants are hostile to claims that the common law already governs virtual worlds.

They are joined by the creators of virtual worlds who also want outside law to stay out, although for a different reason. Virtual-world creators wish to prevent anyone from interfering with their control of their creative projects.[58] The creators have adopted contract law as the means of hedging out real-world law. This article therefore fills a serious gap in the conversation about virtual-worlds governance by arguing that EULAs have some limits in what they can do efficiently and by seeking to show that real-world law can and must provide some background rules for virtual worlds.

III. Contracts and the Common Law

To understand why contracts—by themselves—cannot cheaply replace certain kinds of legal rules, it is important to understand why we even have those other areas of law (property, torts, etc.) at all. Why not rely on contract for all of our legal obligations, the way virtual-world citizens currently must?

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[56] See e.g. Beth Simone Noveck, "Designating Deliberative Democracy in Cyberspace: The Role of the Cyber-Lawyer" (2003) 9 B.U.J. Sci. & Tech. L. 1 (discussing the relationship between technology and deliberative democracy).

[57] John Perry Barlow, *A Declaration of the Independence of Cyberspace* (1996), online: Electronic Frontier Foundation <http://homes.eff.org/~barlow/Declaration-Final.html> ("Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone").

[58] See e.g. Lastowka & Hunter, *supra* note 18 at 53 ("[a]s we explain, even when these owners are not wholly adverse to democratic governance within the virtual spaces they maintain, their exclusive ability to exert absolute control over these environments hopelessly complicates attempts to map traditional notions of democratic governance onto these settings").

A. The Ecology of the Common Law

The roles of the various areas of the common law are complementary—property law does some things well, while contract law fills other roles. Property law, for example, ensures that legal rights are packaged in such a way that goods in the stream of commerce can pass smoothly to higher-value users.[59] Contract law ensures that individual preferences can be maximized.[60]

Each area of the common law helps define its neighbours' boundaries. Property law bounds and constrains contract law. For example, contracts may not be used to create unreasonable restraints on alienation (and thus remove valuable goods from the stream of commerce).[61] Tort law likewise constrains contract law—through the economic loss rule we separate unbargained-for harms (torts) from harms that should have been discussed within a bargain (contracts).[62]

Because the areas of the common law are bounded by one another, isolating any one of them can cause significant problems. An ecological analogy may help: transporting the rabbit to Australia, where its natural predators were lacking, caused the species to spread out of control.[63] Using contract law to govern virtual worlds—by itself—caused a similar pathology. Suddenly contract law was free of the constraints of property law, tort law, and even (because these are private spaces and thus exclude government action) some legislation and constitutional law.[64] Because

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[59] See Michael A. Heller, "The Tragedy of the Anticommons: Property in the Transition from Marx to Markets" (1998) 111 Harv. L. Rev. 621 at 640-42.

[60] See Louis Kaplow & Steven Shavell, "Fairness Versus Welfare" (2001) 114 Harv. L. Rev. 961 at 1102 ("[f]rom the perspective of welfare economics, the purpose of contracts is to promote the well-being of the contracting parties").

[61] See e.g. *Metropolitan Transportation Authority v. Bruken Realty*, 67 N.Y.2d 156 at 161, 492 N.F. 2d 379 (Ct. App. N.Y. 1986) [*Bruken Realty* cited to N.Y.2d]. The court remarks that "[t]he [rule against perpetuities] and the common law rule against unreasonable restraints serve the same general purpose by limiting the power of an owner to create uncertain future estates. The [rule against perpetuities] does so indirectly by limiting the time when future interests must vest. The rule against unreasonable restraints on alienation does so directly by forbidding owners to impose conditions on conveyances which block the grantee from freely disposing of the property" (*ibid.*).

[62] See e.g. Anita Bernstein, "Keep it Simple: An Explanation of the Rule of No Recovery for Pure Economic Loss" (2006) 48 Ariz. L. Rev. 773 ("[w]hen economic-loss plaintiffs cannot connect physical injury or property damage to the acts or omissions of defendants, judges will kick these plaintiffs out of court" at 773).

[63] See e.g. Robert Milliken, "Plague of Rabbits Returns to the Outback" *The Independent* (18 November 1990) 13 ("[t]here were no rabbits in Australia when the first white people arrived 200 years ago. Exactly who was to blame for starting the plague has always been disputed ... ").

[64] See Beth Simone Noveck, "Designing Deliberative Democracy in Cyberspace: The Role of the Cyber-Lawyer" (2003) 9 B.U.J. Sci. & Tech L. 1, 26 ("[t]he Public Forum Doctrine assumes a geographic and spatial reality that does not apply in cyberspace"). See also Dawn C. Nunziato, "The Death of the Public Forum in Cyberspace" (2005) 20 Berkeley Tech. L.J. 1115 at 1116 ("[t]he public/private balance that characterizes real space and renders the First Amendment meaningful within it is all but absent in cyberspace").

these contracts exist in a legal vacuum, no longer circumscribed by other areas of law, they have metastasized and come to dominate the legal landscape.

A diagram of a healthy relationship between various areas of the law might look something like this:

Table 1:

	Asymmetric	**Reciprocal**
Bilateral	Contracts	Relational
Multilateral	Legislation	Property/Torts

Table 1 attempts to show that certain areas of law can govern certain groupings of people at lower cost. If transaction costs were zero, contractual bargains that mimic property or tort regimes would be feasible. However, transaction costs are never zero. Thus, the concept underlying this model is that each area of law reduces certain transaction costs and thereby enables the conclusion of deals of a specific kind (reciprocal or asymmetric) among a given population (bilateral or multilateral) more cheaply than alternative methods would permit.

Table 1 first divides legal relationships according to whether they run one-to-one (bilateral) or one-to-many (multilateral). As used here, bilateral relationships do not mean purely two-party transactions. Rather, "bilateral" is a label for legal relationships at one end of a spectrum of negotiation and coordination costs. Contract law is bilateral: it is cheapest when there are a limited number of parties at the table. As a counterexample, property law is multilateral: property rights are enforceable against the whole world without the rights holder having to engage in expensive serial negotiation with third parties to secure their respect for his property rights.[65]

Of course, more than two parties can enter into a contract. But a staple of the literature has been that contracts become increasingly expensive as more people are added to them. Guido Calabresi and A. Douglas Malamed point out that rising transaction costs may prevent the conclusion of contracts where the contracting group is large and unable to cheaply coordinate preferences.[66] There is no law of nature that prohibits contracts from governing one-to-many relationships—but there is a law of

[65] See Thomas W. Merrill & Henry E. Smith, "Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle" (2000) 110 Yale L.J. 1.

[66] "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral" (1972) 85 Harv. L. Rev. 1089.

mathematics that makes contracts decreasingly useful as the number of negotiating parties grows.[67]

Or, to put it another way, the transaction costs of property rules do not rise with the increase in the number of marginal parties. Suppose a new person enters a country. He must obey the laws of private property. That does not raise the transaction costs for everyone else. However, suppose a new person joins the negotiation table as a party to a contract. Now the negotiation costs of all parties rise. Indeed, the transaction costs of contracts continue to rise sharply with each additional party.

The second division recorded in Table 1 is between asymmetric and reciprocal legal trades. In an asymmetric trade, parties exchange unlike goods or services. This can take the form of barter—a goose for a cart. More commonly, it takes the form of a trade of dollars in exchange for a good or service.

Much of economics lies in exploring the deep-seated nervousness about forcing asymmetric trades. No one knows how much a service or a good is truly worth.[68] Economists make approximations: a resource is worth its opportunity cost, or the next-best use to which it could be put.[69] Or, an economist might say that the value of an item is what a person is willing to pay for it.[70] But in the situation where the parties are not willing to make a deal, there is no final solution to this problem of valuation.[71]

This nervousness about forcing asymmetric trades is at the foundation of the common law of contract.[72] The basic idea of contract is that individualized trades should be enforced by courts, not rewritten to the court's liking.[73] And here is why: if goods and services cannot be objectively valued, there are no grounds for rewriting deals that parties have struck.[74] For all we know, if the deal had been arranged differently, the parties might not have made the trade. Thus, contracts are the most

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[67] *Ibid.*

[68] See Ashutosh Bhagwat, "Parking at BART, or Economics & Its Discontents" (2000) 4 Green Bag 2d 7 at 15, n. 40 ("[n]eoclassical economics generally ignores distributional effects because of the inability to make interpersonal comparisons of utility").

[69] See Richard A. Posner, *Economic Analysis of Law*, 5th ed. (New York: Aspen Law & Business, 1998) at 500-02 (defining opportunity costs).

[70] *Ibid.*

[71] See Amartya Kumar Sen, *Rationality and Freedom* (Cambridge, Mass.: Belknap Press, 2002) at 71 ("economists came to be persuaded ... that interpersonal comparisons of utility had no scientific basis: 'Every mind is inscrutable to every other mind and no common denominator of feelings is possible'").

[72] See e.g. F. Scott Kieff & Troy A. Paredes, "The Basic Matter: At the Periphery of Intellectual Property" (2004) 73 Geo. Wash. L. Rev. 174 at 181 ("[c]ourts are ill-equipped to second-guess the substance of contracts entered into by sophisticated parties merely because the courts believe that some different arrangement would promote better the use of the underlying IP rights"). The author cheerfully concedes that there are other important foundational ideas in contract: individual autonomy, building communities of effort, the morality of keeping promises, and many others.

[73] *Ibid.*

[74] See Posner, *supra* note 69 at 366.

efficient and effective means of governing asymmetric trades among limited numbers of parties.

But not all legal relationships involve asymmetric trades. Sometimes a trade is reciprocal: exchanging like for like.[75] For example, I promise not to strike you, and you promise not to strike me. Tort law cheaply creates certain reciprocal trades among large groups of people. Negotiation is not required, nor desired, because of its high cost. Courts simply start with a presumption that everyone prefers not to be struck, for example, and enforce that rule against every person. Reciprocity is measured ex ante. In the heat of the moment, of course, someone is usually the puncher and someone else the "punchee", likely leading to a difference in valuation of a rule against punching. But ex ante, none of us wants to be punched, and so courts are comfortable with adopting the rule against battery as a default, background rule.[76]

Similarly, the law of property creates cheap, reciprocal, multilateral trades. The transaction costs of negotiation would be prohibitive to creating and maintaining a regime of a private property.[77] Imagine going door to door and asking each person you meet to agree not to walk on your lawn. The very purpose of a property right is that it binds non-signatories to respect private property even though they have not negotiated any contractual agreement.[78]

Multilateral, asymmetric trades—trades between different groups of people—are the bailiwick of legislation. Some legislation purports to create reciprocal trades: I must not discriminate against you because of your race, gender, or national origin, and you must return the courtesy.[79] But a significant portion of legislation is asymmetric in that groups often do not make identical exchanges under the legislative process. Consider, for example, an environmental restriction on industry-waste output.[80] Environmentalists and industrialists are not engaged in a reciprocal trade when negotiating via Congress. However, the final result may well contain provisions that benefit each.

Indeed, courts are just as nervous about deviating from the terms of asymmetric trades in legislation as they are of doing so in the area of contracts.[81] Although the

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[75] See George P. Fletcher, "Fairness and Utility in Tort Theory" (1972) 85 Harv. L. Rev. 537 at 540 (developing theory of reciprocity as a basis for tort rules).

[76] Of course, one can tweak the default rules of tort by consent (e.g., in a boxing match). See Part IV.B, below.

[77] See Merrill & Smith, *supra* note 65.

[78] *Ibid.*

[79] See e.g. *Civil Rights Act Title VII*, 42 U.S.C. § 2000e *et seq.* (2000) (prohibiting employment discrimination).

[80] See *Clean Air Act*, 42 U.S.C. § 7612 (1990) (assessing the economic impact of environmental rules).

[81] See e.g. Frank H. Easterbrook, "Text, History, and Structure in Statutory Interpretation" (1994) 17 Harv. J.L. & Pub. Pol'y 61 at 63-65 (discussing reasons judges ought to be concerned about reworking legislative deals).

practice of enforcing contracts might seem far removed from the practice of courts deferring to the plain meaning of statutes, the underlying principle is identical. Just as courts hesitate to rewrite contracts because they are uncertain what deal would have been reached had the terms been different, courts also hesitate to rewrite legislation where they are uncertain as to whether the law would have been passed had the terms been different.[82] For example, a court might hesitate to rewrite a law, even in order to produce substantial benefits, where it is concerned that the underlying bargain between legislators might have contained considerations undocumented by the text of the bill.[83] Suppose legislator A had agreed to vote for legislator B's proposal on healthcare based on legislator B's promise to support legislator A's attempt to have an aircraft carrier built in A's district. In circumstances such as these, the court would not be able to get its hands on the whole legislative bargain to fairly rework it.[84] This may explain why courts are loath to reinterpret technology statutes, even though such statutes are obsolete by the time they reach the books.[85]

A bilateral, reciprocal obligation looks at first like a tort (and, indeed, is often taught as such). This category of obligations consists of default, background rules that are both triggered by and that apply only within a bilateral relationship. For example, there is no general duty of good faith toward one's fellow citizens. But once parties enter into a contract, they have a duty of good faith toward one another. In civil law countries, such a duty begins when negotiations begin, under the doctrine of *culpa in contrahendo*.[86] Similarly, a rule that requires experts with information not to abuse their positions of trust makes sense, since no one knows ex ante whether she will be in the position of trustor or trustee. But such an obligation would be too burdensome if everyone was made to carry it all the time. So, this category includes the dyads often taught ad-hoc in law school: fiduciary–beneficiary; attorney–client; doctor–patient; principal–agent.[87]

Criminal law is not featured in Table 1, but falls neatly into two categories—indeed, the diagram goes a long way toward explaining criminal law's often dual nature. Common law criminal law usually prescribes multilateral and reciprocal rules

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[82] See Frank H. Easterbrook, "Statutes' Domains" (1983) 50 U. Chicago L. Rev. 533 at 548 ("judicial predictions of how the legislature would have decided issues it did not in fact decide are bound to be little more than wild guesses ... ").

[83] *Ibid.* See also Easterbrook, "Text, History and Structure", *supra* note 81 at 68 ("[i]ntent is elusive for a natural person, fictive for a collective body").

[84] *Ibid.*

[85] See Part III.D., below.

[86] See generally Frederich Kessler & Edith Fine, "Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study" (1964) 77 Harv. L. Rev. 401.

[87] This category is rightly vulnerable to criticisms of parentalism. Because of the bilateral nature of the arrangements, it is relatively cheap to alter the terms of the deal. Perhaps the best defence is that courts are standardizing the duties within such relationships in order to lower information costs. If I only get one phone call from jail, I don't want to worry about whether my attorney has adopted a nonstandard view of the attorney–client relationship.

(like the obligation each of us bears not to murder or defraud another) that mirror tort obligations. But statutory criminal law often deals with "victimless" crimes that reflect a legislative judgment like those in the context of multilateral and asymmetric trades, discussed above.

This is not to say that one area of law can never do the job of another area of law, or that there is never any overlap. The different areas of the common law work together like the players on a baseball team. Every member can bat, but some are good at it. Every member can throw, but only one is the pitcher. In the same way, the various areas of the common law can overlap, but only certain areas excel at securing certain forms of legal arrangements within particular groupings of human beings.

I do not argue that it is impossible to create property or tort-like legal relations by contract, only that it is inefficient to do so. To stretch the above analogy, applying the law of contract, alone, to create a property or torts regime is much like having the same person, cloned, playing all positions on a baseball team. Even if it were possible, it would not be a winning strategy.

Moreover, a baseball team only succeeds when its players work together. A good catcher makes a good pitcher shine. Similarly, even though the law of contract has a critical role to play in community life, it can only do its job because other areas of law—for example, property law—create a background of non-negotiated, one-to-many, community obligations that contract law cannot supply as efficiently. For example, we can only contract about real estate because private-property ownership binds the entire world. Were there no private-property rules to bind third parties, contracting about private property would be a useless gesture. I, alone, might agree to respect your rights in the property, but no one else would be bound to do so. Thus, the only reason that party A can confer valuable property rights on party B by contract is precisely because those property rights already bind third parties not signatory to any agreement between A and B.

Turning back to our examination of the contracts that govern virtual worlds, courts have mistakenly hesitated to develop property, torts, and other rules necessary to govern online communities because the disputes are always presented to them as contractual disagreements.[88] But the courts' reticence is misplaced. Torts, property law, and other community rules are reciprocal arrangements that govern large populations, not asymmetric arrangements made among small ones.

The above discussion should have shown why it is at least questionable to try to replace every form of legal arrangement with networks of contracts. Judges should

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[88] *Bragg*, *supra* note 32 at 605-10; Proposed Joint Case Management Plan, *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, CV-06-2555PHX DGC (D. Ariz. 27 March 2007), online: Justia <http://docs.justia.com/cases/federal/district-courts/arizona/azdce/2:2006cv02555/322017/16> [*MDY Plan*]; Complaint, *Hernandez v. Internet Gaming Entertainment, Ltd.*, 07-21403 (S.D. Fla. 31 May 2007), online: Justia <http://docs.justia/com/cases/federal/district-courts/Florida/F/sdce/1:2007cv 21403/296927/1> [*Hernandez*].

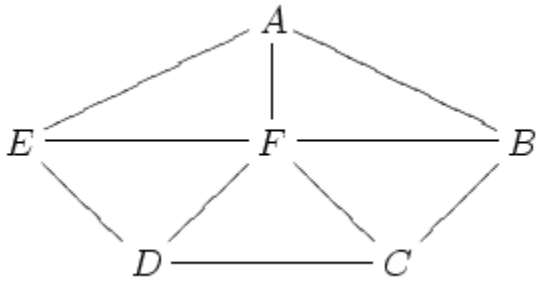
develop background, default rules that apply without contractual negotiation to facilitate or enforce reciprocal trades among members of a large and shifting population. In those cases, these trades present little problem in valuation, and little possibility of actual negotiation. However, where there is an asymmetric trade between a limited number of parties, courts will quite rightly hesitate to rewrite the deal that the parties have reached (because that would be, in effect, forcing a new deal).[89] The following sections will attempt to reinforce this position by applying it to a number of practical examples and cases from virtual worlds.

B. Horizontal Rights in Virtual Worlds: The Serial-Negotiation Problem

Contracts face two particular problems when creating rights within groups. This section discusses the problem of horizontal rights—rights between members of a group. The following section will discuss the problem of vertical rights—the rights between buyers and sellers as assets pass down the stream of commerce. Both sections draw on examples from virtual worlds.

Let us first examine the problem of creating horizontal rights in virtual worlds using only contract law. Suppose F, the corporation that runs a virtual world, has a contract with each virtual-world inhabitant (here, A through E). And suppose B breaches his contract with F by griefing, or harassing, A. Party A cannot enforce F's contract with B. Rather, to do so, A must have concluded its own agreement with B (the outer, "wheel" segment of Figure 1). And, even if A does contract separately with B, no such deal exists between A and C. And so on.

Figure 1:



As discussed above, the contracts that are entered into between the virtual-world creator and each member do not, by themselves, create enforceable rights between

[89] See e.g. *A.I.G. Uruguay Compania de Seguros v. AAA Cooper Transportation*, 334 F.3d 997 at 1010 (11th Cir. 2003) ("[g]enerally, the federal courts are not here to ... reform the contract between two [sophisticated business actors]").

members. And if each party were to attempt to reach such agreements with each other party, the costs of serially negotiating such rights would be prohibitive.[90] To secure such a right—for example, a serially negotiated agreement that would mimic the common law rule against fraud—you would need to ask all the people you met whether they would agree not to defraud you in return for your promise not to defraud them. Even if such rights could be serially negotiated, the risk of holdout would grow with each successive deal. If A could get B, C, and D on board, E would have an enormous incentive to hold out and extract a portion of the value of the group agreement already created. Or worse, E may decide to free ride entirely, safe in the knowledge that everyone else has agreed not to commit fraud. Thus, E would gain a significant advantage by not joining the no-fraud agreement, and would not be negatively affected unless his refusal to join can be communicated to the group.

It is, of course, possible for F to use its bottleneck status (everyone who enters the virtual world must, after all, sign a EULA with F; but, as will be shown, not everyone who affects virtual worlds must do so) to act as a clearing house for the legal obligations that most community members want. F might require that each signatory designate every other signatory as a third-party beneficiary of any promises made to F.[91]

However, there are several, significant problems with the third-party-beneficiary approach. Third-party-beneficiary designations only come to the aid of parties who wish to benefit from other people's promises to the creator of the virtual world. But that represents merely half of the problem. There is no way to *bind* a party who is not signatory to a contract.[92] Also, as an industry-wide practice, virtual-world creators do not in fact include third-party beneficiary terms, and it is worth asking why.[93] It may

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[90] See Fennell, *supra* note 47 at 847. Fennell notes that "[i]n a community of any significant size, the transaction costs, including holdout problems, are likely to make obtaining releases from a given servitude from all other community members a logisticial impossibility, even when doing so would be efficient. Every member of the community faces the same difficulty in assembling the rights necessary to engage in activities prohibited by covenant" (*ibid.*).

[91] See e.g. Michael Trebilcock, "The Doctrine of Privity of Contract: Judicial Activism in the Supreme Court of Canada" (2007) 57 U. Toronto L.J. 269 at 275-76. Trebilcock states that

> [t]he optimal default rule for true third-party beneficiaries is this: if a private promisee paid good consideration in exchange for a promisor's agreement to perform something for a third party with whom neither the promisee nor the promisor has a relevant contractual relationship, then that promise should be enforceable by the third party, although the parties to the contract should presumably be jointly free to vary or rescind it prior to the completion of the gift (as with other gifts). Any other benefit that a third party outside a contractual relationship with one of the parties to a contract might nonetheless derive from that contract should not be enforceable (*ibid.*).

[92] See Randy E. Barnett, "A Consent Theory of Contract" (1986) Colum. L. Rev. 269 at 270 (contracts are void without consent of the contracting parties).

[93] One might wonder why virtual-world providers are not directly sued for breach of their own "community safety" promises in EULAs. Even if a virtual-world provider promises to keep a world "safe", or to ban bad actors, those promises may be held unenforceable under the *Communications Decency Act of 1996* (47 U.S.C. § 230 (2000)). This statute has been broadly interpreted to hold

be that corporations simply do not, for example, want customers suing each other over a scandalous chat in virtual-world channels. Or, corporations may not want to lose any customers. There is some evidence of this: griefing in a virtual world usually results in little action by the virtual-world provider. At the extreme, an offender might be banned for a few days, after which he may return, and hence continue paying his monthly licensing fees.[94]

Moreover, mass third-party-beneficiary designations have odd effects. The right to sue under a third-party-beneficiary clause extends beyond the set of people, limited by traditional notions of standing (in public law), or a right to a remedy (in private law), who can normally bring a cause of action because they were harmed. Using third-party-beneficiary clauses to create crosscutting contractual rights raises the problem of people who would not be truly harmed by a wrongful act being able to sue to prevent it. For example, suppose a EULA required parties not to trespass on other people's property. Imagine party A trespasses on B's land, but B does not mind. C can still sue. The requirement of standing or a right to a remedy usually provides the useful service of limiting the impact that a rule can have within a community. However, contract law has no such limitation: a breach of a contract gives rise to a cause of action.[95]

Further, rights created by third-party-beneficiary clauses are still contractual rights, and therefore give rise to contract remedies. Causes of action in contract law usually give rise to money damages.[96] It would be impractical to use the law to keep someone off of your land, for example, if your only option was to bring a series of lawsuits to receive monetary compensation for actual damage to the trampled grass. Injunctions are needed to keep people out. Likewise, the remedies that would most

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internet service providers immune to claims based on the actions of their users. See *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) (holding internet service providers broadly immune from claims based on bad acts of users); *Doe v. SexSearch.com*, 2007 WL 2388913 (N.D. Ohio 22 August 2007), *Doe v. Friendfinder* Network, Inc., 2008 WL 803947 (D.N.H. 27 March 2008). Cf. *Mazur v. eBay, Inc.*, 2008 WL 618988 (N.D. Cal. 4 March 2008) (holding that where eBay represented live bidding was "safe", the *Communications Decency Act of 1996* did not preempt the claim).

[94] There are notable examples of inaction by virtual-world providers in the face of griefing. One such example is the game company CCP's inaction upon the discovery of a vast Ponzi scheme in its online game Eve Online. See "Biggest Scam in Eve Online History" (22 August 2006), online: MMORPG <http://mmorpg.qj.net/Biggest-scam-in-EVE-Online-history/pg/49/aid/62826>; "CCP Speaks Out on the EIB Scam" (27 September 2007), online: TenTonHammer.com <http://www.tentonhammer.com/node/34217>.

[95] Damages must still be proven, but this is a different thing, since parties can, and do, plead damages for vague harms to the "feel" of an environment. For example, in *Hernandez* the plaintiffs claimed that they were promised a world in which other people were not able to exchange real money for virtual goods. Even though they would not have traditional standing based on other people's economic activities, the plaintiffs claim contracts damages from the effects of such activities (*supra* note 88 at 6, 17).

[96] See Restatement (Second) of Contracts § 346 (1981) (a breach of contract ordinarily gives rise to a claim for damages).

benefit the people in virtual worlds are often equitable: people want to be protected against harassment, or to have their property left alone.

The virtual-world creator, as licensor of intellectual property, certainly may seek injunctive relief against a user.[97] But it is unclear what remedy a user trying to enforce a EULA promise against another user would receive. Would a court permit a user to "piggy-back" on the virtual-world creator's intellectual property licence? Would a court order a virtual-world provider to take specific action (ban a bad actor, return virtual objects or land) based on one user's assertion of contract claims against another user? These questions remain unsettled at best.

The above problems of privity and access to equity can be resolved if courts recognize that EULAs are not just contracts, but are instead hybrid contract/property documents. EULAs contain contractual promises from user to service provider. But they also can contain a grant of a property interest to the licensee; either a limited intellectual-property interest in objects or avatars (as in the Second Life EULA), or a property right in the account or avatar that would be more akin to chattel property interests in a book or DVD, for those worlds that rely less on user-generated content. The recognition of a property interest solves both the privity and equity problems, because property rights bind the world and injunctive relief is proper and commonplace in the enforcement of property interests. Courts could then treat those property grants as a rough analogy to leasehold estates in property. If virtual-world inhabitants have property interests in accounts or avatars then those interests are enforceable against the world, and this begins to resolve the serial-negotiation problem.

The licensing arrangements would then be considered just like covenants and servitudes in real-world subdivisions.[98] Under such a system, each player would not only enter into a contract with the virtual-world creator, but also retain a covenant-style interest that would permit her to enforce agreements against other community members who held similar rights (just as a homeowner may enforce covenants against his neighbours).[99] Each person's property right in his virtual-world account would include covenants governing other people's accounts. Thus, I could sue to stop you from griefing, in the same way a householder in a housing subdevelopment can sue his neighbour if the latter's bloomers are left hanging out on the clothesline. This would address the remedy problem as well, since property interests give rise to injunctive relief.

Such covenant-modeled rights would require courts to develop the law of online property. Significant work might be necessary to limit the reach of such covenant-style rights. For example, one restriction of such covenants in the real world is that

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[97] See 17 U.S.C. § 502 (1976) (authorizing injunctive relief).
[98] See Part II.B, above.
[99] For a discussion of real-property servitudes, see *supra* note 47 and accompanying text.

they must touch and concern the land.[100] Similar boundaries would be needed online. Courts might find that a covenant-style play right must "touch and concern" the use of the account, for example.[101] And a covenant-based solution would require virtual world creators to be willing to make use of such property rights, as a developer does in creating a neighbourhood. But, such covenant-modeled rights would be a significant step forward in terms of providing horizontal legal rights between virtual-world members who sign the EULAs.

There is good reason to believe that virtual-world creators will resist the characterization of EULAs as grants of property interests to players, on the grounds that such an interpretation may limit the creator's control of what users do with that property.[102] In *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, Blizzard Entertainment, creator of the popular virtual world World of Warcraft, threatened to sue MDY, a third-party software developer.[103] Blizzard was concerned because World of Warcraft players were using MDY's software to automate player avatars, and thus play the game without the direct involvement of the player.[104] Since the Blizzard EULA stated that players were not permitted to use third-party software that interacted with Blizzard's virtual world,[105] Blizzard argued that players were breaching the Blizzard EULA by using MDY's software.[106] But instead of suing its customers for breach of contract, Blizzard threatened to sue MDY—for the contractual violations of Blizzard's own customers. MDY brought a declaratory judgment action to determine whether it could be held contributorily liable for the

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[100] See Fennell, *supra* note 47 at 835.

[101] This argument is quite similar to the nebulous arguments raised by courts in intellectual-property cases, noting that intellectual-property owners may only enforce licence terms and conditions that have something to do with use of the intellectual property. See e.g. *Chamberlain Group v. Skylink Technologies*, 381 F.3d 1178 at 1204 (7th Cir. 2004) (claiming that the *Digital Millennium Copyright Act* does not create new property rights and cannot be used to extend rights beyond those granted in the *Copyright Act*).

[102] In both *MDY Plan* (*supra* note 88 at 10) and *Hernandez* (*supra* note 88 at 20), the virtual-world creator or its customer claimed that the third-party software or services provider must have agreed to a contract with Blizzard. A failure to click "I agree" on the Blizzard standard EULA might be a violation of the *Digital Millennium Copyright Act* (Pub. L. No. 105-304, 112 Stat. 2860 (codified as amended in scattered sections of 17 U.S.C.) [*DMCA*]). The merits of this argument are complicated because *MDY Plan*, at least, probably had a fair use defence of interoperability, both as a matter of copyright law and under the *DMCA*. However, under the *DMCA*, even parties with a fair use defence are required to click through a EULA before accessing the software (17 U.S.C. § 1201(a)(1) (2000)). If that EULA requires the fair user to give up the fair use right, then courts have held that the right is waived, even if the right is one, such as interoperability, that the *DMCA* itself protects. See e.g. *Davidson & Associates v. Jung*, 422 F.3d 630 (8th Cir. 2005).

[103] *MDY Plan*, *ibid.*

[104] *Ibid.* at 8.

[105] *Ibid.* at 9-10.

[106] *Ibid.*

supposedly infringing acts of Blizzard's own customers.[107] The court held that Blizzard had granted only a "limited license" of its software, and that the grant of the licence was limited by the contract terms,[108] that World of Warcraft players infringed Blizzard's copyright when they loaded their software into RAM in contravention of the EULA,[109] and that therefore MDY was liable for contributing to the infringement of Blizzard's copyright by Blizzard's customers.[110] Thus, one could imagine that virtual-world creators might resist arguments that the EULA creates any property interest at all in its licensees.

The decision has been roundly (and rightly, in my view) criticized for its overbroad interpretation of which promises are within the "scope of the license." But that debate is not necessary for present purposes. Property grants do not have to be absolute, as every renter knows. Blizzard's grant of a limited interest could still be a sufficient property interest to sustain member-to-member horizontal obligations, while permitting Blizzard itself to sue either its infringing customers or those who contribute to infringement if the member-to-creator promises are breached. The *MDY* court's order is quite encouraging in that regard: it recognizes that EULAs are hybrid property/contract documents, and notes that EULAs contain both property-based limitations on the grant of a licence and clauses that sound purely in contract.[111]

In another case, an opportunity to test third-party beneficiary claims in virtual-world EULAs has been missed by settlement. In *Hernandez v. Internet Gaming Entertainment, Ltd.*, players of World of Warcraft sued the game-services company Internet Gaming Entertainment (IGE) for facilitating the sale of gold pieces (the currency of that virtual world) to other players.[112] The complaint alleged that all players are third-party beneficiaries of every other player's promise to Blizzard to refrain from engaging in the exchange of virtual objects for real money.[113] But even assuming IGE signed a contract with Blizzard,[114] it is unclear that Blizzard's players can sue based on the contract between IGE and Blizzard. Third-party-beneficiary clauses require that the beneficiary be the intended, not just the incidental, beneficiary of a contractual promise.[115] There was no language in the World of Warcraft EULA to support such a designation. *Hernandez* would have been an interesting test case.

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[107] See *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, 2008 U.S. Dist. LEXIS 53988 at 5-6 (D. Ariz. 2008).

[108] *Ibid.* at 12-18.

[109] *Ibid.* at 18-21.

[110] *Ibid.* at 31-32.

[111] *Ibid.* at 16-18.

[112] *Supra* note 88.

[113] *Ibid.* at 20.

[114] *Ibid.*

[115] See Restatement (Second) of Contracts § 302 (1981) (distinguishing "incidental" from "intended" beneficiaries of contract promises).

However, the final fate of the third-party beneficiary contract claims remains unknown, because the parties have since settled.[116]

In sum, contracts are subject to high transaction costs when they are used to create background rules, due to the costs of serially negotiating agreements. One method of avoiding those costs might be for virtual-world owners to use the clearing-house model for crosscutting rights that real-world developers use. But no virtual-world creator offers such clauses, for the reasons discussed above. And even if the corporations' interests were aligned with those of their consumers (often they are not), and even if corporations were willing to impose third-party beneficiary clauses on all consumers (they are not), both the scope of the right and the available contract remedies would still not remotely resemble the property right or tort right that the EULA tried to emulate. To achieve horizontal rights, courts should recognize that EULAs can create limited property interests in favour of virtual-world inhabitants. Horizontal rights could then attach to these interests just as they do in real-world subdivisions.

C. Vertical Rights in Virtual Worlds: Information Costs and the Stream of Commerce

Property law is necessary not only to maintain "horizontal" relationships (property law binds the whole world), but also to streamline "vertical" relationships (that is, interests over time, from one generation to the next or from seller to purchaser). Without this limiting influence, land and goods would become nearly immobile in the stream of commerce, weighted down by the caveats and quibbles of upstream owners. This is one of the core problems hindering the attempts of virtual-world creators such as Sony Online Entertainment and Linden Lab to create effective quasi-property systems out of licences and sublicences.[117] Thus, this section discusses the limitations of contract law in creating vertical legal relationships in virtual worlds.

Property law and contract law differ in the informational burdens they impose on eventual purchasers.[118] Property law keeps transaction costs low by limiting the

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[116] See Plaintiff's Unopposed Motion for Leave to File Motion to Enforce Settlement Under Seal, *Hernandez v. IGE U.S.*, No. 07-21403 (S.D. Fla. 23 July 2008) (representing that parties had reached settlement).

[117] See *supra* note 32.

[118] Information-cost theorists have become interested in the civil law limitation on the number of property forms. See David Lametti, "The Concept of Property: Relations Through Objects of Social Wealth" (2003) 53 U. Toronto L.J. 325 at 360 ("[t]his is the longstanding *numerus clausus* question: Are the categories of property (or real) rights closed? An owner, as well as any other title holder in the Civil law, is constrained to a greater degree by the *numerus clausus* of real rights if he is going to try to redivide the bundles in a manner not envisioned by law"). Within the common law, theorists explain the *numerus clausus* by reference to information costs. If forms are limited and constrained, people can buy property more cheaply. If a buyer buys a fee simple absolute, she knows pretty much what

number of legal forms a property transaction may take.[119] For example, the fee simple absolute is one of a limited set of highly standardized property forms.[120] This limitation on the number of property forms facilitates the exchange of property from one person to another. The purchaser of a fee simple absolute does not need to further investigate what rights she is getting.[121]

Contract law, on the other hand, seeks to permit parties to create their own idiosyncratic deals, but the price is raising information costs for all other parties.[122] If parties were permitted to alter the fee simple by contract, then all subsequent purchasers of a fee simple would have to be vigilant as to what they were actually buying.[123] Thus, from the perspective of information-cost theory, a contract-based system of pseudoproperty will have higher information costs than a true property system.

A related goal of property law is to ensure that high-value resources move smoothly through the stream of commerce toward higher-value users.[124] Property law keeps information costs low by limiting the amount of downstream control a previous owner can continue to exert over an asset.[125] This rule has been a constant feature of property law since the 1290 statute of *Quia Emptores*, which ended subinfeudation and established a more straightforward regime for the sale of land.[126] In the same vein, property transfers nowadays cannot contain unreasonable restraints on

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she is getting without having to engage in expensive inquiries. See Merrill & Smith, *supra* note 65 at 3.

[119] See *ibid.* ("the law will enforce as property only those interests that conform to a limited number of standard forms").

[120] *Ibid.*

[121] *Ibid.* (discussing standardization benefits of the *numerus clausus*, the closed set of property forms).

[122] *Ibid.* at 3-4 (differentiating contract from property law on the grounds of information costs).

[123] *Ibid.*

[124] See Mark Cooper, "From Wifi to Wikis and Open Source: The Political Economy of Collaborative Production in the Digital Information Age" (2006) 5 Journal on Telecommunications & High Technology Law 125 at 130 ("[t]he central claim for the superiority of private goods is that where resources are rivalrous or subtractable, efficiency requires they be devoted to their highest valued use").

[125] *Bruken Realty*, *supra* note 61 at 161 ("[t]he rule against unreasonable restraints on alienation ... forbid[s] owners to impose conditions on conveyances which block the grantee from freely disposing of the property").

[126] See Sheena Grattan & Heather Conway, "Testamentary Conditions in Restraint of Religion in the Twenty-First Century: An Anglo-Canadian Perspective" (2005) 50 McGill L.J. 511 at 517 ("[t]he principle that land should be freely alienable has been enshrined in Anglo-Irish law since *Quia Emptores* in 1290, with the consequence that a total restraint on alienation is void as being repugnant to the estate given"). Technology has brought us full circle: if we believe that members of a virtual world only hold virtual land under licence from the Community Service Provider; and those who purchase from them are under sublicence; and "sub-sublicence", and so on, we have nearly perfectly recreated the pre-*Quia Emptores* world of subinfeudation in land. This is an unprecedented rolling-back of the law by 700 years.

alienation.[127] Servitudes that do not "touch and concern" land do not run with the land to bind subsequent purchasers.[128] Testators are prevented by the rule against perpetuities from exercising excessive mortmain control.[129] The law of found objects quiets title in the finder as against the whole world save the original owner.[130] Bona fides purchaser rules protect buyers even against the claim of a wronged upstream owner.[131] The first sale doctrine limits the ability of a copyright holder to control the fate of the copy sold.[132] And, in the extreme case, adverse possession revokes the rights of a legal owner in favour of an actual user.[133] Each of these examples limits the degree to which prior owners can immobilize assets in the stream of commerce.

Contract law contains no such limits on the downstream effects of private agreements.[134] When a person subcontracts, she must accept the contractual rights subject to the terms of the original contract.[135] Thus, whereas the purchaser of property need only conduct a search on a limited range of interests (a title search, for example), a "sub-sub-sub-sublicensor" must inquire into every term of every pre-existing contract.[136]

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[127] See e.g. *Bruken Realty*, *supra* note 61 at 161 (stating that the rule against unreasonable restraints prevents excessive future control by a prior owner); *Re Sahlender's Estate*, 89 Cal. App. 2d 329, 201 P.2d 69 (Cal. 1948).

[128] See Grattan & Conway, *supra* note 126 at 535 ("the Court avoided the public policy issue by invalidating the covenant on the basis that ... it did not 'touch and concern' the land"). See also Fennell, *supra* note 47 at 835 ("[s]ervitudes differ from contracts in that they bind successors of the original parties—that is, they 'run with the land'" [footnote omitted]).

[129] *Murphy Exploration & Production v. Sun Operating Ltd.*, 747 So.2d 260 at 262 (Miss. Sup. Ct. 1999), quoting *Weber v. Texas*, 83 F.2d 807 (5th Cir. 1936). The court claims that

> [t]he rule against perpetuities springs from considerations of public policy. The underlying reason for and purpose of the rule is to avoid fettering real property with future interests dependent upon contingencies unduly remote which isolate the property and exclude it from commerce and development for long periods of time, thus working an indirect restraint on alienation, which is regarded at common law as a public evil (*ibid.* [references omitted]).

[130] See generally David Riesman, Jr., "Possession and the Law of Finders" (1939) 52 Harv. L. Rev. 1105 at 1123-24.

[131] See generally Saul Levmore, "Variety and Uniformity in the Treatment of the Good Faith Purchaser" (1987) 16 J. Legal Stud. 43.

[132] See R. Anthony Reese, "The First Sale Doctrine in the Era of Digital Networks" (2003) 44 B.C. L. Rev. 577.

[133] Jeffrey Evans Stake, "The Uneasy Case for Adverse Possession" (2001) 89 Geo. L.J. 2419 at 2435-36 (reviewing the justifications for adverse possession, including that adversely possessed land will be put to better use).

[134] See Merrill & Smith, *supra* note 65 at 26-28.

[135] See Fairfield, "Virtual Property", *supra* note 20 at 1093.

[136] *Ibid.*

For example, secondary markets in software have atrophied because software is deemed licensed, not sold.[137] Used software is rare as a result. Because virtual worlds are, among other things, software programs, the problem of "sub-sub-sublicences" also affects virtual worlds. In the virtual world Second Life, inhabitants are permitted to "purchase" land, but Linden Lab has claimed in litigation that such purchases are really licences.[138] This makes it difficult to transfer the virtual land. The next "purchaser" to buy land from the original buyer would be a sublicensor, subject to all the terms of the original licence, whether or not they touch and concern the virtual land. And the next buyer would be a "sub-sublicensor", and so on.

Thus, in Second Life, sublicensing is the new subinfeudation.[139] The medieval law of land transfer that entangled purchasers in a web of feudal interests before the passage of *Quia Emptores* has now reappeared in our current law in the form of sublicensing virtual land. Second Life inhabitants cannot buy and sell virtual land or objects with confidence, even though the creator of the virtual world desires that they do so. This is because contract law cannot alone provide for clear ownership rights in private property. To find the rules that online communities need, courts must look outside the EULAs, as the following part will discuss.

IV. Restoring the Social Contract

The prior section discussed why online communities must be governed by law beyond that of contract. This part discusses the role that courts can play in meeting this need.

Section A will deal with the advantages gained by both courts and online communities in drawing on familiar rules from the common law to create the background rules that virtual worlds need. Section B will demonstrate that it is possible to tweak these common law rules to better fit the new norms developing in virtual worlds. Section C will advocate clarifying the relationship between contract law and other areas of the common law. Finally, Section D will discuss why this process is best accomplished through the common law method, rather than through legislation.

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[137] See Reese, *supra* note 132 at 586-89 (discussing the effect on secondary markets in software of the lack of a first sale rule).

[138] Trial Pleading, Defendant, *Bragg v. Linden Research*, Case 2:06-cv-04925-ER, Document 63 (E.D. Pa. 28 June 2007) at 2 [*Bragg* Pleading] [copy on file with author] ("[this] is a dispute about whether an online service may suspend a user from that service ... ").

[139] See Glen O. Robinson, "Personal Property Servitudes" (2004) 71 U. Chicago L. Rev. 1449 at 1480, n. 111 (discussing subinfeudation and its costs).

A. The Advantages of Applying Familiar Law

The old adage for a wedding states: "Something old, something new, something borrowed, and something blue." Dropping the blue, this is a good suggestion for how courts should go about developing the full tapestry of common law rights and obligations for virtual-world communities. This section discusses the "something old" and "something borrowed" categories by suggesting that courts can apply familiar common law rules to virtual worlds without having to stretch them too much.[140]

To give an example: one might argue that courts cannot apply real-world property law to virtual worlds because virtual objects and land simply do not exist. Virtual property is just an entry in a database. But it is important to realize that real-world property does not exist either. Property law is a consensual hallucination that maximizes profitable use of land and minimizes conflicts over resources. There are no yellow, dotted lines between countries, as appear on a map. Neither is there some invisible yet intrinsic dividing line between one person's land and another's.

Since questions of resource allocation and conflicts over land arise in virtual worlds too, it is not implausible to consider property law as a valuable source of rules to govern virtual property. I have argued in previous articles that under a welfare-economics approach, virtual land shares many of the efficiency concerns of real-world property, and thus property law ought to apply to it.[141]

I will make a much simpler argument here. People design virtual property to have the attributes of real-world property and work hard to make an electronic medium look and feel like a space in which human beings can interact. Both law and technology are human systems. They exist to give form to human goals. If people want to create virtual spaces and fill them with virtual objects, law should not work too hard to find alternative characterizations for them.[142]

Further, courts should take advantage of what people already know. People know what it means to own land because of their experiences in the real world. Given that communicating the actual content of the law is difficult to do clearly and simply (recall the last cocktail-party conversation you had with a nonlawyer), the experience that people have with the implications of real-world land ownership is invaluable. Courts will save a lot of time and will be better equipped to meet consumer expectations if they would apply already familiar property rules to virtual property.

For example, the information-technology company IBM has invested millions of dollars—an enormous amount of money—in the purchase and development of

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[140] Kieff & Paredes, *supra* note 72 at 176 (advocating "avoid[ing] specialized frameworks for analyzing IP law ... [and instead applying] whatever legal regimes the issue at hand implicates ... ").

[141] See Fairfield, "Virtual Property", *supra* note 20 at 1089 (discussing welfare economic benefits of virtual property).

[142] See Kieff & Paredes, *supra* note 72 at 175-76.

islands within Second Life.[143] If Linden Lab, the creator of Second Life, were to wrongfully terminate IBM's access, seize the islands that IBM had developed, and sell them to the highest bidder, would the correct remedy be an action for breach of contract? Likely not. The most appropriate remedy, however the court might reach it, would be in equity—ordering Linden to return the land to its rightful owner.

If parties can rely on rules that they know and are familiar with, information costs will be lowered, and expectations more easily satisfied. It is cheaper to satisfy expectations shaped by real-world experiences by permitting virtual-world law to mimic real-world laws. And courts do not have to go far to find good analogies to the majority of disputes that take place in virtual worlds—conflicts over resources or over dignitary harms occur at least as often in virtual worlds as in the real one.

B. The Rules of the Game

This article has thus far advocated turning to familiar sources of law—most notably property and tort law—to govern online communities. But these rules may need to be modified in light of the particular customs and practices of these communities. Thus, courts may be looking for "something new" when crafting rules appropriate for virtual communities.

But courts need not abandon common law sources when generating new rules. Suppose a court wanted to extend the law of torts to cover actions within virtual worlds. What sources of law should the court consider? *Faute de mieux*, courts currently look to the tort-like rules set forth in the EULAs (codes of conduct, terms of use), even though those EULAs are often not enforceable by one inhabitant against another. Worse, codes of conduct sometimes reflect the interests of the virtual-world creator rather than the norms of the community. But the common law is equipped to solve these problems. For example, tort law as it stands permits courts to modify a general rule ("no hitting") depending on the norm of the community ("no hitting, but boxing matches are OK"). This section shows how courts can apply tort rules as they stand to virtual worlds, while also taking into account the newness of the communities to which such rules would be applied. A real-world example followed by several virtual-world examples should help to clarify this point.

1. Battery and Football

Within the game of football, certain actions that would be routinely considered tortious if engaged in off the playing field—tackling comes to mind—are just part of

[143] Stephen Baker, "IBM on Second Life: More than PR" *Business Week* (15 November 2006), online: Business Week <http://www.businessweek.com/the_thread/blogspotting/archives/2006/11/ibm_on_second_l.html>.

the game.[144] The rules of the game help determine the extent of the consent that players offer merely by playing the game.[145] A tackle that breaks the rules of the game is not consented to and may result in liability. In determining those rules, community consensus may matter more than any contract between player and league. In hockey for example, fighting is not part of the written rules. Yet a member of each hockey team is designated as the fighter and fights are not overly penalized as a whole.[146] Only when the violence gets out of hand—"high-sticking", for example—does the potential for liability surface. Thus, tort law provides a background, default set of rules that can be modified to meet community consensus. The law is not hedged out because people are playing a game.[147] Nor do the employment contracts of the players set the rules. Rather, the rules are worked out by the community, and deviation from those rules (an unconsented touching like high-sticking for example) is penalized by the background system of law.

2. Virtual Rules of the Game

Within virtual worlds, community-defined norms often more accurately reflect the "social contract" between members of the community than do the EULAs. A EULA only defines the scope of consent within a limited framework—that which exists between the consumer and the community service provider. Being a member of a community implicates a broader consent: the consent to the background, default rules of that community. This is the real social contract of a community.

While EULAs cannot cheaply create multilateral, community-sustaining obligations, other areas of the common law can. And such rules can even be tailored to the specific norms of the virtual world without triggering the costs of serial negotiation. The process is just as simple as the one determining that tackling is not a tort, but high-sticking is. For example, one virtual world called EVE Online is a science-fiction world of corporate fraud, yankee trading, and piracy. The game's designers have openly stated that deception is part of the game—that, in fact, "fraud

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[144] See Paul H. Robinson, "Rules of Conduct and Principles of Adjudication" (1990) 57 U. Chicago. L. Rev. 729 at 753 ("[o]ne might take a similar view of a football player who tackles another player during a game. The rules of conduct are not violated; the consent of the other player brings the assault within the rules of acceptable conduct").

[145] See C. Antoinette Clarke, "Law and Order on the Courts: The Application of Criminal Liability for Intentional Fouls During Sporting Events" (2000) 32 Ariz. St. L.J. 1149 at 1168 ("[p]articipants who engage in these sports have necessarily consented to a certain level of violence. [I]f the player's conduct was within the bounds of what one would reasonably foresee as a hazard of the game, the violent act is authorized, and will not expose the perpetrator to criminal liability ... ").

[146] See Carolyn B. Ramsey, "Homicide on Holiday: Prosecutorial Discretion, Popular Culture, and the Boundaries of the Criminal Law" (2003) 54 Hastings L.J. 1641 at 1690 ("[NHL] team owners actually 'believe that fighting is a necessary marketing tool for the sport,' and the NHL has declined to adopt a rule ejecting all brawlers").

[147] For a similar analysis of criminal law in virtual worlds, see F. Gregory Lastowka & Dan Hunter, "Virtual Crimes" (2004) 49 N.Y.L. Sch. L. Rev. 293 at 306.

is fun."[148] Thus, deception and theft of virtual assets is considered part of the game (like being bluffed in a poker game) rather than actionable behaviour. However, this is no basis for completely excluding tort from the EVE Online community. Rather, an understanding of the "rules" of the community—its social contract, rather than its EULA—helps us understand that if the "fraud is fun" meme were not an implicit norm of the community, the same actions would be treated quite differently.

Indeed, without the "fraud is fun" social norm, those types of behaviour might well be actionable in conversion, if not a source of criminal liability. In South Korea, police have investigated numerous complaints of virtual-property theft.[149] Theft in the world of EVE Online is consented to, while theft of virtual property in the South Korean virtual environments is outside the scope of consent. Similarly, a tackle in football is part of the game. A tackle in baseball might raise some objections. This distinction will not be found in any contract—it is found in the community-generated norms themselves.

The take-away point is this: the scope of acceptable behaviour is not ultimately determined by the EULA. Whether "fraud is fun" in a community ultimately depends on the views of a particular community. That, in turn, depends on the norms worked out between community members.

3. Norms and Contracts

This does not mean that contracts have no role to play as a source of norms. Although EULAs do not set community norms, they may well have a hand in shaping them. If community members enter a given world because they desire the specific terms of a EULA, they may very well be ignorant of the fact that they cannot enforce that EULA against other community members. Rather, they may believe that they entered a virtual world that reflects their own ethics. For example, the decision of Linden Lab to permit parties to own virtual property in Second Life may well have been the factor that drew many users to that virtual world.[150] The private-property meme is expressed in the EULA and attracts people who want to own virtual land. Thus, courts need not abandon the EULA as a source of community rules. But it must be recognized as only one source among many, not the definitive document.

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[148] Faith Kahn *et al.*, "Stock Markets in Virtual Worlds" (Panel presentation at State of Play, New York Law School, 7 October 2005) [unpublished] (Kjartan Pierre Emilsson, lead designer at CCP Games, stating that "fraud is fun").

[149] See Ward, *supra* note 3; Yoo, *supra* note 3; Yoon, *supra* note 3.

[150] *Bragg*, *supra* note 32 at 595-96. The court states that

> [m]ost significantly for this case, avatars may purchase 'virtual land,' make improvements to that land, exclude other avatars from entering onto the land, rent the land, or sell the land to others for a profit. Assertedly, by recognizing virtual property rights, Linden would distinguish itself from other virtual worlds available on the Internet and thus increase participation in Second Life (*ibid.*).

EULAs do not always reflect community norms. Community norms sometimes run directly counter to the EULA. To provide an example drawn from recent litigation, the World of Warcraft EULA prohibits the use of all third-party programs that interact with the World of Warcraft software.[151] However, the game is built to facilitate the use of third-party programs.[152] Indeed, the game is unplayable at the highest levels without extensive add-ons and third-party software.[153] This is intentional: Blizzard Entertainment routinely uses the third-party add-on activities of its players as a test bed to gain insight into the features that players most desire.[154] Blizzard then incorporates the functionality of the best add-ons into its own interface.[155] It bans other add-ons based on its view that they are pernicious to the game, often in response to user complaints.[156]

Thus, the EULA's blanket prohibition against third-party software might seem odd to anyone who has loaded the game and seen an announcement by Blizzard Entertainment warning players to update their third-party software so as to be compatible with a new patch.[157] If, for example, one community member were to level tort claims against another for "cheating" in the use of third-party add-ons, a court might wish to draw on community custom and practice as well as EULA clauses in making its determination.

How can we tell whether a contract accurately expresses a norm, or contravenes one? As a general observation, we might say that courts enforce private contracts with limited externalities, but rewrite or void contracts with high externalities.[158] Thus, for example, racially restrictive covenants on sales of land, or contracts to commit murder, are not enforced.[159] Such contracts are too expensive for the broader community. As a rule of thumb, this externalities explanation is adequate.

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[151] Blizzard Entertainment, *World of Warcraft End User License Agreeement* (2 February 2007), s. 2(B), online: World of Warcraft <http://www.worldofwarcraft.com/legal/eula.html>.

[152] Blizzard Entertainment even offers an official "Interface AddOn Kit" to assist players in developing and installing add-ons (online: Blizzard Entertainment <http://us.blizzard.com/support/article.xml?articleid=21466>).

[153] See "World of Warcraft Addons", online: Curse.com <http://www.curse-gaming.com/downloads/wow-addons/default.aspx>.

[154] WoWWiki, "CTMod", online: wikia <http://www.wowwiki.com/CTMod> (explaining that "CTMod can boast that some features originally offered by CTMod have since been incorporated partially or fully into the main WoW program").

[155] *Ibid.*

[156] *MDY Plan*, *supra* note 88 at 8-9.

[157] Blizzard Entertainment, "Patch Notes 1.3", online: World of Warcraft <http://www.worldofwarcraft.com/patchnotes/patch-05-07-04.html> (explaining that "[a]fter the game is patched, you will be prompted to disable addons that are out of date").

[158] See Richard A. Epstein, "In Defense of the Contract at Will" (1984) 51 U. Chicago L. Rev. 947 at 952 (contracts to commit murder, perjury, or other actions seriously damaging the community should be unenforceable).

[159] *Ibid.*

But the common law, in its iterative wisdom, can be more precise. Courts have found ways to enforce even high-externality contracts by seeking the input of the community affected by the externality.[160] This makes sense: the more the contract impacts a community, the more the court should weigh that community's interests in construing the contract. Thus, for example, where a given construction of a contract threatens to negatively impact an entire industry, industry custom and practice is routinely introduced to permit the court to interpret the contract.[161] The greater the externality, the greater should be the reliance on industry custom and practice.[162] Thus, the need for community input can be measured along a sliding scale, from those contracts that concern only the parties, to contracts that impose heavy externalities on other members of the community. Once a spectrum is established, it is easy to see that community-governing contracts lie toward the externality-heavy end, rather than the "parties-only" end.

Thus, courts can and should construe EULAs' terms in light of community custom and practice. Increasing community input to mitigate the effect of the contract on the community is better than refusing to enforce such contracts as a matter of public policy or ignoring the externalities imposed on the community. Courts can draw on EULAs for the new rules that govern virtual worlds, as long as they interpret the terms of those EULAs in light of community custom and practice.

C. Clarity of Contract

Courts should also clarify the relationship between contract law and other areas of the common law so that contracting parties may communicate their intentions clearly to one another. The following example will illustrate the dangers of ambiguity in that relationship. In 2003, Linden Lab, creator of the virtual world Second Life, took the extraordinary step of permitting community members to retain ownership in intellectual property that members created and uploaded to Second Life's servers.[163] More interestingly, Linden Lab itself sold virtual land. This land was represented by an area within Second Life that belonged to the purchaser, and to which the purchaser could add improvements.[164] The sale of this land was conducted through online

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[160] See Fairfield, "Search Interest", *supra* note 46 at 1265 (discussing contracts as expression of community of meaning rather than of individualized intent of parties).

[161] See e.g. *Toren v. Braniff*, 893 F.2d 763 at 765 (5th Cir. 1990) ("the court should consider the intent of the parties as evidenced by the terms of the contract and industry custom").

[162] See U.C.C. § 2-202 (2007) (permitting industry custom and practice evidence to inform contract construction, but excluding parol evidence of the parties' intent regarding the same terms).

[163] *Bragg*, *supra* note 32 at 595 ("[i]n November 2003, Linden announced that it would recognize participants' full intellectual property protection for the digital content they created or otherwise owned in Second Life").

[164] *Ibid.* at 596 ("avatars may purchase 'virtual land,' make improvements to that land, exclude other avatars from entering onto the land, rent the land, or sell the land to other avatars for a profit"). See also *Bragg* Pleading, *supra* note 138 at 3 ("Second Life users may also purchase and sell representations of parcels of 'land' in Second Life ... ").

auctions.[165] Many buyers—Fortune 500 companies—participated in these auctions and built virtual shopping malls, demonstration facilities, recruitment centers, and made other improvements on the land that they purchased in Second Life.[166]

One of these purchasers was an attorney named Marc Bragg. Bragg was a land speculator who purchased land from Linden Lab with a view toward selling it to other community members, or developing it himself for later resale at a profit.[167] Bragg allegedly relied on the statements made by Linden Lab that purchases of virtual land actually conveyed a property-ownership interest when he legitimately purchased a number of parcels of land.[168]

However, in late 2005, Linden Lab and Bragg had a falling-out.[169] Linden Lab claimed that Bragg used an "'exploit'"—or loophole—in the auction system to bid on land before it was up for private auction.[170] Linden Lab terminated Bragg's account with Second Life as a consequence, effectively repossessing all of Bragg's land and virtual objects, whether legitimately or illegitimately purchased.[171] Linden then resold that virtual property.[172]

In early 2006, Bragg sued Linden Lab.[173] The thrust of Bragg's argument was that Linden Lab could not publicly state that it was selling "ownership" of land, then retract those statements in its EULAs.[174] Linden Lab countered that Bragg was a mere contract licensee, and that Linden was permitted to terminate an account for any

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[165] Second Life, "Land Auctions: FAQs", online: Second Life <http://secondlife.com/auctions/faq.php> (explaining how to find land for purchase via the online auction system).

[166] See Richard Wray, "Corporate world makes haste to get in step with the virtual worlds" *The Guardian* (14 July 2007) 37 ("IBM, for instance, brought Wimbledon to Second Life this summer as a way of showcasing its technological ability. Cisco interviews job applicants in the virtual world. News groups, including Sky News and Reuters, have a presence in virtual worlds … ").

[167] *Bragg*, *supra* note 32 at 597 (explaining that Bragg "had not only purchased numerous parcels of land in his Second Life, [but] also digitally crafted 'fireworks' that he was able to sell to other avatars for a profit").

[168] *Ibid.* at 596-97 ("Bragg claims that he was induced into 'investing' in virtual land by representations made by Linden and Rosedale in press releases, interviews, and through the Second Life website").

[169] *Ibid.*

[170] *Ibid.* ("Linden sent Bragg an email advising him that Taessot [the particular piece of virtual land] had been improperly purchased through an 'exploit'").

[171] *Ibid.*

[172] Robin Linden, "Linden Lab Files Response to Complaint" (29 June 2007), online: Official Linden Blog <http://blog.secondlife.com/2007/06/29/linden-lab-files-response-to-complaint/> ("Linden recovered [the land] and auctioned it off to other users, in accordance with the Terms of Service. ... Linden has asked the court to hold the funds that were in Bragg's account at the time it was suspended and the proceeds from the sale of the 'virtual land' in that account, pending resolution of the dispute").

[173] *Bragg*, *supra* note 32.

[174] *Ibid.* at 595 ("Bragg contends that Defendants, the operators of the virtual world, unlawfully confiscated his virtual property and denied him access to their virtual world").

reason, and certainly was permitted to terminate Bragg's account for exploitation of a loophole in the auction system.[175]

The outcome of the case is irrelevant here (the parties settled and Bragg's account was returned), but neither side was fully wrong.[176] Because courts have not defined the relationship between EULAs and virtual property, the parties were not able to clearly articulate the deal they wished to make. This ambiguity created costs for both parties. A common law that clarifies the interplay between contract and property, or between contract and any other area of the law, is therefore necessary for online communities to thrive. This article offers one vision of that relationship. Whether that vision is adopted or another is instead, a clear articulation of the relationship between the different areas of the common law is as—if not more—important than the development of those areas themselves.

D. Common Law Advantages

Finally, how should all this be accomplished? Should judges make the changes suggested in this article, or should the legislatures make them? I have assumed throughout that the best way to effect change in this area—within common law jurisdictions—is to encourage judges to develop rules following the common law tradition. This in no way reflects a preference for common law over civil law approaches. Civilian jurisdictions have robust traditions of judicial decision making that can achieve the results discussed here as well or better than common law approaches.[177]

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[175] *Bragg* Pleading, *supra* note 138 at 2 ("[this] is a dispute about whether an online service may suspend a user from that service for engaging in a fraudulent scheme to obtain money, to the detriment of the service and its user community").

[176] Indicatively, the case settled, with terms undisclosed at the time of this writing. See Marty Linden, "Resolution of Lawsuit" (4 October 2007), online: Official Linden Blog <http://blog.secondlife.com/2007/10/04/resolution-of-lawsuit>.

[177] For example, the goal of having courts make limited decisions governing technology is better served by the civil approach to judicial law making than its common law alternative. See generally John Henry Merryman & Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, 3d ed. (Stanford, Cal.: Stanford University Press, 2007) at 36-38 (discussing the role of judges and precedent in civil systems). Access to a tradition of incremental judicial lawmaking is possible, although more complex, in the civil tradition. See *ibid.* at 38 ("[i]t is clear, however, that the traditional image of the civil law judge is waning. The trend is toward increased judicial scope and power"). Especially when public law, constitutional, or other constitutive questions are in play, courts in civil traditions wield law-making authority similar to that observed in common law systems. See *ibid.* ("[i]n some civil law jurisdictions an ordinary trial judge can reject the application of a statute if he or she considers it contrary to the constitution"). See also Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. by William Rehg (Cambridge, Mass.: MIT Press, 1996) at 238-40 (developing a civil theory of judicial review in constitutional courts). And even in private law, there has been a longstanding, although often minority, understanding that the law inevitably leaves gaps courts must

The phrase "common law" describes a method of iterative, incremental, experimental, judicial decision making, as well as some areas of the law to which that method is commonly applied.[178] For example, tort cases are often decided using the common law method, especially if they raise new questions, as is often the case with technology issues.[179] In addition, courts are more likely to use the common law method in determining tort disputes because torts have been historically treated as an area for common law analysis.[180] Courts are most comfortable using the common law method in areas that have been historically governed by the common law.[181] Thus, the term "common law" describes the intersection of the common law method with traditional common law areas of law. Property, torts, and contract law are core "common law" areas where the method and the historical treatment of the subject matter converge.[182]

There are several reasons for using the common law to regulate disputes related to technology. First, the common law is an immediately available tool to solve problems related to emerging technologies. Judges who interpret contracts governing online communities would be acting well within their authority to decide cases as a matter of common law. As the first tort and property disputes arise between members of online communities, courts will be doing nothing extraordinary when they treat them as everyday questions of tort or property law. The context is new, but the law ought not to be.

Moreover, the common law limits its decisions in scope. Limited decisions governing limited types of cases make for a humble and constrained body of law that does not have a large spillover effect in networked systems. In contrast, technology legislation is infamous for creating unforeseen consequences.[183] The difficulty with

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fill. See e.g. Frank Kantorowicz Carter, "Gustav Radbruch and Hermann Kantorowicz: Two Friends and a Book: Reflections on Gnaeus Flavius' Der Kampf um die Rechtswissenschaft, 1906" (2006) 7 German L.J. 657 at 663 ("[Radbruch & Kantorowicz] put forth a doctrine, later called the 'free law doctrine,' which recognized the so-called gaps in the law usually ignored by other schools; these, they suggested, needed to be filled with judge-made law").

[178] See generally Melvin Aron Eisenberg, *The Nature of the Common Law* (Cambridge, Mass.: Harvard University Press, 1988) at 4-7.

[179] For a brief and good treatment on the problems of defining the common law, see Frederick Schauer, "Is the Common Law Law?", Book Review of *The Nature of the Common Law* by Melvin A. Eisenberg, (1989) 77 Cal. L. Rev. 455.

[180] See Eisenberg, *supra* note 178 at 1 ("[t]he common law ... is that part of the law that is within the province of the courts themselves to establish. In some areas of law, like torts and contracts, common law rules predominate").

[181] *Ibid.* at 4-7.

[182] *Ibid.*

[183] Electronic Frontier Foundation, "Unintended Consequences: Seven Years Under the DMCA" (April 2006), online: Electronic Frontier Foundation <http://www.eff.org/WP/unintended-consequences-seven-years-under-dmca> (discussing unintended consequences of the *DMCA*). See also Alex Cameron & Robert Tomkowicz, "Competition Policy and Canada's New Breed of 'Copyright' Law" (2007) 52 McGill L.J. 291 at 291-94 (discussing the "substantial implications and unintended consequences for Canadian competition policy" of recent anticircumvention legislation).

legislation is that it is often sweeping, and a rule intended to solve a relatively minor problem can end up inflicting much larger ones in other areas.[184] The common law, however, governs only cases. If a rule created in one case causes problems in a different area of law, a court can restrict the prior ruling to its facts, and craft a new rule that better suits the dispute before it.

And finally, the common law is iterative. Instead of attempting to encode all cases in a single rule, the common law can address one case at a time. If a rule seems useful to resolve another case, the courts can extend it. If the rule seems to be causing more trouble than it is worth, the courts can contain it. This experimental approach to law is similar to the one used in technological research and development—a mixture of innovation and backwards compatibility, and occasionally painstaking trial and error.

There are, of course, the usual objections to allowing the common law courts to govern issues of technology. The first argument springs from the unfounded vilification of judge-made law as antidemocratic. The label "activist" gets thrown about carelessly by partisans on both sides of this debate.[185] But it is important not to conflate a common law judge doing her job with an activist. An activist acts in spite of legislation passed on a topic. A common law judge works out answers to new cases as they are presented to her. There is nothing antidemocratic about the decisions of a common law judge: the rules she designs are not in opposition to any rule that democratically elected representatives have considered.

The second objection to judge-made law governing technological issues is one of institutional competence. If we believe that judges are not competent to decide technologically complex issues, we ought to appoint panels of software engineers to determine how law ought to apply to online communities. The fact that we are dealing with electronic-database entries rather than tracts of land is cause, the technologists tell us, for judges to doubt their ability to craft appropriate rules. There certainly is some truth to this argument. Failure to understand basic technology might lead judges to craft bad rules.

But the reverse is far more likely, and more pernicious. Courts might turn down the opportunity to apply perfectly good common law (e.g., the common law of property to a land dispute like Bragg's, or the common law of torts in a harassment context) because of the unfamiliar technological context. The real issue here is not

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[184] Electronic Frontier Foundation, *ibid.* at 1 ("Congress meant to stop copyright infringers from defeating antipiracy protections added to copyrighted works [but] ... [i]n practice, the anticircumvention provisions have been used to stifle a wide array of legitimate activities ... ").

[185] See Margit Cohn & Mordechai Kremnitzer, "Judicial Activism: A Multidimensional Model" (2005) 18 Can. J.L. & Jur. 333 at 334 ("[f]irst, one misuse of the term should be removed from the debate. Too often, judicial activism' has been used pejoratively by those who disagree with the outcome of a decision. In these cases, substantive criticism of the content of a decision is disguised by an institutional argument on the court's role").

technological systems; the real question is one of human systems. Those sorts of questions can be answered by judges at least as well as by software engineers.

V. Challenges and Responses

Thus far, this article has attempted to show some of the limits of contracts in governing large and shifting communities, and how courts can play a larger role in addressing the needs of virtual communities. This Part acknowledges and responds to some of the common criticisms that may be levelled at the positions taken in this article.

A. Market Solutions

The most serious criticism of the analysis presented here might be that when consenting and competent consumers agree to terms that favour a vendor, they ought not to be permitted to complain later that the terms are not what they would have wished.

The simplest response is that without protection of private property and protection against force and fraud, freedom of contract is an empty claim. And under the model developed in this article, the common law of property and torts provide cheaper and better methods of securing these necessary background protections than attempting to do so via a series of contracts. Other market-based criticisms and responses follow.

1. Information Forcing

Whenever contract difficulties arise, the first instinct of academics and judges is to try to avoid the problem the next time around by improving the readability of the contract. The reasoning goes that if only the parties had read the contract and understood the problem, they themselves could have reached some contractual solution. Or, if the difficulty proves insurmountable, the customer still would have had the opportunity to make an informed decision not to sign the contract at all.

But this kind of coercive information forcing rarely helps in the context of mass-market contracts. Consumers never read the new and improved contracts that courts labour over.[186] Requiring consumers to read lengthy contracts every time they purchase a jug of milk is not a solution, it is part of the problem. The resulting transaction costs would kill many of the mass-market deals that, in the aggregate,

[186] See. e.g. Vincent Gautrais, "The Colour of E-Consent" (2003) 1 University of Ottawa Law & Technology Journal 189 at 193 (developing an online theory of consent, and noting that "consumers rarely read the contracts presented to them ... ").

provide an enormous benefit to society.[187] Thus, the old judicial standby of adopting information-forcing rules that require consumers to read contracts is inadequate.

The *Bragg* case illustrates this point. The court in *Bragg* held that the arbitration provision in the Second Life EULA was unconscionable, despite the fact that Bragg was an attorney.[188] In the wake of the court's decision, Linden Lab redrafted the contract, and then required all of its customers to agree to the new EULA. As is standard with EULA updates, failure to agree to the new EULA by any Second Life user would result in his being banned from the virtual world. Thus, the court's information-forcing decision achieved nothing. And nothing was the best that could be expected from that decision—if the court had somehow managed to force consumers to read the EULAs, it would have wasted much of the customers' time to achieve precisely the same result.

2. Communities as Network Goods

The next question is why communities do not leave virtual worlds whose governing contractual regimes are not to their liking. One answer is that communities cannot simply pick up and go. As discussed below, online communities are network goods that benefit from economies of demand—people want to be where people already are. An empty virtual world attracts no one, whereas a populous one continues to attract more members. Thus, an online community may acquiesce to be governed by suboptimal contractual terms despite the existence of superior terms offered by a competitor.

The literature on network goods focuses on determining when and why groups of people continue to use a suboptimal product instead of switching to a superior one.[189] A network good is one in which economies of scale in demand increase the value of a commonly-held product.[190] The more people use it, the more the product grows in value. For example, because compatibility in operating systems is important, Microsoft's product grows in value as more consumers buy it.[191] This might explain why people do not switch from Microsoft to a better operating system.

Thus, network goods suffer from switching costs.[192] If party A and party B both switched to a product offering new standards, both would benefit.[193] However, neither

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[187] *Ibid.*

[188] *Bragg*, *supra* note 32 at 606 (noting that the contract was procedurally unconscionable despite the fact that Bragg was an attorney).

[189] S.J. Liebowitz & Stephen E. Margolis, "The Fable of the Keys" (1990) 33 J.L. & Econ. 1; Joseph Farrell & Garth Saloner, "Standardization, Compatibility, and Innovation" (1985) 16 RAND J. Econ. 70.

[190] *Ibid.* See also Ariel Katz, "A Network Effects Perspective on Software Piracy" (2005) 55 U. Toronto L.J. 155 at 157 (discussing network effects in software development and distribution).

[191] Liebowitz & Margolis, *ibid.*

[192] See Farrell & Saloner, *supra* note 189.

switches because they are unable to coordinate their preferences.[194] A relatively straightforward account of market failure therefore argues that where preferences are hard to coordinate, an inferior market standard might prevail despite the existence of a better standard.[195] When this happens, the community is locked in to the standard.

This basic account is not without its critics. Some scholars note that the nature of a market failure in standards militates against there ever being a really clean example of it.[196] Market failures are profit opportunities.[197] Even if network goods do suffer market failures, the greater the failure, the greater the incentive for a new party to enter and solve the problem.[198] There is, therefore, a mild Catch-22: if a market failure becomes sufficiently notorious, someone will surely have identified it and acted to overcome it in order to make a profit.[199]

This argument, though elegant, is incomplete. Market failures do exist. They provide profit opportunities not just for the arbitrageur, but for the beneficiary of the failure. And market failures persist. For example, monopolists work hard to create and keep monopolies because it is highly profitable for them to do so. The beneficiary of the market failure must work to prevent arbitrage in order to retain her rents. The easiest way to do this is for the beneficiary of the market failure to draft contracts that lock her customers in. Thus, contracts can distort markets as easily as they can facilitate them.

Indeed, this is what we see from the contracts that govern virtual worlds.[200] For example, Blizzard trumpeted the successful lock-in of its customers in a 2006 report to investors, now archived with the Securities and Exchange Commission: "Advantages that accrue to highly successful MMORPGs [include] high consumer switching costs—the player has to leave their characters and friends!"[201] The contracts that govern worlds like Blizzard's World of Warcraft are, unsurprisingly, designed to create high switching costs, not reduce them.

The problem of lock-in and high switching costs has led to discussions of whether the creation of standards common to all virtual worlds might permit people to exit one virtual world along with their virtual property in order to join another. But the expectations of what such standards might achieve are unrealistic. Some virtual worlds are medieval fantasy games, others are member-created social environments,

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[193] Liebowitz & Margolis, *supra* note 189 at 3.
[194] *Ibid.*
[195] *Ibid.*
[196] *Ibid.* at 4-6.
[197] *Ibid.* at 4.
[198] *Ibid.* at 5.
[199] *Ibid.*
[200] See e.g. *supra* note 34.
[201] Vivendi Games, *Introduction to Vivendi Games*, Investors Report filed with Securities and Exchange Commission (June 2006) at 15, online: Securities and Exchange Commission <http://www.sec.gov/Archives/edgar/data/1127055/000095012306007628/y22210erx99wl.html>.

and so on. The underlying code—called the "engine"—of each virtual world differs radically from one world to the next. Graphics developed for one virtual world will not function in another. Transportability of avatars, objects, or other virtual-world creations will not happen soon, if ever.

However, it is true that if people could take their investment in virtual objects and land with them, they would be more willing to leave one virtual world in search of another that offered more advantageous terms. One way to promote such a practice is to permit people to sell their assets. This is the solution to lock-in that occurs in the real world. When I buy a house, I am locked in to the community in which it is situated. I cannot take the house with me when I move. But my property interest in the house solves this problem since it allows me to sell my property when I move, liquidate my assets, and buy into a new community. In the same way, the effects of lock-in would be reduced if virtual-world inhabitants could sell their accounts, move to a new virtual world, and use the money to buy new virtual property.

In order for the market to produce better contractual-governance regimes, courts should adopt background rules that reduce lock-in. An analogy within the political arena might clarify the threat of lock-in to virtual-world communities. Those real-world countries that will not let citizens leave are without exception those governed by the worst rules. Permitting citizens to exit at will is a most effective way of encouraging countries to adopt rules that citizens need to thrive.

Property interests are a good answer to lock-in. Recognizing property interests in virtual property would permit virtual-world inhabitants to escape suboptimal contractual regimes. It would allow inhabitants to liquidate their assets and move elsewhere. Once virtual-world citizens have the option to leave, they will benefit from meaningful choice of contractual terms. This will create a true market. Until then, however, the market is not meaningfully testing contract terms; suboptimal contracts can and do survive by relying on lock-in.

3. Adverse Selection

If there is an unmet demand for default, background rules in virtual worlds, then some virtual-world creator should have met that demand by now. Assuming for the sake of argument that virtual-world creators could give communities what they need, it is worth exploring why they have not done so.

The phenomenon discussed here is called adverse selection.[202] A thought experiment will help to understand its effects. Suppose that (as is true) the overwhelming majority of online spaces write EULAs that bar a certain activity—for example, the trade of virtual objects for real dollars, called real-money trade.[203]

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[202] For a similar analysis of adverse selection in real-world housing developments, see Fennell, *supra* note 47 at 866.

[203] See *supra* note 34.

Suppose the majority of players would prefer an environment with laxer rules about real-money trade for virtual objects. In other words, there would be a consensus that a little bit of market trade would benefit the community.[204] However, players generally do not want an environment where all bets are off—for example, where players can simply pay the virtual-world creator to obtain power or prestige.

Imagine, then, being the new entrant to the field of virtual-world creation. Do you adopt the rule that most consumers would prefer—that of a lax standard of enforcement against real-money trade? The risk is that a higher percentage of the people who enter the newly created community will be closer to the unacceptable end of the spectrum of social behaviour. This would eventually cause other community members to leave.[205] In the end, only the most abusive players would remain, since the average citizen would go elsewhere. This adverse-selection problem explains why it has been so difficult for virtual-world creators to set optimal rules by contract.[206]

The example above deals with real-money trade—but the same holds true of many other community standards.[207] For example, suppose that the majority of online community members would prefer to allow robust debate generally uninterrupted by serious threats of lawsuits. The majoritarian preference for speech could then be reasonably described as "respectful rough and tumble". However, many communities currently have strict antiharassment rules. Consider what would happen if a new virtual community were to relax those strict rules. If the new community were to state that it will have a higher tolerance for harassment, then a higher proportion of harassers would enter the community, eventually driving off even those who initially had a higher tolerance for such behaviour.

This pattern seems to be playing out in the litigation surrounding Second Life. Second Life was the first community to relax the prohibition against ownership of virtual property. Second Life used this unique status as a selling point over other virtual worlds.[208] Many land speculators were drawn to Second Life because they wanted to own virtual land and develop it. The judge in *Bragg* remarked on this, noting that unsatisfied community members should not be tasked with simply exiting Second Life if they do not like the service, because no other community offered the

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[204] Fennell, *supra* note 47 at 866 (noting that even where there is unmet demand, adverse selection might prevent the adoption of a popular standard).

[205] *Ibid.* at 866.

[206] *Ibid.* at 866-67.

[207] *Ibid.* at 866 ("[w]hile it might be the case that many people would not mind an occasional house with, for example, four pets, or a motorcycle, or a gnome in the front yard, obvious difficulties arise if one's community is the only one in the metropolitan area that allows a particular use").

[208] *Bragg*, *supra* note 32 at 596. The defendant stated in a press release that "[u]ntil now, any content created for persistent state worlds ... has essentially become the property of the company developing and hosting the world. ... We believe our new policy recognizes the fact that persistent world users are making significant contributions to building these worlds and should be able to both own the content they create and share in the value that is created" (*ibid.*).

unique chance to own virtual property.[209] But this has exposed Second Life to unique costs—Linden Lab has suffered a disproportionate amount of legal trouble over property issues precisely because of its attempt to satisfy consumer preferences. Thus, there is some evidence that the phenomenon of adverse selection is impacting the ability of the creators of virtual worlds to give their customers what they want.

4. Incentives to Create

Finally, critics might wonder whether adopting the recommendations set forth in this article would diminish the incentives of virtual-world creators to create. For example, virtual-world creators have already used EULAs to resist vesting private-property interests in virtual property because they fear that private ownership would interfere with their control over virtual worlds.[210] If virtual-world creators are denied total control over their creations, the argument goes, they will not create at all.

Indeed, prior literature has claimed with some plausibility that monopolies in intellectual property have positive wealth effects, not merely distributional ones.[211] For example, the terms under which state-granted monopolies over intellectual property can be licensed are often viewed as wealth enhancing, rather than purely distributional. Since the goods are valuable, public policy incites creators to create.[212] Without the incentive of a promised monopoly, fewer goods would be created.[213]

However, it might be useful to consider that online community members are creators too.[214] The organizer of an online community does do significant work. YouTube, for example, identified a need, created a structure to fulfill that need, and

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[209] *Ibid.* at 606 ("[t]here was no 'reasonably available market alternatives [to defeat] a claim of adhesiveness.' Although it is not the only virtual world on the Internet, Second Life was the first and only virtual world to specifically grant its participants property rights in virtual land" [references omitted]).

[210] See Fairfield, "Virtual Property", *supra* note 20 at 1082-84 (discussing the elimination of virtual-property interests by contract).

[211] See e.g. Mark Lemley, "What's Different About Intellectual Property?" (2005) 83 Texas L. Rev. 1097 (discussing the effect of varying levels of intellectual-property protection on information markets).

[212] See Cooper, *supra* note 124 at 126-27 ("[t]raditional economic analysis hypothesized that large producers would reap the benefits of network externalities ... ").

[213] See e.g. William M. Landes & Richard A. Posner, *The Economic Structure of Intellectual Property Law* (Cambridge, Mass.: Belknap Press, 2003) at 13 ("[t]he dynamic benefit of a property right is the incentive that possession of such a right imparts to invest in the creation or improvement in period 1, given that no one else can appropriate the resource in period 2. It enables people to reap where they have sown. Without that prospect the incentive to sow is diminished").

[214] *Ibid.* at 127 ("new forms of collaboration bind people together in productive, social, and economic relations to produce and self-supply an increasing array of micro-products that meet their needs").

has thus benefited from a remarkable internet phenomenon.[215] But the YouTube community creates the lion's share of the value within this online community—both because the community creates the content, and because the community views and monitors that content.[216] If the terms of YouTube were such that community members could not create, society would be poorer. Thus, it seems reasonable to argue that social welfare would be enhanced by supplying virtual-world communities with the particular legal rules that they need to operate effectively.

To summarize, the market cannot reduce the transaction costs created by attempting to emulate background rules by contract. Improving the readability of contracts will not help either because consumers rationally do not read contracts. Furthermore, communities cannot leave for another virtual world with better terms even if another company could offer them, since communities are network goods, and switching costs are prohibitive. And the cost of all of this is that communities themselves might create less. Very few individuals or groups will invest or build if their interests in those investments are not protected.

B. The Proper Role of Contracts in Online Communities

Putting the pieces together, what should courts do when asked to determine questions of virtual property, where the question is presented as an abstruse contract question? What should courts do when parties bring tort-like suits for breaches of the social norms governing virtual worlds, again through stretched claims of contract? And how should denizens of virtual worlds and virtual-world creators draft contracts that maximize the incentives for inhabitants to build and create (at the lowest possible cost)?

This article has espoused one view of contract: that it performs best when it works together with other areas of the common law to secure individualized agreements among limited groups of people. Contract law functions effectively only in conjunction with other areas of law that create default, background rules that apply to everyone. Thus, in a virtual-trespass case, courts should not decline to find a cause of action because there is no "contract" between the trespasser and the owner of the virtual land. In a virtual-torts case, courts should determine which violations of social norms so offend dignitary or personal interests that tort sanction is a plausible response.

This article accepts that contracts will play a necessary role in creating legal relationships in virtual worlds. Once private property and personal or dignitary interests are protected, contracts can be employed to maximize individual

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[215] *Ibid.* ("[l]arge numbers of producers have seen increasing returns ... by consumers becoming producers in technology-facilitated environments").

[216] *Ibid.* ("[p]eople are no longer passive participants in the economy, as they were in the media available in the 20th century").

preferences. Once property law is in place, contracts are necessary to facilitate transfers of property. Once tort law is in place, contracts will be meaningful, since parties—and courts—will have assurance that the agreements are not the result of force or fraud.

An analogy to an orchestra may help. Contracts are currently trying to play every instrument, and the result is cacophony and litigation. But contracts could—and should—act as the conductor, giving courts an indication as to when other areas of law ought to be applied. Thus, for example, a contract governing a virtual world could invoke the tort law of a particular state to resolve disputes between members. This is easily done through incorporation by reference and choice-of-law provisions. Instead of attempting to supplant other areas of law, these contracts would cue or usher in other areas of law when their core competencies are needed. Such contracts would work together with other areas of the law rather than attempting to supplant them.

Of course, there are still some hitches in this easy confluence between contract and other areas of the common law. For example, what reason do we have to believe that the creators of virtual worlds will write their contracts to achieve those results? But strong tort rules protecting players are good for virtual-world providers because safe consumers are happy customers. And clear private-property rules increase profit possibilities for virtual-world creators, especially those that rely on selling virtual objects to their players (such as Webkinz, which sells virtual and real stuffed animals to children).[217]

The question best left to contract is not whether background rules should exist, but which ones ought to be applied. Contracts are flexible enough not to have to rely on their own terms to resolve all problems that may arise. Where a nonnegotiated, default rule is needed, contracts can turn to the law of property, the law of torts, criminal law, or constitutional law to provide it. In so doing, contract returns to its rightful place alongside the other areas of the law.

Conclusion

The internet's greatest promise lies in its social software. The creativity latent in massive online communities has only begun to be tapped. But the law has lagged behind the developments in that area. The promise of online communities will only be fully realized if the law protects private property and personal dignity as a matter of first principles, rather than relying on contracts to create all of the legal relationships that communities might need.

This article has made a very limited argument: contract cannot be the sole means of creating rights and obligations for members of online communities. For online

[217] Online: Webkinz <http://www.webkinz.com>.

communities to thrive, courts must recognize that private property, torts, and other community-critical rights and obligations can be adapted from the familiar rules that already govern communities in the real world to suit the realities of the virtual world.

This article is in no way espousing an anticontract message. Contracts have a crucial part to play in ordering individual preferences, in maximizing gain from trades, and in enabling commercial parties to plan for the future. But the law and literature have reached a crisis point where freedom of contract has run up directly against other market-critical ideas. Free markets clearly need freedom of contract. But it should be entirely uncontroversial that they also need private property and freedom from force and fraud. Contracts cannot usefully exist without the rest of the common law.

This article has also attempted to say something more general about contract law and its relationship with the rest of law. Contracts have been the vehicle through which public life has been privatized. When contract law permits parties to tweak default preferences in order to maximize their satisfaction it yields positive outcomes. But virtual worlds have heralded a new phenomenon in the use of contract law—that is, contracts that do not tweak default rules, but eliminate or ignore them. If the costs of legal rules are to be kept low, the courts must employ background, default rules to govern reciprocal relationships in large and shifting populations. Once those rules are firmly in place, parties can then rely on them when creating their own contractual relationships. If the relationship between contract law and the rest of the law is clarified, contracts can become tools for fostering innovation and creativity, for facilitating trades in new forms of property, and for helping courts navigate the uncharted waters of new law governing the day-to-day lives of the millions—and soon billions—of members of online communities. In so doing, contract law would take its proper place in the broader and still-developing social contract of virtual worlds.