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## **ONLINE GAMES AND IP - BATTLE OF THE FORMS TO SOCIAL NORMS: RECONCEPTUALISING AND RE-LAYERING?**

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### **Abstract**

Online interactive environments like World of Warcraft, Second Life, Habbo and The Sims Online are international entities, attracting users across the globe. They have one common regulatory mechanism; the End User License Agreement (EULA). This contractual document forms the cornerstone of the regulatory and governing system within each of these distinct spaces. Yet the EULA is regularly contravened by users and the game provider alike, suggesting it is neither fit for purpose, nor adequately designed for these online spaces. The EULA forms not only the contractual relationship between the service provider and the end-user, but is also intended to control the behaviour of the users in the relevant online environment. These are very often the only forms of control or regulation that are present in online environments, and therefore control more than user behaviour.

Despite this, there is no specific set of ‘virtual laws’ in these online environments yet the disputes arising from these environments are becoming increasingly common. There are online / offline boundaries, and different levels of controlling mechanisms. These boundaries are only one dimension of the control required in these spaces. Code is protected by copyright, and copyright is allocated by contracts. As such, there is an inter-dependent core which sees code, copyright and contract allocating not just property rights and intellectual property rights but adjudicating on disputes. In this relationship, there are different levels which combine to produce a situation whereby contract is dominant. This paper will consider the current layers of control in online gaming environments in light of some examples of legal disputes that have arisen. It will consider the Magic Circle theory and the Theory of Interration – and potential modifications in light of Tseng’s suggestions but also in context of disputes and the

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layers currently in place before suggesting that there is perhaps a chasm in this system of layered governance and control.

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## 1. Introduction

Virtual worlds and online games – particularly Massively Multiplayer Online Role Playing Games or MMORPGs<sup>1</sup> – are traditionally defined by the characteristics that they share.<sup>2</sup> This is indicative of the difficulties that arise in pinpointing precisely where this genre fits within the wider media landscape. There have historically been several attempts to pinpoint an agreed-upon definition of online games, but this has largely been unsuccessful.<sup>3</sup> Bell for example highlights that Massively Multiplayer Online Games (MMOGs)<sup>4</sup> are persistent, continuous environments, which are operated by players and facilitated through networks.<sup>5</sup> These characteristics distinguish these games from other games such as *Angry Birds*<sup>6</sup> or *Lego Star Wars*,<sup>7</sup> which whilst still games, are of a different genus, lacking the central massive and multiplayer elements. This is by no means the leading definition however, and others such as Kennedy have indicated that there are other elements which ought to be considered in defining these spaces, suggesting that the feature of avatars is also one which sets these games aside from other games.<sup>8</sup>

Definitions and characteristics of these online spaces are of secondary importance; it is appropriate to highlight the factors that make them unique, but it is more significant to identify the spaces and environments which provide the contextual framework for the discussion to follow. Nevertheless, the definition of the spaces themselves is indicative of a wider difficulty that is a constant factor in dealing with these environments: precision.<sup>9</sup> Precision is a prerequisite, as is a need to appreciate how online spaces differ from the offline world, and from other environments. To this extent, MMORPGs are a part of cyberspace – without a doubt, largely because their existence is dependent upon their ‘cyber’ element – but more importantly they are almost a segregated area of cyberspace. In governing, regulating or controlling

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<sup>1</sup> Hereafter MMORPGs.

<sup>2</sup> R Kennedy, “Virtual Rights? Property in Online Game objects and Characters” (2008) 17 *Information & Communication Technology Law* 95-106; M Bell, “Toward a Definition of Virtual Worlds” (2008) 1 *Journal for Virtual Worlds Research*; K Barker, “MMORPGing, Law and Lingo” in M Freeman and F Smith (eds), *Current Legal Issues: Law and Language* (Oxford: OUP, 2013) 417-433.

<sup>3</sup> See J Rogers, “A Passive Approach to Regulation of Virtual Worlds” (2008) 76 *George Washington Law Review* 405-425; F G Lastowka and D Hunter, “The Laws of the Virtual Worlds” (2004) 92 *California Law Review* 1-73; B T Duranske, *Virtual Law: Navigating the Legal Landscape of Virtual Worlds* (Chicago: ABA Publishing, 2008); R Kennedy, see note 2 above; M Bell, see note 2 above.

<sup>4</sup> Hereafter MMOGs.

<sup>5</sup> M Bell, see note 2 above. But see also: T L Taylor, *Play Between Worlds: Exploring Online Game Culture* (Cambridge (MA): MIT Press, 2006), at 9–11; R Bartle, *Designing Virtual Worlds* (San Francisco: New Riders, 2003), at 102–104; M de Zwart, “Contractual Communities: Effective Governance of Virtual Worlds” (2010) 33 *University of New South Wales Law Journal* 605-628; G Lastowka, *Virtual Justice: The New Laws of Online Worlds* (New Haven: Yale University Press, 2010), at 9.

<sup>6</sup> *Angry Birds*, available at <http://www.angrybirds.com/> (accessed 20 May 2013).

<sup>7</sup> *Lego Star Wars*, available at <http://starwars.lego.com/en-gb/Games/Default.aspx> (accessed 20 May 2013).

<sup>8</sup> R Kennedy, see note 2 above.

<sup>9</sup> K Barker, see note 2 above.

cyberspace – of which there are separate and lengthy debates elsewhere<sup>10</sup> – the concept is one which is essential. If cyberspace is viewed as a one-dimensional space, almost parallel to the offline world, then it is difficult to appreciate how such a place is difficult to control. However, if cyberspace is viewed as a fragmented space – as Murray has suggested<sup>11</sup> – then it is easier to conceptualise controlling at least parts of it, if not the entirety of it. It is, however, also easy to forget that cyberspace is multijurisdictional and transnational, and that national boundaries do not accord to the boundaries of cyberspace.<sup>12</sup>

Defining what online games are is almost as important as identifying what they are not, as this assists in understanding how they operate, and how they are controlled.<sup>13</sup> Similarly, it is beneficial to appreciate the different terminology that is used to identify with such environments, and the typical behaviours which are commonplace.<sup>14</sup> MMORPGs as outlined above, are largely defined by what they are, or the characteristics which identify them and distinguish them from others. Whilst there is little consensus about a precise definition, there is at least partial agreement that states online games are almost unique in terms of what they offer to their users or – to those interacting with *Second Life* – residents.<sup>15</sup>

The late 1990s and early 2000s introduced issues which could produce legal disagreements in virtual online interactive environments.<sup>16</sup> It is apt that some of these debates have again reared their heads in relation to social networking sites,<sup>17</sup> indicating that the issues arising in the 1990s when there was a significant advent of new environments becoming available, are far from complete and are still relevant and current throughout the development of Web 2.0 and the advent of Web 3.0.<sup>18</sup>

This paper will discuss some of the recent legal issues and legal disputes that have arisen in a number of online games and virtual environments, with an aim of identifying the weaknesses in the governance structure and regulation of them. The

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<sup>10</sup> See A Murray, *The Regulation of Cyberspace: Control in the Online Environment* (Abingdon: Routledge-Cavendish, 2006); D G Post, “Governing Cyberspace: Law” (2007-8) 24 *Santa Clara Computer & High Tech Law Journal* 883-914; D G Post, *In Search of Jefferson’s Moose – Notes on the State of Cyberspace* (New York: OUP, 2009); J Goldsmith and T Wu, *Who Controls the Internet?* (New York: OUP, 2008); N Suzor, “Order Supported By Law: The Enforcement of Rules in Virtual Communities” (2012) 63 *Mercer Law Review* 523-595, at 530; N Suzor, “The Role of the Rule of Law in Virtual Communities” (2010) 25 *Berkeley Technology Law Journal* 1817-1886, at 1818.

<sup>11</sup> A Murray, ‘Looking back at the Law of the Horse – Why Cyberlaw and the Rule of Law are important’ BILETA 2013 Keynote Speech available at <http://thelawyer.blogspot.co.uk/2013/04/my-keynote-address-to-bileta.html> (accessed 20 May 2013).

<sup>12</sup> Internet & Jurisdiction, *Synthesis II* (December 2012) available at <http://www.internetjurisdiction.net/wp-content/uploads/2012/12/Internet-Jurisdiction-Synthesis-II-December-2012.pdf> (accessed 21 January 2013).

<sup>13</sup> See below at *Controlling Online Gaming Environments*.

<sup>14</sup> K Barker, see note 2 above.

<sup>15</sup> S Robbins and M Bell, *Second Life for Dummies* (Oxford: Wiley, 2008).

<sup>16</sup> See below at *The Legal Issues Arising in Virtual Worlds and MMORPGs*.

<sup>17</sup> See for example: S Anderson, “‘Instagram Act’ could see social media users lose control of their photos” (The Telegraph, 30 April 2013) available at: <http://www.telegraph.co.uk/technology/social-media/10028168/Instagram-Act-could-see-social-media-users-lose-ownership-of-their-own-photos.html> (accessed 1 June 2013).

<sup>18</sup> N Spivack, “Web 3.0: The Third Generation is Coming” (2007) available at <http://lifeboat.com/ex/web.3.0> (accessed 20 May 2013).

focus of this paper will consider the layers of control which are present in online games and virtual worlds, and discuss in light of some recent disputes and issues, whether there is an omission in the current layers of control. The concept of layers of control is two-fold. In the first instance, it considers the layers of controlling mechanisms which are present in online games currently, and includes approaches such as contractual control, dispute resolution mechanisms and real-world legal disputes. The secondary element considers layers present in these environments, including contractual control, in-game reporting systems and software controls. These can be combined to produce a so-called ‘big picture’ of the governance paradigm in online games and virtual worlds. This paper will suggest that current approaches, both theoretical and practical have left a large gap whereby disputes occur, but which provide few realistic options for the resolution of disputes.

This is a relevant debate, especially in the context of the enduring difficulties surrounding the contractual-copyright paradox and relationship that is much relied upon in the digital age, by both content creators and content consumers. This paper will also consider a potential shift in the perspectives of governance and control in these online interactive environments in light of the layers present.

## 2. The Legal Issues arising in Virtual Worlds and MMORPGs

The initial issues that attracted attention in online games and virtual worlds concerned the activities of users in *LambdaMOO* – an online world which pioneered the idea of self-governance and peer-rule.<sup>19</sup> It was this environment that introduced the idea of virtual sexual assault and virtual rape<sup>20</sup> and widened the debates surrounding cyber-harm and cybercrimes.<sup>21</sup> In the late 1990s as virtual worlds and online games were developing at a pace concurrent with technology, the activities’ and actions of users were also changing, and were perhaps beginning to challenge the status quo, particularly in terms of control and governance.

The issues arising in *LambdaMOO*<sup>22</sup> that led to news coverage and subsequent attention indicated that hitherto, the contractual- and community-dominated systems of control were adequate and at least appropriate for the environments. However,

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<sup>19</sup> J Burgess et al, “The History of *LambdaMOO*” available at <http://www-cs-faculty.stanford.edu/~eroberts/cs181/projects/controlling-the-virtual-world/history/mud.html> (accessed 18 May 2013).

<sup>20</sup> R MacKinnon, “Virtual Rape” (1997) 2 *Journal of Computer Mediated Communication* available at <http://jcmc.indiana.edu/vol2/issue4/mackinnon.html#References> (accessed 20 January 2013). See: J Dibbell and C Thorn (eds), *VIOLATION: Rape in Gaming* (CreateSpace Independent Publishing Platform, 2012).

<sup>21</sup> See for example BBC News, “‘Game theft’ led to fatal attack” (31 March 2005) available at <http://news.bbc.co.uk/1/hi/technology/4397159.stm> (accessed 8 August 2011), where a gamer lost his life over a virtual item obtained through gaming. See also: S Brenner, “Fantasy Crime: The Role of Criminal Law in Virtual Worlds” (2008) 11 *Vanderbilt Journal of Entertainment and Technology Law* 1-91, at 37; O S Kerr, “Criminal Law in Virtual Worlds” [2008] *University of Chicago Law Forum* 415-429.

<sup>22</sup> J L Mnookin, “Virtual(ly) Law: The Emergence of Law in *LambdaMOO*” (1996) 2 *Journal of Computer-Mediated Communication*, available at <http://jcmc.indiana.edu/vol2/issue1/index.html> (accessed 17 February 2013); R MacKinnon, see note 20 above.

following the dual punishment of Mr Bungle – the avatar at fault<sup>23</sup> – and the community judgment,<sup>24</sup> it became clear that the experimental and idealistic system of control was not working and was susceptible to manipulation or abuse. This was the situation with Mr Bungle, who had been judged by a group of his avatarian peers, and then when punished, was banished by the community leader in addition to the punishment outlined by the community.<sup>25</sup> This was not only a breach of the community rules, but was also a problem in terms of what the community thought appropriate. If the community were not prepared to follow the dispute resolution provisions, it was farcical to have such provisions outlined; this indicates that contractual agreements are not adhered to, respected or read.<sup>26</sup> Where they are the mechanisms of control and they are not obeyed, this essentially leads to a lawless environment.<sup>27</sup> In our offline worlds, we rely upon law and order to maintain social structure and ensure that justice is at least seen to be carried out. However, in online spaces, which are potentially akin to private territories,<sup>28</sup> it is difficult to observe this situation. Rosedale has indicated such a position, advocating that *Second Life* is a country rather than a game.<sup>29</sup> Such an interpretation has significant ramifications in terms of layers of governance if true. Consequently, it is difficult to assert that the ‘tried and tested’ systems of governance and regulation have been successful.

However, this was not the only evidence of issues arising in online games and virtual environments which challenged the accepted system of governance and control. In 2003, *Second Life* proclaimed that they allowed their residents property rights in their virtual property.<sup>30</sup> In 2007 this became an issue of debate and legal dispute between Marc Bragg and the developers of *Second Life* (Linden Research), with Bragg claiming a contractual entitlement to claim property and intellectual property rights.<sup>31</sup> Whilst this dispute was settled before the issue went to court, there was no adjudicated outcome, there was nevertheless an understanding that property rights when declared in a contractual agreement are enforceable.<sup>32</sup> An alternative and additional element to this dispute concerned a cornerstone of the dispute resolution procedures contained within the contractual agreement users are required to accede

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<sup>23</sup> R MacKinnon, see note 20 above.

<sup>24</sup> J Dibbell, *My Tiny Life: Crime and Passion in a Virtual World* (London: Fourth Estate, 1998) available at <http://www.juliandibbell.com/articles/a-rape-in-cyberspace/> (accessed 16 February 2013).

<sup>25</sup> J L Mnookin, see note 22 above.

<sup>26</sup> Y Bakos et al, “Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts” (2009) NYU Law and Economics Research Paper No. 09-40, available at <http://ssrn.com/abstract=1443256> (accessed 9 August 2013).

<sup>27</sup> See for example D G Post (2009), note 10 above.

<sup>28</sup> B T Duranske, see note 3 above, at 126, 127.

<sup>29</sup> *Evans v Linden Research* (2011) 763 F Supp 2d 735 (E.D. Penn) [30].

<sup>30</sup> M Haughey, “Second Life Residents to Own Digital Creations” (14 November 2003) available at <http://creativecommons.org/press-releases/entry/3906> (accessed 20 May 2013).

<sup>31</sup> *Bragg v Linden Research* (2007) 487 F Supp 2d 593 (E.D. Penn).

<sup>32</sup> There is of course, a distinction between journalistic reports of rape in online worlds, and a federally lodged lawsuit concerning property rights, but they are both examples of a wider issue concerning the position of users and governance controls in online interactive environments such as *Second Life* and *LambdaMOO*.

to.<sup>33</sup> Residents are thus required to proceed through the stipulated dispute resolution methods. This was an onerous obligation, one the US courts determined was unenforceable, and users could not therefore be required to follow this procedure.<sup>34</sup> The effect of this judgment has not been to outlaw contractual dispute resolution procedures, but to ensure that they are fair, and under US contract law, conscionable.

The *Bragg* case<sup>35</sup> has not been the only indicator of property disputes in *Second Life* or virtual worlds. There have been other disputes and disagreements that have seen residents and the developers enter court proceedings to reach a resolution. In the case of *Volkov v Eros*,<sup>36</sup> again from 2007, the property concerned was that which had been developed by *Volkov* and allegedly infringed by *Eros*. The dispute proceedings concerned not only property but also intellectual property and business interests. Again the decision reached was not one that a court adjudicated on, and settlement was reached.<sup>37</sup> These cases serve not only to indicate that there are issues with the dispute resolution provisions, but also that user-user disputes were likely to increase as a result. *Volkov* has since been followed by a number of class actions concerning property interests in the US<sup>38</sup> usually against the game developer rather than by users against other users. This is perhaps a quirk specific to online interactive gaming environments which allow and even encourage users to introduce their own scripted items,<sup>39</sup> and user-generated content into the environments. Lastowka and Humphreys have indicated that this is suggestive of a reflection of rights for the users,<sup>40</sup> and a shifting sense of the role users play in online games.<sup>41</sup> One element perhaps, in which the users expect to hold some form of property interest in the items and even the

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<sup>33</sup> Second Life, “Terms of Service” (7 May 2013) available at <http://secondlife.com/corporate/tos.php> (accessed 20 May 2013).

<sup>34</sup> B Duranske, “Bragg v Linden Update: Defendants Motion to Dismiss and Compel Arbitration Denied” (Virtually Blind, 1 June 2007) available at <http://virtuallyblind.com/2007/06/01/bragg-v-linden-update-motions-to-dismiss-and-compel-arbitration-denied/> (accessed 20 January 2012).

<sup>35</sup> *Bragg v Linden Research*, see note 31 above.

<sup>36</sup> *Eros LLC v John Doe*, unreported, (2007) US District Court (Middle District, Florida) case no. 8:07-cv-1158- T-24TGW.

<sup>37</sup> Digital Media Law Project, “Eros LLC v Doe” (10 September 2007) available at <http://www.dmlp.org/threats/eros-llc-v-doe> (accessed 18 May 2013).

<sup>38</sup> See for example *Eros LLC v Thomas Simon*, unreported, (2007) US District Court (Southern District, New York) case no. 1:07-cv-477; *Evans v Linden Research* 2012 WL 5877579 (US District Court, Northern District, California).

<sup>39</sup> Second Life, “Getting Started in LSL scripting in Second Life” available at [http://wiki.secondlife.com/wiki/Getting\\_started\\_with\\_LSL](http://wiki.secondlife.com/wiki/Getting_started_with_LSL) (accessed 20 June 2012).

<sup>40</sup> G Lastowka, “User-Generated Content and Virtual Worlds” (2007-8) 10 *Vanderbilt Journal of Entertainment and Technology Law* 893 895-917, at 899. See also: W J Nichols, “Painting Through Pixels: The Case for a Copyright in Videogame Play” (2006-2007) 30 *Columbia Journal of Law and the Arts* 101-132; T Scassa, “Acknowledging Copyright’s Illegitimate Offspring: User-Generated Content and Canadian Copyright Law” in M Geist (ed), *The Copyright Pentology* (Ottawa: Ottawa University Press, 2012) 431-453.

<sup>41</sup> S Humphreys et al, “Fan based production for computer games: User led innovation, the ‘drift of value’ and the negotiation of intellectual property rights” (2005) 114 *Media International Australia* 16; S Humphreys and J Banks, “The labour of user co-creation. Emerging social network markets?” (2008) 14 *Convergence* 401-418.

environment itself. It is after all, unrealistic to expect people to work for something that is not in their own interest.<sup>42</sup>

*Second Life* is not the only multi-user environment which saw property disputes arise during 2007 and 2008. *World of Warcraft* – perhaps the most popular online game in history<sup>43</sup> – was also the subject of legal disputes. These predominantly concerned property ownership, but they also concerned issues of breaching the EULA and contravening the Terms of Use Agreements.<sup>44</sup> Perhaps the most significant arose between *Hernandez* and *Internet Gaming Exchange (IGE Ltd)*.<sup>45</sup> Both parties were users of *World of Warcraft*, and used the environment for different purposes; the first for casual use, and the latter for business use. *Hernandez* alleged that *IGE* was interfering with the gaming experience of non-commercial users by engaging in gold-farming.<sup>46</sup> This practice involves carrying out repeated menial tasks to generate achievements and currency which could then be sold to other users to save them from carrying out the same activity, and thereby allowing them to ‘level up’ and reach the more challenging levels quickly. This interfered with the enjoyment of the game for the other users, and *Hernandez* alleged that not only were *IGE* in breach of contract through breaching the EULA, and using the gaming platform for a commercial purpose, but that the Terms of Use Agreement was breached through engaging in such behaviour. A further allegation surrounded the role of *Blizzard Entertainment*. *Hernandez* and *IGE* have no contractual relationship; they contract individually with *Blizzard*.<sup>47</sup> As a result, *Hernandez* lodged proceedings against a third party, and sought to involve the game developer in resolving the dispute. Interestingly, yet again a settlement was reached, through which *IGE* agreed not to engage in such activities. This was not only a victory for *Hernandez*, but was also significant for other users of online games and virtual worlds because a third-party action succeeded.<sup>48</sup> This is significant because it indicates that third parties can succeed in actions, and will not hesitate to involve the platform providers in their disputes.

During the late 2000s, the landscape concerned with legal disputes arising from online games and virtual worlds was largely dominated by issues of virtual property and intellectual property rights. However, this has now developed and broadened, so that disputes are more widespread and concern more than mere proprietary interests. In July 2012, it was reported that *Habbo* was wide open to abuse by sexual predators

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<sup>42</sup> S J Horowitz, “Competing Lockean Claims to Virtual Property” (2006-2007) 20 *Harvard Journal of Law & Technology* 443-458, at 444; B T Duranske, see note 3 above, at 140-1.

<sup>43</sup> P Tassi, “World of Warcraft Drops a Million Subscribers in Three Months” (Forbes, 8 March 2012) available at <http://www.forbes.com/sites/insertcoin/2012/08/03/world-of-warcraft-drops-a-million-subscribers-in-three-months/> (accessed 18 May 2012).

<sup>44</sup> *MDY Industries v Blizzard Entertainment* 2010 WL 5141269 (9<sup>th</sup> Circuit).

<sup>45</sup> *Hernandez v Internet Gaming Entertainment*, unreported, (2007) US District Court (Southern District, Florida), case no. 07-CIV-21403-COHN/SELTZER.

<sup>46</sup> K Barker, see note 2 above, at 429.

<sup>47</sup> K Barker, “MMORPGing - The Legalities of Game Play” (2012) 3 *European Journal for Law and Technology*, available at <http://ejlt.org/article/view/119> (accessed 9 August 2013).

<sup>48</sup> J Fairfield, “Third Party Beneficiaries and Other Fantastical Beasts in Virtual Worlds” (TerraNova, 14 April 2009) available at [http://terranova.blogs.com/terra\\_nova/2009/04/third-party-beneficiaries-and-other-fantastical-beasts-in-virtual-worlds.html](http://terranova.blogs.com/terra_nova/2009/04/third-party-beneficiaries-and-other-fantastical-beasts-in-virtual-worlds.html) (accessed 16 February 2013).

seeking to abuse and molest children.<sup>49</sup> This was quite obviously in breach of the acceptable use policy<sup>50</sup> and the so-called control and protection measures that were in place in this environment. Unfortunately, the *Habbo* debacle highlighted the ease with which the license agreements and other contractual pre-requisites are circumvented and ignored by users who pay little attention to their provisions. Whilst such activity is doubtless in breach of the contractual agreements, it again demonstrates the weaknesses and flaws of the contractual system of regulation and control. Perhaps more alarmingly, it also highlights the culture that is dominant in online gaming, and this is further exemplified through Anita Saarkesian, in the summer of 2012,<sup>51</sup> who became an object of hatred and ridicule for daring to speak out and investigate the sexism and anti-female perspectives adopted by a number of gamers.<sup>52</sup>

Whilst these examples are sporadic and few in number, they serve to highlight and demonstrate the difficulties that have become prevalent in the recent past. There are a number of disputes that have not been considered here that concern other elements of online gaming and its intersection with the law.<sup>53</sup> It is easy to forget that these spaces are entirely virtual, and are entirely controlled by those who create them. This is problematic for no reason other than the producers and developers of the games will have a vested interest in maintaining their subscriber base rather than disciplining their users and paying customers. This is another flaw in the contractual system of control, and highlights that whilst there are layers of control, for example, contractual acceptable use policies, and dispute resolution systems, there are few standardised layers across environments, and it is difficult to determine any scale of gradual layering designed to resolve disputes at different levels. The current approach to controlling online games adopts a number of different approaches, and therefore a number of different levels of control.

### 3. Controlling online gaming environments

There are a number of approaches which have been mooted in relation to online games and virtual worlds as potential governing structures and theories of control.<sup>54</sup>

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<sup>49</sup> R Seifert, "Striptease and cyber sex: My stay at Habbo Hotel" (*Channel 4 News*, 12 June 2012) available at <http://www.channel4.com/news/striptease-and-cyber-sex-my-stay-at-habbo-hotel> (accessed 16 February 2013).

<sup>50</sup> Habbo, "The Habbo Way" available at [http://www.habbo.com/safety/habbo\\_way](http://www.habbo.com/safety/habbo_way) (accessed 16 February 2013).

<sup>51</sup> K Fernandez-Blance, "Misogyny, Violence highlighted in online video game, social media threats" (11 July 2012) available at <http://www.londoncommunitynews.com/2012/07/misogyny-violence-highlighted-in-online-video-game-social-media-threats/> (accessed 20 July 2012).

<sup>52</sup> A Saarkesian, "Tropes v Women in Video Games" available at <http://www.kickstarter.com/projects/566429325/tropes-vs-women-in-video-games> (accessed 16 February 2013).

<sup>53</sup> For example, virtual thefts and other crime related elements of virtual interaction.

<sup>54</sup> For example, The Magic Circle, Theory of Interration, Passive Regulation. See also: B Glushko, "Tales of the (Virtual) City: Governing Property Disputes in Virtual Worlds" (2007) 22 *Berkeley Technology Law Journal* 507-532; D P Sheldon, "Claiming Ownership But Getting Owned: Contractual Limitations on Asserting Property Interests in Virtual Goods" (2006-2007) 54 *UCLA Law Review* 751-788; N Suzor (2012), see note 10 above, at 530; N Suzor (2010), see note 10 above, at 1818; D L Burk, "Authorization and governance in virtual worlds" (2010) 15 *First Monday*; S

Similarly, there have been a number of suggestions in relation to the governance of cyberspace and the Internet more widely.<sup>55</sup> This has included differing models for control at different levels and across different layers – for example, governmental control, environment-specific controls and social norms. Suzor indicates that in addressing governance in online games and virtual worlds there are weaknesses in the rule of law when applied to cyberspace.<sup>56</sup> However, before these are considered, it is necessary to identify what is meant by governance in this particular context. Perhaps the most problematic element in relation to disputes in online games and virtual worlds arises where disputes have not been settled within the game or world, and the governance approach has been exhausted,<sup>57</sup> indicating there is a chasm between the layers of control which operate within online games and virtual worlds, and the layers of control which operate outside them and include real-world laws. Governance of online games and virtual worlds here is essentially the control or regulation of them, or the methods and theories of controlling the behaviour and environments that are online games and virtual worlds. This is necessarily very broad, not least because each of these online interactive environments is distinctive and offers the user something slightly different. In this way, there are different elements to each, and this is why it becomes necessary to provide a definition of them based on shared characteristics.<sup>58</sup> There is also a shared differentiating factor; the subtle distinctions in both environment and avatarian freedom.

The starting point for any discussion on governance and control is the End User License Agreement (EULA). Although this document purports to control all aspects of interaction and activity within an online game or virtual world, it often falls short of this aim, leaving users and avatars in some significantly vulnerable positions should disputes arise. It has been suggested that the difficulty does not lie with the contract itself; rather, it lies with the enforcement of the contract.<sup>59</sup> This is arguably a very pertinent point, and whilst it is a reminder of the difficulty with contracts of this type, there have been some strong indications that parts of these contractual agreements are invalid and therefore unenforceable to begin with.<sup>60</sup> As such, the enforceability element is one which must be dealt with elsewhere; suffice to say that any system of governance is only as good as the enforcement of it.

Aside from the EULAs, there are other suggested ideas and methods which could be used in order to provide some element of control in online games and virtual worlds, which comprise an element of cyberspace, described as a traditionally lawless place.<sup>61</sup>

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Humphreys, “Ruling the Virtual World. Governance in massively multiplayer online games” (2008) 11 *European Journal of Cultural Studies* 149-171; S Humphreys and M de Zwart, “Griefing, Massacres, Discrimination and Art: the Limits of Overlapping Rule Sets in Online Games” (2012) 2 *University of California Irvine Law Review* 507-536, at 518; M de Zwart, see note 5 above, at 605; G Lastowka, see note 5 above.

<sup>55</sup> See above at *Introduction*.

<sup>56</sup> N Suzor (2010), see note 10 above, at 1842.

<sup>57</sup> N Suzor (2012), see note 10 above, at 594.

<sup>58</sup> See above at *Introduction*.

<sup>59</sup> B Glushko, see note 54 above, at 521.

<sup>60</sup> *Bragg v Linden Research*, see note 31 above.

<sup>61</sup> J R Reidenberg, “Governing Networks and Rule-Making in Cyberspace” (1996) 45 *Emory Law Journal* 911-930.

If this is indeed the situation, it seems strange that regulators and providers have consistently sought to introduce some element of hierarchy and control.<sup>62</sup> Nevertheless, other options have tended to be diverse, and focus on different aspects of the relationships between users and online environments.

Online games and virtual worlds such as *World of Warcraft* and *Second Life* are distinct spaces, and alongside sharing certain characteristics, also share a common theme of control: End User License Agreements.<sup>63</sup> The contractual documents are diverse, encompassing Terms of Use Agreements, Terms of Service, Rules of Play, Codes of Conduct and License Agreements. The EULA is a standard-term agreement which each user is required to consent to prior to gaining full access to the online environment concerned. These contractual documents determine all manner of rights, obligations and liabilities entered into by both the end user and the game developer or platform provider.<sup>64</sup> Despite this, very few people, if any, read them or their contents.<sup>65</sup> These license agreements are not between one user and all other users – rather, they are between one user and the developer.<sup>66</sup> This, whilst making the situation workable from the perspectives of the game provider, is not beneficial to the users of these online environments. In this way, if there is a dispute between user A and user B, there is no contractual agreement between the 2 parties in disagreement. Therefore, users A and B must either rely upon the developer to intervene in the dispute – which is highly unlikely given the statements issued by providers such as Linden Labs<sup>67</sup> – or base their position on third party contractual rights.<sup>68</sup>

Aside from the elements of the online environments that are purely contractual, and the difficulties users may have in asserting their contractual bases for dealing with disagreements, the EULAs themselves often contain a wealth of clauses. These clauses aim to control and deal with every aspect of behaviour which may arise in the game environment, or link each contract to another which deals with different aspects of game play. For example, *World of Warcraft* has multiple contractual agreements, ranging from the EULA to the Terms of Use. The linking of one agreement to another was the source of a copyright dispute in the US in 2010, whereby the developers of *World of Warcraft* claimed that a user had breached the EULA and had therefore also breached copyright in the game.<sup>69</sup> In this way, it is possible to construe these contractual agreements as forming a constitution of the environment concerned. They outline the central elements of the governance system, akin to the legal systems in our offline existences. This interpretation is possible because of positions such as those

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<sup>62</sup> For example, dispute resolution provisions within EULAs and Non-Player Characters to patrol game environments.

<sup>63</sup> *Second Life*, see note 33 above; Blizzard Entertainment, “World of Warcraft End User License Agreement” (22 August 2012) available at [http://us.blizzard.com/en-us/company/legal/wow\\_eula.html](http://us.blizzard.com/en-us/company/legal/wow_eula.html) (accessed 20 May 2013).

<sup>64</sup> R Dannenberg et al, *Computer Games and Virtual Worlds: A New Frontier in Intellectual Property Law* (Chicago: ABA Publishing, 2010), at 6.

<sup>65</sup> OUT-LAW News, “Nobody Reads Terms and Conditions: It’s Official” (19 April 2010) available at <http://www.out-law.com/page-10929> (accessed 20 April 2010).

<sup>66</sup> K Barker, see note 2 above.

<sup>67</sup> Developer of the virtual world, *Second Life*.

<sup>68</sup> *Hernandez v Internet Gaming Entertainment*, see note 45 above.

<sup>69</sup> *MDY v Blizzard Entertainment*, see note 44 above.

adopted by Barlow in 1996,<sup>70</sup> when he declared that cyberspace is free from governmental control. Such an interpretation of EULA-style constitutional arrangements also benefits from support as diverse as that offered by Murray in his supposition that cyberspace is fragmented and not one-dimensional.<sup>71</sup> As such, it would seem that whilst layers of control and governance are perceptible, they are also fragmented and no longer cohesive. If these three elements are combined, it is possible to conclude that each virtual world and online game is a distinct fragmented area of cyberspace; not subject to the traditional, jurisdictional and national boundaries in the offline world, but still subjected to rules and regulation albeit of a different kind - that which is found in the EULA, and upon which access to the environments is dependent.

This interpretation broadly fits within the theory of virtual worlds, particularly relating to the Theory of Interration<sup>72</sup> and the Magic Circle Theory<sup>73</sup> – which broadly outline the need for a distinction between places designed for play and those that are not. The Interration Theory outlines a potential structured approach to regulation and governance: open worlds are subject to governmental control whereas closed worlds are not.<sup>74</sup> The closed-worlds, as viewed under the Interration Theory would essentially seal themselves off from offline law, meaning that all disputes would need resolving within the environment itself. This aspect of the theory poses perhaps the greatest challenge to the control and dominance of the EULA. If the environment is closed, and rejects the involvement or influence of any law or controlling mechanism other than that which is virtual and space-specific, the validity of the EULA is undermined, especially as it will inevitably contain some form of applicable law clause. At the very least, the Theory of Interration indicates that there ought to be some significant changes to the standard-form clauses contained within the license agreements. The Theory of Interration is closely connected to Declarations of Rights, and in particular the Declaration of the Rights of Avatars.<sup>75</sup> In order for such regulatory systems and layers of governance to work, there would necessarily be some ideal of rights granted to players / users and avatars, especially if the open-worlds are reliant upon governments to protect their rights. This is broadly aligned with the situations occurring in offline regulatory systems, and if open-worlds are willing to subject themselves to governmental regulation, it seems consistent that rights would be an essential element of this.

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<sup>70</sup> J P Barlow, “Declaration of the Independence of Cyberspace” (8 February 1996) available at <https://projects.eff.org/~barlow/Declaration-Final.html> (accessed 17 February 2013).

<sup>71</sup> A Murray, see note 11 above.

<sup>72</sup> E Castronova, “The Right to Play” in J M Balkin and B S Noveck (eds), *The State of Play: Law, Games and Virtual Worlds* (New York: NYU Press, 2006) 68-85, at 80.

<sup>73</sup> J Fairfield, “The Magic Circle” (2009) 11 *Vanderbilt Journal of Entertainment and Technology Law* 823-840; E Castronova, “The Right to Play” (2004) 49 *New York Law School Law Review* 185-210, at 200-05; J M Balkin, “Law and Liberty in Virtual Worlds” (2004) 49 *New York Law School Law Review* 63-80, at 73–76.

<sup>74</sup> Y S Tseng, “Governing Virtual Worlds: Interration 2.0” (2011) 35 *Washington University Journal of Law & Policy* 547-570.

<sup>75</sup> R Koster, “Declaring the Rights of Players” in J M Balkin and B S Noveck (eds), *The State of Play: Law, Games and Virtual Worlds* (New York: NYU Press, 2006) 55-67 available at <http://www.raphkoster.com/gaming/playerrights.shtml> (accessed 16 February 2013).

The Interration Theory and Rights Declarations are not however without criticisms and difficulties, especially as these theories can be used to highlight the potential pitfalls of real-world laws applying to online spaces. Nevertheless, for the discussion of layers of governance and control, they are a useful indicator of divisions that could be present. Such perspectives arise in relation to the pervasive issue of enforcement of online control. Tseng has advanced the Theory of Interration, and suggests that there are two elements requiring attention if such a system of control is to become a reality.<sup>76</sup> Firstly, there would be a need to adopt the Magic Circle Theory and differentiate what is governed online and what is not. Then, there would be a need to introduce some form of legislation which would allow developers to choose from a number of options for their environments and would facilitate governance. This is a largely theoretical situation as it is highly unlikely that game developers and providers are willing – or able – to undergo such a significant shift in mind-set.<sup>77</sup> Nevertheless, it is perhaps more possible now than ever before to see that there will be some form of change in approach on behalf of the developers, especially in light of the recent guidance issued by the Law Commission.<sup>78</sup> This includes calls for consumer protection to be extended to cover End User License Agreements,<sup>79</sup> and this would necessarily encompass game contracts. This is indicative of different layers operating simultaneously – offline real world law is operating at one level, whilst there is another layer of contractual control operating within gaming environments.

The Law Commission advice builds on previous consultations as to the state of unfair term legislation, and more recently, a consultation dealing with consumer protection<sup>80</sup> which included a refreshing yet distinct focus upon digital content. Legislative action is therefore not unforeseeable, and could be the first step in enacting some form of distinct regulatory system for online digital platforms of all varieties rather than those dealing primarily with content consumption.<sup>81</sup> However, before that stage is achievable, a significant number of challenges as to the regulatory frameworks and theories are as yet unclear in relation to online gaming and gaming environments.

The Magic Circle theory is broadly similar to the Theory of Interration, and indicates that there must be a difference between what is deemed to be virtual or online, and that which is deemed to be ‘real’ or offline. It is suggested that this Magic Circle distinction is designed to allow different systems of control and governance to have an input. For example, in the offline, real world, governance could be through criminal law or a declaration of rights, whereas in an online, virtual environment,

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<sup>76</sup> Y S Tseng, see note 74 above, at 566.

<sup>77</sup> *Ibid.*

<sup>78</sup> Law Commission, “Unfair Terms in Consumer Contracts: Advice to the Department for Business, Innovation and Skills” (March 2013) available at [http://lawcommission.justice.gov.uk/docs/unfair\\_terms\\_in\\_consumer\\_contracts\\_advice.pdf](http://lawcommission.justice.gov.uk/docs/unfair_terms_in_consumer_contracts_advice.pdf) (accessed 9 August 2013).

<sup>79</sup> Department for Business, Innovation and Skills, “Consultation on Enhancing Consumer Confidence by Clarifying Consumer Law” (July 2012) available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31350/12-937-enhancing-consumer-consultation-supply-of-goods-services-digital.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31350/12-937-enhancing-consumer-consultation-supply-of-goods-services-digital.pdf) (accessed 9 August 2013).

<sup>80</sup> *Ibid.*, 128.

<sup>81</sup> Such as the Digital Copyright Exchange; R Hooper, “Copyright works: streamlining copyright licensing for the digital age” (London: IPO, 2012) available at <http://www.ipo.gov.uk/hargreaves-copyright-dce> (accessed 20 May 2013).

similar governance of behaviour is likely to be through contractual clauses. Despite the ease with which this position could influence governance, there are strong criticisms of the division between the offline and the online. It has been stated that such a clear-cut distinction is impossible and far from realistic.<sup>82</sup> Similarly the suggestion that offline laws do not apply to online situations has been contradicted too.<sup>83</sup> Despite these criticisms, the status quo does not work, and is not suited to that which it seeks to control. The division between online and offline layers, and laws is one which has pervaded the area of cyber-activity for a number of years with one caveat; lawmakers are beginning to realise that for laws to apply and be appropriate for online issues, they must be suited to the online environment rather than stretched to fit. Duranske has implied that it is irrelevant whether the game declares itself open or closed, or states that law will apply to it.<sup>84</sup> His reasoning is based on the argument that such issues are trivial because ultimately, “it is just a game.”<sup>85</sup> These criticisms and arguments rest on the perception of cyberspace and online games as one dimensional, rather than multidimensional and multi-layered, and this is the concept which must now be advanced. As such, it is possible to determine that theories of governance and control are possible in relation to online multiuser environments.

Aside from Interration and the Magic Circle, other elements of governance and control are present in online interactive environments. These include initiatives such as social norms and community governance.<sup>86</sup> Social norms can – and have in limited situations – proved valuable. There is however a significant hurdle to using social norms. They (social norms) are particularly fluid as concepts, especially when a multitude of nationalities and social groups converge as they do in online multiuser environments. In addition to this, there is still a need for a hierarchical structure to ensure that the decisions are upheld, and are not improperly enforced. This was the difficulty with the social-norm and community governed virtual world of *LambdaMOO*.<sup>87</sup> Mr Bungle raped female avatars, and in accordance with the community rule, punishment was issued.<sup>88</sup> However, the community rule failed when the leader implemented an additional level of punishment without the knowledge or consent of the community. This demonstrates the vulnerability of the community self-governance or social norm approaches in online environments. Despite this, Reed<sup>89</sup> and Stoup<sup>90</sup> have recently indicated that perhaps social norms are now the appropriate mechanisms through which gaming ought to be controlled. This idea was discussed by Rowland while considering the potential developments of cybercommunities,

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<sup>82</sup> J van Kokswijk, “Social Control in Online Society” (2010) available at [http://www.kokswijk.nl/agenda/files/CW2010-JvK\\_v1.pdf](http://www.kokswijk.nl/agenda/files/CW2010-JvK_v1.pdf) (accessed 15 February 2013), at 241; J Fairfield, see note 73 above, at 826.

<sup>83</sup> B T Duranske, see note 3 above, at 76.

<sup>84</sup> B T Duranske, see note 3 above, at 76.

<sup>85</sup> *Ibid.*

<sup>86</sup> P Stoup, “Development and Failure of Social Norms in Second Life” (2008) 58 *Duke Law Journal* 311-344, 325.

<sup>87</sup> See above at *Legal Issues Arising in Virtual Worlds and MMORPGs*.

<sup>88</sup> R MacKinnon, see note 20 above; J Dibbell and C Thorn, see note 20 above.

<sup>89</sup> C Reed, “How to Make Bad Law: Lessons from Cyberspace” (2010) 73 *Modern Law Review* 903-932.

<sup>90</sup> P Stoup, see note 86 above, at 325.

indicating that a lack of effective governance could encourage and breed disputes and unrest.<sup>91</sup> This would broadly indicate that appropriate levels of governance must be in operation in order to ensure a cohesive community which can manage disputes is in existence.

It is of course not just online games and virtual worlds that are the subject of such debates over governance and control. Social networking sites are very similar in that they require their users to subscribe to their systems of use and contractual agreements outlining the terms on which use is available.<sup>92</sup> Nevertheless these environments do differ from gaming environments. The EULAs are broadly the same, containing many similar clauses. From the perspective of users, whilst the environments are different, the contractual agreements are not so different and this has proved problematic when it comes to so-called ‘market-choice.’ If a user distinguishes between environments but is not prepared to agree with the contractual terms of one vastly different space compared to all others, this user is essentially faced with a ‘take it or leave it’ position.<sup>93</sup> Such an element of EULAs and licensing arrangements are commonplace however encounter difficulties when there is a distinct lack of choice. Users in this way are then forced to accept a contractual agreement with which they may have concerns in order to enter the environment of choice. This pressing consumer issue arises when games and worlds offer significant inducements to potential users to attract their custom.<sup>94</sup>

The Office of Fair Trading has recently announced that it intends to explore issues such as this,<sup>95</sup> and it is to be hoped that action is taken to protect consumers under relevant consumer protection initiatives, especially given that it is somewhat unclear as to whether users benefit from protection under UCTA<sup>96</sup> and the UTCCR<sup>97</sup> at present. Perhaps the recent consultations by the Office for Fair Trade will be able to rectify the position users are subjected to in relation to digital content, and End User Agreements.

It is pertinent to consider the control issues present in online interactive, multiuser environments, especially when they seemingly fail to adequately prevent or resolve disputes arising. Contractual arrangements are not the only potential method of controlling online spaces; several alternatives or modified arrangements are possible. What is clear from the use of a community system originally in *LambdaMOO*, the use of Game Masters or Wizards,<sup>98</sup> and the community approach adopted in *Second Life*<sup>99</sup>

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<sup>91</sup> D Rowland, “Cyberspace – A Contemporary Utopia?” (1998) 3 *Journal of Information, Law and Technology*, available at [http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1998\\_3/rowland/](http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/1998_3/rowland/) (accessed 20 December 2010).

<sup>92</sup> P Warr, “Instagram loses half its daily users after T&Cs debacle” (WIRED News, 15 January 2013) available at <http://www.wired.co.uk/news/archive/2013-01/15/instagram-losing-daily-users> (accessed 21 April 2013).

<sup>93</sup> J J Kayser, “The New New-World: Virtual Property and the End User License Agreement” (2006) 27 *Loyola of Los Angeles Entertainment Law Review* 59-85, at 60.

<sup>94</sup> For example, *Second Life* claims that its users own all property arising out of interaction.

<sup>95</sup> Office of Fair Trading, “OFT Investigates free children’s web and app-based games” (12 April 2013) available at <http://www.offt.gov.uk/news-and-updates/press/2013/33-13> (accessed 20 May 2013).

<sup>96</sup> *Unfair Contract Terms Act 1977*.

<sup>97</sup> *Unfair Terms in Consumer Contracts Regulations 1999*.

<sup>98</sup> i.e. an avatar with a position of authority.

is that there is a desire on the part of those who are being regulated. There is also some involvement in the governance system from those being regulated, albeit this has so far demonstrated weaknesses – and potential failings – with the layers of control. There is also clearly a desire and interest on the part of the game developer and provider to have a role in the control of the environments they create. On top of this, there are also clear indications that governments see a role in controlling these areas despite the claims of Barlow.<sup>100</sup> As such, there is at least a triumvirate of interested parties, which are representative of different layers within these environments. Accordingly, regardless of the mechanism, when these interests are combined, one potential solution would be to merge the various approaches and interests to reflect control at different levels, and through different mechanisms depending on the layer. Gilbert suggests that the EULA should not be the sole element of governance,<sup>101</sup> and that the logical step is to introduce a combined model of governance in online interactive multiuser environments, which outlines different layers to deal with different disputes at different levels.

#### **4. The Concept of Change – Re-layering the ungovernable?**

The concept of layering and layered governance needs expanding. Currently, there are several potential layers of control and governance in operation. Software code (under a ‘Code is law’<sup>102</sup> approach), contractual control, social norms, dispute resolution processes and real-world laws all operate to varying extents in governing online games and virtual worlds. There have been a number of notorious examples from different online games and virtual worlds indicating the failures of various combinations of these controlling mechanisms. These failings have all indicated that while there are several possible options for resolving issues within the environments, there is a gulf between the real-world laws and the environmental approaches to disputes that arise when these options have been exhausted. This suggests that there is a missing layer between the two. Such a layer could potentially operate in a manner similar to the small-claims track for civil disputes, to ‘siphon off’ disputes which have not been resolved satisfactorily within the gaming environment, but which do not necessarily require full litigation. A greater indication from the layers currently in place is the ineffectiveness of some of them, particularly the code-contract-copyright paradigm. For example, this requires users to agree to dispute resolution proceedings<sup>103</sup> under the EULA, and this is usually subjected to a particular legal jurisdiction; in the case of *World of Warcraft*, the law of California is applicable.<sup>104</sup> In resolving a dispute under this contractual provision, the user is likely to be placed in a

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<sup>99</sup> Second Life, “Community Standards” available at <http://secondlife.com/corporate/cs.php> (accessed 20 May 2013).

<sup>100</sup> J P Barlow, see note 70 above.

<sup>101</sup> B J Gilbert, “Getting to Conscionable: Negotiating Virtual Worlds’ End User License Agreements without Getting Externally Regulated” (2009) 4 *Journal of International Commercial Law & Technology* 238-251.

<sup>102</sup> L Lessig, *Code: Version 2.0* (New York: Basic Books, 2006).

<sup>103</sup> There is some discussion as to whether such clauses are actually enforceable but this falls outside of the scope of this work.

<sup>104</sup> Blizzard Entertainment, see note 63 above.

position whereby the route of recourse available is prohibitive and unrealistic. This is indicative of a failure of the layers of governance from the perspective of a user.

The contractual EULA relies upon copyright to provide proprietary interests, whilst simultaneously seeking to introduce rules and behavioural limits. The EULA is very much seen as a 'one size fits all' document. This has no layers to it – it relies on other mechanisms to provide the layers. When this is considered in a much wider context, layers become apparent. Social norms for example, provide at least two layers at a basic level. Above this, the EULA implements a different set of rules and expectations, often containing more detailed provisions. This is therefore superior to the social norms which govern the community directly. In this way there are now a number of layers. Building upon this, the code – which allows actions, property and controls – is the ultimate layer of what can and cannot be done and this rests above the EULA. This is however, far from a final layer and the remaining layers will be dependent upon the precise mechanisms of a particular world or game, most especially if the world chooses to become open or closed, and opts for governmental control. If this occurs, then there is the potential for a further layer to be introduced above the code. Whilst this is a simplistic illustration of how the layers could be introduced, it is not one which suffers from a lack of support. Mayer-Schonberger has considered layers of governance for cyberspace more widely.<sup>105</sup> In his consideration, there are many more variables, but nevertheless, if each world and game is governed individually – as it must – then there is still potential for a further layer to be implemented above the EULA and above the code but below that of governmental involvement. This is potentially to mirror some in-house regulatory bodies such as the Football Association.<sup>106</sup> This layer could be the first multi-world governance layer, which could regulate all worlds or games that subscribe to its authority.

The layers of governance would reflect not only theoretical considerations, but would also ensure that there was appropriate regulation and adjudication on disputes at an appropriate level. For example, a simple case of breaching the rules of play could be dealt with at the social-norm level. If there was a subsequent breach, this could then be dealt with in a repeated manner, but there could also be the right of recourse to a higher level.<sup>107</sup> Depending upon the ultimate outcome, it is possible that the dispute could escalate to the highest level. Even if this were the case, it would introduce some structured approach to these spaces, without imposing rules that are unsuited to the environments they seek to play a role in. Layered governance would also allow for a subsequent set of rules or laws to be applicable if the dispute cannot be resolved through the online-specific levels. At this point, the dispute would become an offline dispute and would fall broadly within the parameters of offline governance, thereby creating an incentive for disputes to be resolved virtually.

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<sup>105</sup> V Mayer-Schonberger, "The Shape of Governance: Analyzing the World of Internet Regulation" (2003) 43 *Virginia Journal of International Law* 605-674, 611

<sup>106</sup> The FA, "Rules of the Association" available at <http://www.thefa.com/football-rules-governance/more/rules-of-the-association> (accessed 20 May 2013).

<sup>107</sup> For example, virtual courts, as mooted by Alemi; F Alemi, "An Avatar's Day In Court: A Proposal for Obtaining Relief and Resolving Disputes in Virtual World Games" (2007) 11 *UCLA Journal of Law and Technology*.

The different approaches and the different focuses on the relationships between users and online environments has been a significant factor in considering different controlling mechanisms. The different suggestions indicate the perspective from which governance is viewed and as such, it is difficult to reconcile the different approaches with one another. Similarly, it is inherently problematic to advocate for one dominant approach over all others – this has traditionally and historically been the situation with the EULA, yet it is proving to be far from ideal as a ‘one size fits all’ measure for online interactive environments. Consequently, the different governance approaches and suggestions must be considered in a new way. Instead of determining which should be the single approach to adopt, it is time to reconsider the levels of governance. Not all suggested approaches deal with the same issues, and for this reason it is impractical and undesirable to attempt to have one singular governance system. Similarly, it is difficult to give credence and equal significance to each approach as this could potentially lead to a situation where different approaches adjudicate on one issue but lead to different, and contradictory outcomes. This leads to a reconceptualization of governance, to move away from a one-dimensional situation. It is necessary to consider that disputes and issues arise at different levels, and rather than expecting a single contractual document to deal with all of these, there ought to be a flexible, appropriate system which can broadly be applicable to not just online games and virtual worlds, but cyberspace more widely. This reconceptualization focuses on the idea of layers, and layers of governance, through which multiple parties can retain their interest in control. It is to be remembered that online games and virtual worlds are very different environments to the offline worlds which we inhabit.

In addition, there is a further element which ought to be considered in this discussion. This relates to the controls built-in to the code of each online game and virtual world. Code provides the structure and all content within the environment – without code there is no environment. Consequently, it would appear that code is law, as Lessig’s theory has advocated.<sup>108</sup> If code is indeed law, the code provides for possible activity and content. If the code does not allow it or provide for it, then it cannot be. In this respect, the code is all-encompassing and the most powerful element of any governance scenario. Concurrently, those who are in control of the code ought to be those with the greatest and most significant interest in governance and control of the particular environment. In most instances the developers will be those in control of the code, but contradictorily will be those who have a lesser interest in control of the environment. The inherent conflict for developers arises in power to expel a user from the environment, but this user is likely to be a paying consumer, and there is little incentive to punish such a user, regardless of the breaches of EULA or Rules of Play that the user has undertaken. By punishing or expelling a user, the developer is reducing the income stream and profitability. Whilst this punishment, control and expelling users may be within the power of the developer, it is unlikely to be desirable or realistic for the developer to be placed in a position of conflicting interests.

Consequently, Lessig’s theory that code is law<sup>109</sup> needs some expansion and slight modification if it is to become the centre-piece of reconceptualised layers of

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<sup>108</sup> L Lessig, see note 102 above.

<sup>109</sup> *Ibid.*

governance. However, it is not just code that is currently centrally placed in the current system of control. Code is protected by copyright, and copyright is allocated by contracts.<sup>110</sup> As such, there is an inter-dependent core which sees code, copyright and contract allocating not just property rights and intellectual property rights but adjudicating on disputes. In this relationship, different levels combine to produce a situation whereby contract is dominant.

## 5. Conclusion

This article has considered the current governance framework for online games and virtual worlds and some of the theoretical arguments for altering the system. The dominant conclusion and hypothesis rests with the idea of layers. Such a concept will allow online worlds and games to retain their distinctive features and their independence from other environments, whilst introducing some structure, and non-contractual control of these valuable spaces. Lessig has indicated that code is law<sup>111</sup> and whilst code can be law, it relies upon other things to ensure that it is. Code alone is not sufficient to deal with all manner of disputes. Similarly, contract has the same weakness.

Subsequently, in light of the SABIP report<sup>112</sup> indicating copyright and contract must be reconsidered, and the Law Commission advice that consumer protections need to apply to EULAs,<sup>113</sup> there is a compelling case for pre-emptive changes to be made to online gaming governance systems. Layers of control are required to govern complex, advanced online interactive environments at appropriate levels, and dispel the myth that cyberspace is lawless. Cyberspace is not lawless – cyberspace is distinct, and often misunderstood. Reconceptualising cyberspace – but more particularly online games and virtual worlds – would allow a reconsidered and restructured governance system, and reflect the acceptance of cyberspace as a distinct and diverse space.

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<sup>110</sup> See for example, *Second Life*, see note 33 above; *Blizzard Entertainment*, see note 63 above.

<sup>111</sup> L Lessig, see note 102 above.

<sup>112</sup> SABIP, “The Relationship between Copyright and Contract Law” (July 2010) available at <http://www.ipo.gov.uk/ipresearch-relation-201007.pdf> (accessed 9 August 2013).

<sup>113</sup> Law Commission, see note 78 above.