Chapter 6
Intellectual Property and Virtual Worlds

“There can be no doubt that communications pervade contemporary social life. The audio-visual media, print and other communications technologies play major parts in modern human existence, mediating diverse interactions between people. Moreover, they are numerous, heterogeneous and multi-faceted. Equally, there can be no doubt that communications are dynamic and ever-changing, constantly reacting to economic and popular forces.” (Cobley, 2004)

INTRODUCTION

As stated previously, virtual worlds are created by computer code which is designed to act like real world property. (Fairfield, 2005) Also noted earlier was the emergent certainty that digital technology is detaching information from the physical plane, which, in turn, disrupts the foundations of property law. The next question posed was, should this virtual property be protected and regulated in the same manner as real world property? The answer was perhaps. However, first, another aspect of property law should be considered, intellectual property.

A good deal of computer code is just one step away from pure idea. Like ideas, it is non-rivalrous; that is, one person’s use of the code does not stop another person from using it. (Fairfield, 2005) This kind of code is deemed to be protected by intellectual property law. (Lessig, 1999; Geist, 2003; O’Rourke, 1997) Intellectual property protects the creative interest in non-rivalrous resources. Richard Posner (2000) noted: “Intellectual property is characterized by heavy fixed costs relative to marginal costs. It is often very expensive to create, but once it is created the cost of making additional copies is low, dramatically so, in the case of software, where it is only a slight overstatement to speak of marginal cost as zero. Without legal protection, the creator of intellectual property may be unable to recoup his investment, because competitors can free-ride on it; and so legal protection can expand output rather than, as in the usual case of monopoly reduce it.”
Multimedia creators rely heavily on this theory. (See e.g., Davidson & Associates, Inc., et al v. Internet Gateway, et al., No. 4:02-CV-498 CAS (U.S. Dist. Ct., E. Dist. Missouri, 2004)). There is a different kind of multimedia which is upsetting this theory, multi-author interactive online role-playing games. MMORPGs bring another type of code into existence; one which is designed to act more like land or chattel than like ideas. A type of code more prevalent on the internet than the first type of code and which uses most of the internet’s resources. This type of code is rivalrous, if one person owns and controls it, others do not. (Fairfield, 2005) In fact, it makes up the structural components of the internet itself. For example, domain names, URLs, websites, email accounts, and virtual worlds. The chattel-like code creates virtual property akin to real life property. It demands protection too. (Bradley and Froomkin, 2005)

At the moment virtual property is governed under a system where initial rights are allocated to traditional intellectual property rights holders, and subsequent rights are governed by license agreements called End User License Agreements (EULAs). The traditional intellectual property rights holders have been systematically eliminating any emerging or potential virtual property rights which game players may be entitled to by the use of EULAs. This is causing an imbalance in resources and rights. The common law is a complex system which has evolved over time to encode many different factors into its rules. In particular, the law of contract and the law of property have traditionally balanced each other. The law of contract permits parties to realize the value of idiosyncratic preferences through trades. The law of property traditionally limits the burdens that parties may place on the productive use or marketability of high-value resources by means of contract. (Merrill and Smith 2001) At the moment, emergent useful property forms in cyberspace are being eliminated by contract.

Copyright law has been the first line of defense for the games companies, but the protection afforded to the games companies can be equally applied to the games users. The Federal Court of Australia, Galaxy Electronic Pty Ltd v Sega Enterprises Ltd (1997) 145 ALR 21, held that visual images created by playing a video game fell within the Australian statutory definition of ‘cinematographic film’. The question is, nevertheless, who is creating the film: the games company who provide the backdrop and venue or the players who provide the dialogue, action, and plot. The structure and building-blocks are the legal property of the creator-company; however, each character is the embodiment of a player’s story.

A. VIRTUAL WORLD ARCHITECTURE

An understanding of the technology is important to determine where and when the real world law would interface with the virtual world. Online role-playing games use a type of client/server architecture. This means that two physically separate computer programs control the game. (Salem & Zimmerman, 2004) One computer program operates on the player’s personal computer, and another computer program operates on a centralized server that multiple players may access simultaneously using the Internet. (Id.)

The computer program on the server controls the logic of the game and maintains the state of the game. Software logic generally is defined as ‘the sequence of instructions in a program.’ (TechEncyclopedia at http://www.techweb.com/encyclopedia) The game logic is the set of instructions that defines the types of objects that appear in the virtual world and the events that can occur in the game. For example, the game logic defines the appearance and power of a particular weapon and determines what a character must do before advancing to a new skill level. Copyright would likely vest with the game company. The state of the game is the state of the virtual world at any