Chapter 7
Contract Law and Virtual Worlds

“Apart from the educational aspects and training of programmers there are commercial benefits. Manufacturers have realized that they are more likely to improve their sales if their new machines can win at chess than if they can invert nonsensical matrices. The lay purchaser is more likely to prefer a chess program (which he believes he understands) as a measure of the power and speed of a machine. Indeed, as consoles become more and more common, then eventually computers will become as available as the television set. If so, it is very likely that future generations will use them in their leisure time to interact with game playing programs. The commercial profits of such entertainment could well exceed that of any “useful” activity.

Unfortunately, at the moment, most people who wish to play games with computers do not have the eminence of a Turing, et al. Rather than convince the ‘reader’, they have to convince the firm that such work is useful. A word of advice: do not say you wish to ‘play games’. Much better is a wish to study ‘dynamic technique of search and evaluation in a multi-dimensional problem space incorporating information retrieval and realized in a Chomsky Type 2 language.” (Bell, 1972)

INTRODUCTION

Software companies offering subscriptions to virtual worlds want protection for their intellectual and economic investment. As such, companies condition entry to their worlds upon acceptance of a EULA which will generally impose strict restrictions on rights of participants. Professor Julie Cohen’s (1998) explanation in ‘Lochner in Cyberspace’ illustrates how private contracts routinely extend beyond real world law. ‘Lochnerism’ describes judicial activism in the sphere of economic legislation. It comes from the case, Lochner v New York, 198 U.S. 45 (1905). “For an example of the use of the term in the present context, consider the following: Many commentators have recognized the similarities between the Court’s current approach to structural media regulation and its approach to economic and social legislation during the Lochner era. Importing content neutrality and tiered scrutiny into the
constitutional analysis of structural regulation has opened the door to deep economic review.” (Burnstein, 2004 pp 1057-1058; Benkler, 2003 pp 201-205) Compare the assertion that First Amendment defences of the right of databases to control access to their contents have “some fairly strong parallels” with “the traditional conception of Lochner.” (Richards, 2005 pp 1212-13) This can be seen to extending to virtual worlds via these complex agreements with their ‘click-wrap format’ which discourage a complete review of their terms. Click-wrap agreements are online interactive contracts similar to shrink-wrap licenses. Shrink-wrap licenses are often used for software, where a consumer is deemed to agree to the license when he removes the plastic shrink-wrap packaging from the product box. Click-wraps appear on-screen and the participant must either agree or disagree to the terms before advancing to the next screen. Click-wrap agreements are of the shrink-wrap license. (Casamiquela, 2002, pp 477-80; Lemley, 1995) The motivation for the explosion of software licensing agreements remains in dispute. There are those who believe EULAs benefit corporations and consumers alike, while critics bemoan its influence on the application of intellectual property law.

EULAs attempt to regulate a number of different aspects of both law and gaming environments, including: gamer etiquette, game rules, privacy policies, business policies, and real world law of contracts and intellectual property. The extent of these restrictions suggests that any efforts to limit the impact of real world law must first recognize the way in which the EULA’s use of contract law unavoidably shapes all aspects of virtual worlds.

Dr. Richard Bartle (2004) is a strong advocate of maintaining game space via EULAs. He believes that the potential real world problems can be avoided by following three design principles: (1) the notion that virtual worlds are game-like spaces; (2) the necessity of the virtual world’s evolution; and (3) the exploration of identity. He believes virtual worlds should be a place. A place that allows players to do whatever they want to do (within the context of its physics) and be whatever they want to be (within the context of their own personality). (Id.) These three design principles dovetail neatly with the virtual freedoms described by Professor Jack Balkin (2004) as constituting virtual liberty.

Return to the key question regarding the interface between virtual world laws and real world laws. How should the law safeguard and shield the independence of virtual worlds and those who play within them, including the ability of players in those virtual spaces to cultivate and impose their own norms?

A. FREEDOM TO PLAY AND DESIGN

Legal regulation of virtual worlds is gaining more interest as more and more people flock to virtual worlds and invest their time and resources there. The next section reviews the idea of regulation and freedom in virtual space. (Balkin, 2004) There are three. First is the freedom of players to take part in virtual worlds and to network with one another through their avatars. The second freedom is for game designers to design, build, and maintain a virtual world; this freedom would be called the freedom to design. Finally, there would be a shared right between the designers and players to construct and enhance the game space together; and hence, deemed the freedom to design together.

1. Freedom to Play

Games are difficult to define. Game scholar, Johan Huizinga (1971), identifies them using the idea of irrelevance. If it involves a moral consequence, it cannot be a game. “Whatever is transpiring, if it genuinely matters in an ethical or moral sense, cannot be called a game.” (Id.) Rather, he believes that games are places where we only act as if something matters. Without a doubt, play-acting seriousness can be one of the most central pur-