

For the Good of the Game

Real World Litigation About Virtual Conduct

by Peter J. Pizzi

Broadband Internet access has facilitated a more robust online experience. Today's expanded data network enables millions to enjoy their favorite television content online whenever and wherever they want, on whatever device they prefer. Videos posted to YouTube.com and then virally distributed across the Internet have become a powerful force in the national dialogue. Other examples abound, illustrating the impact of bandwidth on the quality of the online experience.

As Internet-related technology has exploded, so has participation in 'virtual worlds' and online interactive gaming. Some observers say that today's virtual worlds are actually what the Internet will look like for *everyone* in the next 10 years.¹ Games have evolved to the point where those with special 'in world' skills or achievements have found ways to translate their achievements into real-world currency. Disputes about virtual conduct are now producing litigation in state and federal courts, including at least one class action suit. To varying degrees, the cases share a common theme—litigants claim their lawsuits are seeking to protect the integrity of the online experience. The argument

frequently advanced is that if the alleged wrongdoers are allowed to engage in the tactics in question, the ability of other users to enjoy the genuine gaming or 'virtual' experience will be compromised.

The Growth of Gaming and Virtual Worlds

Online role-playing games originated from text-based environments such as Dungeons & Dragons, which appeared in the 1980s.² In those games, text-based commands allowed a user to communicate actions to other users, and thereby act out fantasies and scenes remote from other participants. Processing power enhancements and technological innovation lead to more realistic video displays in games like Doom.³ The increase in bandwidth for home users, and the proliferation of Internet connectivity, allowed these role-playing fantasy games to go online with networked play via the Internet. Thus was born the MMORG, or massively multiplayer online role-playing game.

The audience for MMORGs has rapidly expanded in the last five years. Indicative of the breadth of this audience, since 1997 some 13 different games at one point had a subscription base in excess of 200,000 users.⁴ By 2008, the total number of active subscriptions to all MMORGs exceeded 16 million users.⁵

Currently, the dominant MMORG is World of Warcraft (WoW), published by Blizzard Entertainment. WoW has grown at an astonishing rate since it first appeared in 2004. It currently enjoys a 62.2 percent market share, with over 10 million total subscribers.⁶ WoW players create and/or select online characters to venture forth in the game's imaginary journey, interacting along the way with 'toons' made by other players. As part of the virtual world, players can obtain online WoW currency called gold, which can be used to improve their characters and purchase skills, food, water, transportation and equipment. Players obtain gold by performing tasks or collecting or making goods they then sell, within the game,

to other subscribers or virtual vendors.

In contrast to fantasy role-playing games like WoW, virtual social worlds do not involve competition for points or advancements to higher levels, or winning or losing, *per se*. The most popular of virtual social worlds is Second Life, which as of March 2008 had 13 million registered accounts, a figure that may overestimate its popularity since it includes an unknown number of inactive accounts.⁷ Perhaps a more accurate metric is the number of paid premium accounts: As of March 2008, 89,875 users held this distinction.⁸

Many gamers have begun to sell digital goods, property, or avatars for real-world money on ebay and other similar e-commerce sites. For example, a virtual representation of the city of Amsterdam in the Second Life sold for \$50,000.⁹ With real currency changing hands over 'in world' assets, litigation about virtual worlds was inevitable.

A Class Action About Gold Farming

Internet Gaming Entertainment (IGE)¹⁰ is a business built around WoW gold. IGE allegedly employs hundreds of workers, each having their own WoW account, who spend 14 or more hours a day collecting gold while playing WoW.¹¹ Most of these gold-farming operations are in China.¹² In WoW, gold can be sold to other subscribers or virtual vendors through the virtual auction house on WoW. IGE circumvents this auction house by operating a website where subscribers to WoW are permitted to purchase the additional gold that IGE employees collected.

IGE's in-game activities annoyed Antonio Hernandez, a WoW subscriber, to the point that Hernandez filed a class action lawsuit, *Hernandez v. Internet Gaming Entertainment*, on behalf of those WoW subscribers who dutifully abide by WoW's rules and refrain from making outside gold purchases from outfits like IGE.¹³ Hernandez alleged

that by running this operation to sell gold for real money, as well as promoting the sale of this gold through chat spam, virtual junk mail, pay-per-click campaigns and search engine marketing, IGE violated the WoW terms of use (TOU) and its end user license agreement (EULA). The violation cited was the TOU and EULA prohibition against "the sale of virtual assets for real money." All WoW account holders agree to be bound by the TOU and EULA.

Hernandez claimed that he and all other users of WoW were intended third-party beneficiaries of the TOU and EULA.¹⁴ Third-party beneficiary claims are usually difficult to win because the third party must show he or she was an "intended beneficiary" of the contract, and many standard contracts include language stating that there are no third-party beneficiaries.¹⁵ The WoW TOU and EULA documents do not contain such language, and there is some speculation that the game's publisher, Blizzard, could strengthen Hernandez's case by filing a declaration to the effect that members of the plaintiff class were intended beneficiaries of contract provisions prohibiting gold farming.¹⁶ IGE has attempted to rebut this novel legal argument by denying that it is a party to the TOU or EULA, and therefore not subject to their terms.¹⁷ After some discovery took place, the parties began settlement discussions that are ongoing at press time.¹⁸

Casting some doubt on the viability of the plaintiff's claims, the court in *Hernandez* suggested that the parties' discovery efforts should focus upon "liability and standing issues [which] seem the most challenging issues for Plaintiffs, rather than...class certification issues."¹⁹ This footnote appeared to signal the judge's skepticism of Hernandez's claim, and the possibility that "the Court may look favorably on an eventual motion for summary judgment [by the defendant], particularly regarding standing to

sue."²⁰ As this case continues, many attorneys, WoW subscribers, and virtual property companies will be anxiously observing how the parties involved in the case handle these issues involving a virtual wrongdoing in a real-world setting.

Putting a Stop to Exploits in Second Life

Second Life encourages users to fashion their own virtual identity or avatar, then create garments to wear, parcels of real property on which to construct dwellings, and furnishings and other virtual possessions to adorn the avatar's life. Second Life's terms of service (TOS) provide that users have full property rights in their virtual creations.²¹ Legal scholars consider Second Life to be one of the most "misunderstood technologies to emerge on the information technology scene in many years."²² In contrast to games like WoW, Linden Research, Inc. allows Second Life users to retain copyright and other intellectual property rights to any content they create. These rights serve as "an intentional relinquishment of Linden's rights to derivative works created using its platform," which is in direct contrast to WoW, where Blizzard continues to retain rights over all content on its platform.²³

Second Life users are able to perform such actions due to the characteristics of the program, which was "initially released...as a barren landscape with a set of tools that residents could use to create and build all manner of objects and structures."²⁴ The landscape of the program is divided into parcels on which users can build what they choose.²⁵ To facilitate the purchase of these parcels, Linden created the Linden Dollar, which "may be purchased and sold for real world money through a variety of exchanges."²⁶ Parcels of land within Second Life can typically be purchased when Linden releases virtual land regions for public auction with a

minimum bid of \$1,000. Linden authorizes these auctions as the only means by which a user can purchase Second Life property; if the user attempts to participate in an unauthorized auction, he or she will be in violation of the TOS.²⁷

Marc Bragg was a subscriber to Second Life until Linden terminated his account, contending he violated the TOS by acquiring a region of virtual land through an “exploit”—a weakness or bug in the software code. Linden cited Bragg’s in-game chats as evidence that he “was aware that the purchase was improper.”²⁸ Following this incident, Linden seized the parcel in question and froze Bragg’s account, effectively confiscating his virtual property within Second Life.

Bragg sued in Pennsylvania state court on various common law and statutory theories. When Linden moved to compel arbitration pursuant to the arbitration clause in its TOS, the court held that the clause was procedurally and substantively unconscionable, casting into doubt whether Linden would be able to enforce its TOS contract at all.²⁹ Though Linden subsequently revised its TOS to alleviate the issues raised by the court, it faced the prospect of conducting further discovery and a possible trial on a docket open to the public, perhaps motivating the settlement the parties reached in October 2007.

The real issue in the case—unresolved due to the settlement—focuses upon the “rights and obligations [that] grow out of the relationship between the owner/creator of a virtual world platform and the users invited to interact within that platform.”³⁰ Bragg brought his suit in state court in order to resolve his expulsion and termination from Second Life. One question posed by the pleadings is the extent to which real property laws are applicable to virtual land, and whether such land could be considered a subscriber’s intellectual property.³¹ Linden argued that

“objects” should be distinguished from “virtual land” due to the fact that “full property rights (*i.e.*, intellectual property rights) exist in one (objects) but that only license to use is granted in land.”³² This license to use the land does not bestow the user with title to the land, it simply grants permission to access “Linden Lab’s proprietary servers, storage space, bandwidth, memory allocation, and computational resources of the server, which together generate the virtual land.”³³ Bragg countered these arguments by asserting that “under a virtual property right regime, [he] would hold title or deed to his virtual land in Second Life,” and therefore, he should be entitled to “rights associated with land ownership.”³⁴

While these arguments ultimately were not resolved in the *Bragg* case, they represent issues that will become increasingly important in the future, as the state and federal judiciaries determine their roles in mediating and settling such disputes. Candidus Dougherty, in his article discussing *Bragg’s* impact, found that “[o]nce the ‘what’ and ‘how’ of virtual property rights are determined, the next question is the ‘who’—meaning should the state protect the rights and enforce the rules or should the virtual world developers.”³⁵ The resolution to this final question will have a drastic effect on virtual world companies like Linden, as well as everyday users like Bragg. Regardless of which side benefits from such a judicial determination, the virtual world industry will be fundamentally altered.

Game Publisher Sues to Protect the Gaming Experience

Recent cases involving virtual worlds also include instances in which the publisher of the game has commenced litigation in order to put a stop to conduct in violation of game rules. In *Blizzard Entertainment v. In Game Dollar*,³⁶ WoW publisher Blizzard Entertainment sued

In Game Dollar, which operated www.peons4hire.com, a gold-farming site similar to the one operated by IGE in the *Hernandez* case. Peons4hire spammed WoW chat sites with advertisements for “power levels” and stashes of “virtual gold.”

Relying upon the WoW TOU and EULA, Blizzard alleged in their complaint that these spamming practices “diminished players’ game experience and cost Blizzard subscribers, bandwidth, employee time, and ultimately, revenue.” In December 2007, the case settled, and a permanent injunction was entered that shut down In Game Dollar’s WoW operations. While peons4hire was not the largest virtual property company that did business within WoW, it was known for aggressive marketing through the use of chat spam, and therefore the suit could be seen as a warning sign to any similar companies, like IGE, that might consider using such tactics.

Conclusion

These cases illustrate the ways in which in-world disputes have moved beyond users’ computers and into the judicial arena. Resorting to the courts, however, seems to produce a particularly unsatisfactory outcome. The costs of litigation are significant to the parties, and will likely vastly outstrip the dollar amounts at stake.

One author suggests MMORG publishers should be compelled, perhaps by an act of Congress, to extend some basic rights to all participants in virtual worlds beyond those the typical EULAs, including the recognition of virtual property rights and a related takings clause, but requiring that all but the most serious issues be adjudicated in the virtual world.³⁷ Second Life publisher Linden seems to be moving in that direction. Linden’s arbitration clause, modified after the adverse outcome in *Bragg*, now provides for in-game arbitra-

tion for disputes involving less than \$10,000.³⁸ Until a comprehensive solution appears, however, lawyers interested in representing clients in this new frontier will need to keep informed of the interplay between in-world conduct and real world legal principles and mechanisms. ☞

Endnotes

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