

Virtual Property, Electronic Contract, and the God Paradox¹

Prof. Joshua Fairfield, Washington & Lee University School of Law, Lexington, USA

Abstract:

Contract is king in virtual worlds. Although virtual worlds raise the full spectrum of legal issues, in the U.S. system they are governed nearly exclusively by End User License Agreements. These contracts purport not only to regulate the relationship between a licensor and licensees of intellectual property, but also to control relationships between players in a virtual world. Moreover, these End User License Agreements purport to create quasi-property systems governing the terms under which players of the games may use, dispose of, improve, or alienate objects and land acquired within a game. Contracts even determine what a crime is in a virtual world, because violating a EULA can constitute unauthorized access of a protected computer system. This talk seeks to evaluate whether contract can fill all of these roles normally reserved for other areas of law.

For example, consider the problem of sexual harassment in virtual worlds. The perpetrator of the harassment has signed a contract promising not to harass other players. But that promise – because it is a contractual promise – runs to the “god” of the virtual world, not to the other players. The victim of the harassment has little or no recourse based on the contract. Worse, if she appeals to the “god” of the virtual world, that corporation has little incentive to take the claim seriously, and at most has the power to remove the offender’s account. This is hardly adequate justice.

Consider also the problem of virtual property. Robust legal protection for private property benefits society. Yet virtual world EULAs nearly universally abolish private property. Game “gods” claim that players grant them a legal right in everything that players create in the world by signing the End User License Agreements. This is similar to Microsoft arguing that every document created using its products is owned by Microsoft. The End User License Agreement interferes with our normal understanding of private property: that people wish to own private property so that they can reap the benefits of creating, building, or improving it.

I propose that these and many other problems virtual worlds face stem from using the wrong legal tool to create legal rights. Legal rights follow one of three general patterns: one-to-one, one-to-many, and many-to-many. Contract law typifies one-to-one legal relationships. Two parties are free to write their own law in a contract, and as long as the spillover from that contract does not affect the rest of society too much, the law enforces their private agreements. Contract law therefore works best when it governs one-to-one relationships. Property law governs all-to-all relationships. Everyone benefits from the concept of private property, within limits, because everyone benefits from ownership,

¹ Joshua A.T. Fairfield, Associate Professor of Law, Washington & Lee University School of Law. All papers available at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=521554, or by keyword search using the . This abstract combines themes found in two prior articles: Joshua A.T. Fairfield, *Virtual Property* 85 B. U. L. Rev. 1047 (2005); and *Anti-Social Contracts: The Contractual Governance of Virtual Worlds*, forthcoming McGill Law Journal (2008). The abstract also introduces themes more fully developed in a current work in progress, titled *The God Paradox*. This abstract is for informational purposes only. Please do not cite or redistribute.

improvement, and use of their private property. Property is therefore reciprocal: the basic concept of property is that each person in society must respect each other person's property.

Concepts of governance cover one-to-many relationships. In the real world, a sovereign owes specific duties to the citizen, and in return may make specific demands on that citizen. This is a one-to-many relationship, and is the core of public law. Further, the sovereign's relationship with citizens is not merely a binary relationship; the sovereign acts on behalf of society, or other members of society to enforce rules. This is a many-to-many obligation, mediated through the government. Some theorists may be more comfortable understanding this distinction in terms of private and public law. Contract is private law (one-to-one); government is the core of public law (many-to-many). Virtual worlds do not have robust public law. Instead, the "god" corporations that create virtual worlds use contracts to create a quasi-governmental structure. Through EULAs, corporations are forcing a system that requires a many-to-many approach into a legal form designed to accommodate one-to-one legal relationships.

It is now possible to see why law in virtual worlds has gone awry in the US system. The common law privileges contract law above even constitutional law. After all, a person may waive her constitutional rights by contract. US courts have held that players can, by clicking "I Accept," waive their fair use privileges under the copyright laws. Even the criminal law in virtual worlds is set by contract. For example, several weeks ago a woman was indicted for violating MySpace's terms of service.

I propose that this contract-above-all approach is flawed. Contracts are private law best suited for one-on-one relationships. US law uses such contracts to govern both property (an all-to-all relationship) and for public law government (which is a one-to-many relationship). In so doing, it creates the sort of problem discussed above: corporations use contracts to dictate social policy; to abolish private property ownership; to create legal rights that are unenforceable by the victims who should benefit by them; and so on.

Further, I propose that the "god" model of corporate governance of virtual worlds is not merely bad for players, but is in fact dangerous for the corporations. Game "gods" seem to believe that they can reduce their potential for liability by increasing the control they exert over their players. This is incorrect. If corporations indeed control their players, they are liable for players' actions. If corporations are sovereigns, they have the responsibilities of a sovereign to a citizen. If corporations assert the power of "gods"—if they control everything—then they are liable for everything.