

ARTICLE

PROPERTY AND DEMOCRACY IN VIRTUAL WORLDS

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“Programming used to be thought of as a domain of pure control: you told the computer what to do, and the computer had no choice but to obey your orders.”¹

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“Civilizations continually borrow from their neighbors, even if they
‘reinterpret’ and assimilate what they have adopted.”²

I. INTRODUCTION

If you have seen the science-fiction movie *The Matrix*,³ where the protagonist discovers that his experiences are the product of an elaborate computer simulation, you have an idea (albeit a fantastically sophisticated and sinister one) of what a massively multiplayer online role playing game (MMORPG) or, more concisely, a virtual world, is – a computer-generated environment in which people can interact with each other through computer-generated characters. Although the immersive virtual reality of *Matrix*-like worlds remains the province of movies, virtual worlds with increasingly sophisticated visual representations are becoming popular, drawing hundreds of thousands of participants.⁴ The *Matrix* movies generated interest for their ability to combine popular film-making and philosophical questions.⁵ Virtual worlds, as they exist today, have generated academic interest for their ability to raise issues of political theory, economics, and law, among other subjects. Interestingly, *The Matrix* and similar movies explore highly sophisticated technology-generated artificial environments where individual autonomy turns out to be far more limited than the level of technology would suggest. As we shall see in this analysis of virtual worlds and law, a similar dynamic can be seen in the treatment of individual players and property in virtual worlds.

The move to virtual worlds is a natural evolution for video games. Video games developed in part out of the fantasy worlds that had been outlined in role playing games like *Dungeons and Dragons*.⁶ In some ways, the move to simple video games, while a technological advance over the cards, dice, and graph paper used to determine and model game events in role playing games,

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¹ STEVEN JOHNSON, EMERGENCE: THE CONNECTED LIVES OF ANTS, BRAINS, CITIES, AND SOFTWARE 169 (2001).

² FERNAND BRAUDEL, A HISTORY OF CIVILIZATIONS 29 (Richard Mayne trans. 1993).

³ See THE MATRIX (Warner Bros. Studios 1999), although contemporary films such as THE THIRTEENTH FLOOR (Sony Pictures 1999) and DARK CITY (New Line 1998) have explored similar territory.

⁴ See e.g., David Jenkins, *World of Warcraft Reaches 2 Million Subscribers Worldwide*, GAMASUTRA, June 14, 2005, at http://www.gamasutra.com/php-bin/news_index.php?story=5606 (describing Blizzard Entertainment’s success in attracting subscribers).

⁵ See, e.g., WILLIAM IRWIN ET AL., THE MATRIX AND PHILOSOPHY: WELCOME TO THE DESERT OF THE REAL (William Irwin, ed. 2002).

⁶ BRAD KING & JOHN BORLAND, DUNGEONS AND DREAMERS: THE RISE OF COMPUTER GAME CULTURE FROM GEEK TO CHIC 21 (2003).

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was often a step backward in terms of community. Early computer game designs for PCs and early console game systems like the Atari 2600 Video Computer System primarily hosted games played by one or two individuals. However, the desire for community has been present throughout the evolution of computer gaming.⁷ Multi-user Dungeons represented an early text-based attempt to create a computer-based version of the role-playing game experience.⁸ Although single-person-video gaming has maintained its popularity from personal computers and early console systems like Atari to contemporary systems like Microsoft's Xbox and Sony's Playstation 2, there is a developing interest in expanding from single person experiences to interaction between multiple players. Early computer gamers developed tournaments like QuakeCon, where gamers would meet together for competition and camaraderie, and organized local area network parties where they hooked computers together to play interactively.⁹ Through widespread public adoption of the Internet in the 1990s, the increasingly mainstream appeal of video games, and continuing increases in computer power, the evolution of sophisticated virtual worlds became possible.¹⁰

The synthesis between role-playing and video games became apparent with the development of Richard Garriott's *Ultima Online*, a fantasy role-playing game whose "elaborate persistence" eliminated the imposed narrative structure of other video games and presented the first significant virtual world.¹¹ Interestingly for purposes of this article's examination of law's relationship to virtual world, dissatisfaction with *Ultima Online* led to a lawsuit by players, which the proprietors ultimately settled by making a donation to the San Jose Tech Museum of Innovation.¹² From early on, participants in virtual worlds have sought methods, including legal action, to assert their rights against proprietors.¹³

The promise of MMORPGs to be virtual worlds and not just games has attracted increasing attention from academics in a variety of fields. The economist Edward Castronova has described the academic interest in virtual

⁷ *Id.* at 51.

⁸ See STEPHEN KLINE ET AL. DIGITAL PLAY: THE INTERACTION OF TECHNOLOGY, CULTURE, AND MARKETING 160 (2003).

⁹ See KING, *supra* note 6, at 106-47.

¹⁰ See Steven L. Kent, *Alternate Reality*, GAMESPY.COM, Sept. 23, 2003, at <http://archive.gamespy.com/amdmmog/week1> (describing the development of virtual worlds).

¹¹ See KLINE, *supra* note 8, at 162; see also KING, *supra* note 6, at 148-62.

¹² See KLINE, *supra* note 8, at 162-63.

¹³ See Eurogamer.net, *Mythic Sued Over EULA*, THE REGISTER, Feb. 12, 2002, at http://www.theregister.co.uk/2002/02/12/mythic_sued_over_eula (describing how a company that traded in virtual items sued a virtual world that sought to restrict that trade through its EULA).

worlds by asking:

Why should economists and other social scientists have an interest in places like Norrath?¹⁴ One reason is that these places provide a fascinating and unique laboratory for research on human society The second and more significant is that virtual worlds may soon become one of the foremost important forums for human interaction, on a level with telephones. Moreover, in that role, they may induce widespread changes in the organization of Earth society.¹⁵

Legal academics have also begun to consider the implications of virtual worlds, pondering what role, if any, earthly laws should have in virtual worlds. In this paper I will consider the implications of virtual property on some significant legal issues in virtual worlds, exploring in particular the questions of governance of virtual worlds, the role of property in virtual worlds and what I term the “cross-border problem” – how virtual worlds will deal with the question of the dual-citizenship of their players in the real and virtual worlds. I will examine how legal scholars have suggested handling the legal issues raised by virtual worlds. Professor F. Gregory Lastowka and Professor Dan Hunter have made a persuasive analysis that virtual items (items used and existing solely in virtual worlds) can be properly classified as property, but they concluded that virtual worlds should be left free from terrestrial law to develop their own norms and laws.¹⁶ Professor Jack Balkin has suggested that the proprietors of virtual worlds are inviting regulation by terrestrial authorities by commodifying and commercializing virtual worlds, and that regulation might be avoided by legislation distinguishing between commodified virtual worlds and more artistically inclined worlds.¹⁷ I will evaluate these opinions and analyze the issue of virtual property and its role in virtual worlds. I will argue that law is already present in virtual worlds and any attempt to remove law from virtual worlds will depend, paradoxically, on using law as the tool to maintain virtual worlds as law-free zones. I will argue that embracing property rights is a prerequisite to resolving governance issues in virtual worlds and necessary to allow further evolution of communities in virtual worlds and increase the autonomy of game participants. Increased autonomy of game

¹⁴ Norrath is part of the virtual world in the game EverQuest. See Janelle Brown, *Three Lives in Everquest*, SALON, June 15, 1999, at <http://archive.salon.com/tech/feature/1999/06/15/everquest> (describing the writer’s experience in Norrath).

¹⁵ Edward Castronova, *Virtual Worlds: A First-Hand Account of Market and Society on the Cyberian Frontier* 38 (CESifo Working Paper Series No. 618, 2001), at http://ssrn.com/abstract_id=294828 (last visited June 8, 2005).

¹⁶ See generally F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CAL. L. REV. 3 (2004).

¹⁷ See generally Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043 (2004).

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participants will yield a range of benefits not only to these participants, but also to the developers and administrators of virtual worlds and the structure of virtual worlds themselves.

A. *A Note on Terminology*

One obstacle to productive thought on virtual worlds is the widespread use of terms derived from the medium's founding genres of fantasy and science fiction. Terms like "wizard," "god," "cyborg," and even the commonly used "avatar" present the situation in melodramatic quasi-religious terms that suggest an otherworldly existence.¹⁸ This terminology exaggerates differences between virtual and terrestrial worlds making virtual world problems seem far more incalculable. The issues confronting a "cyborg" or a "wizard" will seem less likely to be resolved through law than the issue of a person's rights to a character he has created. Such terms are often used in describing these revolutionary new communities and communications, but these terms can also lead to stagnation in attitudes toward virtual words. Even virtual world designers, immersed in fantastic worlds of dwarves and space ships, discuss the difficulty in virtual worlds reaching their true potential while mired in science fiction and fantasy.¹⁹ At the risk of creating new terms, I will refer to players who work, trade, and engage in the wide variety of activities of virtual worlds as "participants," and the companies that design, administer and govern virtual worlds as "proprietors." Use of more quotidian terms is not merely contrarian but is intended to suggest the unique qualities of the virtual world. In both cases, these terms capture the complex range of activities performed by each group within virtual worlds without using exotic terminology.

II. VIRTUAL WORLD ISSUES

A. *Governance in Virtual Worlds*

Proprietors face a number of significant issues with strong legal implications. The foremost of these problems is to decide how they will run their worlds. At first glance, this might seem like a non-issue in virtual worlds. Professor Lessig's argument that "code is law"²⁰ would appear to be most true in an entirely coded virtual world, and anything left out of the Lessigian code/law would fall into the catch-all restrictions of the end user license agreement ("EULA") or terms of service ("TOS") that participants agree to when joining the virtual world.²¹ This level of player restriction is certainly

¹⁸ See Lastowka & Hunter, *supra* note 16, at 54-55 (using these terms).

¹⁹ Wagner James Au, *Showdown in Cyberspace: Star Wars vs. The Sims*, SALON, July 9, 2002, at <http://www.salon.com/tech/feature/2002/07/09/mmorg.html>.

²⁰ See LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* (2000).

²¹ See, e.g., *World of Warcraft Terms of Use* § 3(C)(iv), at

true in the world of non-virtual world console games, such as those played on Microsoft's Xbox platform. Although some non-virtual world games allow a certain degree of player autonomy, the player is primarily able to do only what the game, as coded by its designers, allows the player to do. Modifying the Xbox console to alter the playing experience is discouraged both by statute and by Microsoft.²² This makes attractive cheats, key combinations and other activities which allow the player to access special game features hidden in the game code by the designers, allowing players a semblance of escape from the otherwise rigid controls of the game.²³

Virtual worlds present greater problems for their proprietors than do non-virtual world games. These problems stem directly from the nature of their creations. Proprietors building virtual worlds seek out participants to populate and modify the worlds they have created. The active role of participants in developing virtual worlds creates a far different self-perception among participants in virtual worlds than in console games where players simply assume predetermined roles and perform predetermined tasks. The self-perception results from the vastly increased autonomy that virtual world proprietors market as a prime attraction of virtual worlds – even where autonomy means doing boring things. When conflicts begin to arise between participants or between participants and proprietors in virtual worlds, the approach is far different. As Professor Castronova puts it, “[t]o anyone versed in political history, it should be no surprise that the game companies have made themselves vulnerable by approaching these matters as customer service issues rather than governance. In their own minds, the players are not customers, but citizens with corresponding rights.”²⁴ The question of rights lends a charged dynamic to the usual tension between business and customer. However, as Raph Koster, the lead designer for the *Star Wars Galaxies* virtual

<http://www.worldofwarcraft.com/legal/termsofuse.html> (stating that a participant “may not do anything that Blizzard Entertainment considers contrary to the ‘essence’ of World of Warcraft.”).

²² See Byron Acohido, *Hackers Use Xbox for More than Games*, USA TODAY, July 11, 2003, available at <http://www.usatoday.com/tech/news/2003-05-15-xbox-xhtm>; see also Digital Millennium Copyright Act, 17 U.S.C. § 1201 (2004); ANDREW HUANG, *HACKING THE XBOX: AN INTRODUCTION TO REVERSE ENGINEERING* (2003).

²³ See Kevin Poulsen, *Microsoft Battles Halo 2 Holes*, WIRED, May 16, 2005, available at <http://www.wired.com/news/games/0,2101,67515,00.html> (quoting Jeremy Hunt, moderator of a Halo web forum, arguing that people who take advantage of glitches in Microsoft's *Halo 2* “aren't cheaters . . . [t]hey're just avid gamers hungry for new experiences and the respect of their peers”).

²⁴ Edward Castronova, *On Virtual Economies* 34–35 (CESifo Working Paper Series No. 752, 2002), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=338500 (last visited June 8, 2005).

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world puts it, “[t]he pesky thing about rights is that they keep coming up.”²⁵

Contracts, like EULAs or TOSs, are insufficient to regulate the various and complex long-term relationships between participants and proprietors. As a form of click-wrap agreement, EULAs and TOSs provide little consideration of participants’ needs, and ad hoc rulemaking by proprietors outside of these agreements will likely be unsatisfyingly arbitrary. Resolution of disputes not covered by EULAs is becoming a problem.²⁶ However, participants are not entirely at the mercy of owners. Professor Balkin suggests that proprietors have invited suits and regulation and other manifestations of real-world law by emphasizing commerce within virtual worlds, but law is really being acknowledged in virtual worlds because it is already there and because participants demand it.²⁷ The absence of a robust legal system in a complex environment like a virtual world inhabited by people with very limited rights will lead those people to search for environments where they have greater power. Participants have far greater power to deal with proprietors outside virtual worlds than inside them. This power imbalance will lead participants to forum shop to the real world legal system where their powers to deal with proprietors may be greater than the option of complaining on a virtual world message board. Ignoring laws within the complex environments of virtual worlds will serve as an invitation to use outside laws.

In some ways the attitudes of proprietors reluctant to allow greater participant autonomy are reminiscent of anti-union entrepreneurs of the early and middle twentieth century. Paternalistic businessmen, such as Herb Kohler of the Kohler Corporation, an unexotic manufacturer of plumbing fixtures, pioneered company towns and provided innovative benefits to workers, but were extremely reluctant to recognize worker demands or attempts by workers to organize.²⁸ Like the robber barons of the late nineteenth and early twentieth centuries and other manufacturing industry pioneers, proprietors are entrepreneurial, part of newly developing industries and quick to regard their businesses primarily as their creations. Proprietors appear more likely to support paternalistic solutions to virtual world problems and less likely to endorse solutions that incorporate a more involved role for participants. Many proprietors of virtual worlds find themselves in a situation familiar to a more traditional entrepreneur – a business is launched and only belatedly are the legal implications considered. That the business of proprietors is the creation of virtual worlds only lends further complexity to this familiar situation.

²⁵ Raph Koster, *Declaring the Rights of Players*, at <http://www.legendmud.org/raph/gaming/playerrights.html> (last visited June 8, 2005).

²⁶ See Daniel Terdiman, *Online Feuds a Big Headache*, WIRED, Nov. 3, 2005, at <http://www.wired.com/news/games/0,2101,65562,00.html>.

²⁷ See generally Balkin, *supra* note 17.

²⁸ RICK PERLSTEIN, *BEFORE THE STORM: BARRY GOLDWATER AND THE UNMAKING OF THE AMERICAN CONSENSUS* 34-48 (2002).

Proprietors have launched their worlds but are surprised to find that their citizens may find each other annoying, as in the real world, or that their customers do not agree with everything the proprietor chooses to do.²⁹ In a number of situations, the absence of law or other forms of interpersonal regulation in virtual worlds has caused commentators to describe them as parallels of medieval societies.³⁰ Code and authoritarian EULAs can become the primary law that participants encounter and they remain subject to arbitrary decision-making by proprietors.³¹ This power imbalance and lack of effective means of redress suggest significant governance problems. The absence of law also leads to disputes between participants, particularly as participants spend increasing amounts of time in virtual worlds and increasingly engage in quotidian tasks.³²

B. Property in Virtual Worlds

The question of property is an unsettled one in virtual worlds. Legal commentators tend to fall into two categories: the first suggesting that independent and unique virtual world norms be allowed to develop,³³ and the second advocating that property and other forms of commoditization be

²⁹ See Amy Jo Kim, *Killers Have More Fun*, WIRED, May 1998, at <http://www.wired.com/wired/archive/6.05/ultima.html>; see also Lev Grossman, *Bloody Ethics: Can a Game That Poses Moral Questions About Murder Survive Its Own Success?*, VILLAGE VOICE, Feb. 9-15, 2000, at <http://www.villagevoice.com/news/0006/grossman,12395,8.html>.

³⁰ See Castronova, *Virtual Worlds*, *supra* note 15, at 36 (observing, “journal entry, 20 June. i started a loner, an asocial avatar on a deadly server where all avatars hunt, kill, and loot one another, anyone studying hobbes should come here and have a look at the state of nature.” [sic]); see also Raph Koster, *The Man Behind the Curtain*, at <http://www.legendmud.org/raph/gaming/essay5.html> (describing how, “[a]t the last player lunch, a fellow told me that he was fascinated by how UO [Ultima Online] had recapitulated European history from 800AD to 1200AD in six months of existence. He commented on the parallels between marauding bandit gangs, the enclaves of feudal systems building secure spaces and leaving the wilderness to the less civilized people.”).

³¹ See Balkin, *supra* note 17, at 2066 (noting that “many game spaces do not have clear-cut rules about what players can and cannot do, other than the limitations of the software program itself.”); see also Helbreath USA Terms of Agreement, at <http://www.helbreathusa.com/terms.php> (last visited June 8, 2005) (stipulating that “upon notice published over the Service, iEN may modify this agreement, prices, and may discontinue or revise any and all other aspects of the Service at its sole discretion and without prior notice. You are responsible for reviewing information posted by iEN that deals with pricing and services. Continued use of iEN or non-termination of your membership after changes are posted constitutes your acceptance of the modifications”).

³² See Terdiman, *Online Feuds*, *supra* note 26.

³³ See Lastowka & Hunter, *supra* note 16, at 72-73 (arguing for the development of virtual-world norms).

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avoided entirely where possible.³⁴ Commentators are increasingly assured that virtual property can be justifiably defined according to property theory and law.³⁵ This virtual world property is extensive. In 2001 the economist Edward Castronova estimated that the gross national product of one virtual world, Norrath, was equal to that of Bulgaria.³⁶ Since then the value of virtual economies has continued to grow, with a recent estimate claiming a \$200 million market for virtual items.³⁷ That the extent of virtual world property is only now being widely recognized may stem from a combination of the novelty of the question and the limited spheres where it exists as an issue. Virtual world property can also be shown to fit into existing legal paradigms defining intellectual property.³⁸ What has caused greater difficulty for commentators is determining who owns this property and who should own it.³⁹

Despite the uncertainty of fundamental questions about its nature in virtual worlds, property is ubiquitous in virtual worlds. The vast majority of virtual worlds exist in a property paradigm.⁴⁰ While most proprietors discourage participants from selling virtual items in markets external to the virtual worlds in which they operate, proprietors frequently, if not almost universally, use some variation of a property-based system internally within their virtual worlds.⁴¹ As Professor Lastowka and Professor Hunter note, “[t]he real property systems within all of these worlds mostly conform to the norms of modern private property systems, with free alienation of property, transfers

³⁴ See Balkin, *supra* note 17, at 2090-95 (calling for government regulation of virtual worlds).

³⁵ See Lastowka & Hunter, *supra* note 16; see also Daniel C. Miller, *Determining Ownership in Virtual Worlds: Copyright and License Agreements*, 22 REV. LITIG. 435 (demonstrating the ways in which the actions and characters of participants and other virtual items fit into copyright law).

³⁶ Castronova, *Virtual Worlds*, *supra* note 15, at 33.

³⁷ See Tom Leupold, *Virtual Economies Break Out of Cyberspace*, GAMESPOT, May 6, 2005, at http://www.gamespot.com/news/2005/05/06/news_6123701.html (discussing the size of the trade in virtual items). But see Cory Ondrejka, *A \$200 Million Market?*, TERRA NOVA, May 7, 2005, at http://terranova.blogs.com/terra_nova/2005/05/a_200m_market.html (questioning some of the calculations involved).

³⁸ See Miller, *supra* note 35.

³⁹ See Molly Stephens, Note, *Sales of In-Game Assets: An Illustration of the Continuing Failure of Intellectual Property Law to Protect Digital-Content Creators*, 80 TEX. L. REV. 1513, 1534 (2002) (exploring the dilemmas involved in determining ownership of virtual property).

⁴⁰ See Lastowka & Hunter, *supra* note 16, at 30 (“No virtual world, not even a community-conscious, social MUD like LambdaMoo, has an entirely communal property system. Private property is the default.”).

⁴¹ See, e.g., *World of Warcraft Terms of Service*, *supra* note 21; see also Castronova, *On Virtual Economies*, *supra* note 24, at 33.

based on the local currency, and so forth,” which is unsurprising given that virtual worlds are largely the productions of “property-owning corporations.”⁴² However, the endorsement by proprietors of alienability of property within the world, while discouraging alienability outside, provides confusion.⁴³ Adding further confusion for participants who are not allowed to own property within their virtual worlds are the examples of virtual world proprietors who do allow customers to have property rights within and without their virtual worlds.⁴⁴

Similarly, there is both confusion and hypocrisy in the way proprietors attempt to restrict out-of-world sales of virtual items. When Blizzard Entertainment, the proprietor of the popular *World of Warcraft* virtual world, stated that it did “not allow ‘in game’ items to be sold for real money” and that it would take any and all actions necessary to stop this behavior,” they justified the statement by arguing that such trading “is illegal, but it also has the potential to damage the game economy and overall experience for the many thousand of others who play *World of Warcraft* for fun.”⁴⁵ This pronouncement prompted one *World of Warcraft* participant to contrast personal experience of selling game items from other virtual worlds with the stern warning from Blizzard.⁴⁶ The participant asked, “Is it illegal to sell your account when you’re done playing the game? I know that in other games like D2 [*Diablo II*] and EQ [*EverQuest*] people sold their accounts with high level characters on E-Bay [sic] and other similar sites . . . was that illegal?”⁴⁷ The

⁴² See Lastowka & Hunter, *supra* note 16, at 33.

⁴³ See *Goldfarmers*, WORLD OF WARCRAFT GENERAL DISCUSSION, at <http://forums.worldofwarcraft.com/thread.aspx?fn=wow-general&t=3956679&p=1&tmp=1#post3956679> (last visited July 11, 2005) (on file with the Journal of Science & Technology Law) (discussing difficulties in eliminating trade given the game’s system); *Selling Gold Should Be Legal*, WORLD OF WARCRAFT GENERAL DISCUSSION, at <http://forums.worldofwarcraft.com/thread.aspx?fn=wow-general&t=3966237&p=1&tmp=1#post3966237> (last visited July 11, 2005) (on file with the Journal of Science & Technology Law) (listing forum debate over whether issues of illegality of character and virtual property trading and intellectual property).

⁴⁴ See Press Release, *Second Life Residents to Own Digital Creations*, at http://lindenlab.com/press_story_12.php (last visited June 8, 2005); *Terms of Service and End User License Agreement for Second Life* § 5.3, at <http://secondlife.com/tos.php> (last visited June 8, 2005) (stating that “[p]articipants can create Content on Linden’s servers in various forms. Linden acknowledges and agrees that, subject to the terms and conditions of this Agreement, including without limitation the limited licenses granted by you to Linden herein, you will retain any and all applicable copyright and/or other intellectual property rights with respect to any Content you create using the Service”).

⁴⁵ World of Warcraft Community Site, *Selling World of Warcraft In-Game Content for Real Money*, at <http://www.worldofwarcraft.com/news/announcements.html> (last visited June 8, 2005).

⁴⁶ See sources cited *supra* note 43.

⁴⁷ See *id.*

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confusion evident in this well-intentioned participant's question reflects the fact that issues of property represent a serious quandary within virtual worlds because of problems of unequal and incomplete enforcement.

Strict proprietor pronouncements regarding property rights, such as Blizzard Entertainment's, suggest that proprietors are either concerned that they will have an enforcement problem if they do not attempt to use law-based intimidation, or that the situation appears in danger of slipping out of their control.⁴⁸ Such a problem is readily conceivable given the ease of transfer of virtual world items.⁴⁹ Some observers suggest that proprietors are hypocritical in their treatment of sellers of virtual property because they generally enforce the trading prohibition, but allow the most dedicated participants, their best customers, to engage in transactions without legal consequences.⁵⁰ To other participants, uneven enforcement of property transfer prohibitions by proprietors undermines participant motivation to obey the system. Uneven enforcement producing lack of faith in the governing system is one of the general consequences of an autocratic and arbitrary central rule.⁵¹

The search for extra-world venues for the sale of virtual property arises because most participants will inevitably make an intuitive efficiency analysis. Even where no established markets exist to value virtual property, the use of an internal property-based system and the existence of a real-world property-based system allow an exchange mechanism through the common currency of time. Earning both real and virtual money share a common component – real-world time. The hierarchy of values in virtual worlds preferences a time-consuming system of gradual acquisition of wealth.⁵² As one writer puts it:

⁴⁸ See Daniel Terdiman, *Virtual Trade Tough Nut to Crack*, WIRED, Dec. 20, 2004, at www.wired.com/news/avantgo/story/0,2278,66074-00.html (describing the challenges proprietors face in trying to enforce restrictions against trade in virtual items).

⁴⁹ Edward Castronova, *The Price of 'Man' and 'Woman': A Hedonic Pricing Model of Avatar Attributes in a Synthetic World* 22 (CESifo Working Paper Series No. 957, 2003), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=415043 (last visited June 8, 2005) (describing the ease of transfer of participant accounts).

⁵⁰ See Terdiman, *supra* note 48 (quoting Professor Dan Hunter arguing that virtual world companies "are often two-faced in their opposition to secondary market trading. Publicly, the Blizzards and Sony Onlines of the world say these virtual worlds are role-playing games and that the users want the games to be about play, said Hunter. 'If you talk to them in private,' he said, 'they will accept, or at least start to tell you, a significant number of the power players—the guys they count on to drive the world—if you didn't allow the transfer of these things, they would just head off into another (game).'"

⁵¹ See, e.g., Arkady Ostrovsky, *Investment Dries Up as Rule of Law Seeps Away in Russia*, FINANCIAL TIMES, at <http://news.ft.com/cms/s/02384ae2-89f7-11d9-aa18-00000e2511c8.html> (Mar. 1, 2005) (discussing the consequences of a decline in the rule of law in Russia).

⁵² Often the acquisition of virtual world wealth can be very gradual indeed:

Journal entry, 20 April. I have made my first kills, mostly rats. They did me a great

There's no shortage of realism in this game – the trouble is, many of the nonviolent activities in [*Ultima Online*] are realistic to the point of numbingly lifelike boredom: If you choose to be a tailor, you can make a passable living at it, but only after untold hours of repetitive sewing.⁵³

Participants refer to the tedious process of gaining virtual currency through virtual menial activities as “grinding.”⁵⁴ When time-based activities allow the acquisition of virtual currency used to purchase virtual items, it is easy to see how participants begin to think that they should use real world income to purchase these items. Inevitably, participants with more money than time who wish to participate in games without a significant time commitment will seek to buy their way out of “untold hours of repetitive” virtual sewing. This dynamic suggests that proprietors will continue to face significant challenges in trying to eliminate trade in virtual property.

It appears unlikely that the sale of virtual items in forums outside the virtual world, such as auction sites, may be meaningfully eliminated. The spontaneous development of sales of virtual property in MMORPGs was likely, given the cross-border interaction of virtual world participants, but surprising to developers because of their flawed assumption of control.⁵⁵ In fact, Professor Castronova suggests that in the refusal by virtual world proprietors to allow participants “the opportunity to buy their way to a powerful avatar . . . the companies implicitly encourage the buying and selling of avatars outside the game.”⁵⁶ Game developer commoditization undoubtedly encourages the further spread of commerce, but is more probably a recognition of persistent reality than a profound change. Like other forms of property, virtual world property and characters created by participants lend themselves to sale.⁵⁷ Commerce has arisen in virtual worlds and proven hard to destroy. The use of legislation imposed on participants, such as that proposed by Professor Balkin, will create static hierarchies of worlds, but will not have a meaningful effect on the spread of commerce. Commerce in virtual worlds has

deal of damage and I have been killed several times. I do return to life but it is a pain to go through. Nonetheless, I have to attack the rats. I need money to buy edible food and water, and rat fur, and other similar junk is about the only thing I can get my hands on the vendors will pay money for. I was hoping to do more exploring and less work, but a woman named ‘Soulseekyre’ told me that beyond Freeport live bots so powerful that they could kill me instantly. My problem is that I am under-equipped.

See Castronova, *Virtual Worlds*, *supra* note 15, at 10-11.

⁵³ Kim, *supra* note 29, at 143-44.

⁵⁴ See Greg Cato, *MMOs: It's the Economy Stupid*, OVERANALYZED, Dec. 15, 2004, at http://www.overanalyzed.com/portal.php?topic_id=19.

⁵⁵ See Terdiman, *supra* note 48 (discussing whether it is possible for proprietors to halt trade in virtual items).

⁵⁶ Castronova, *On Virtual Economies*, *supra* note 24, at 26.

⁵⁷ Castronova, *The Price of a 'Man' and 'Woman'*, *supra* note 49, at 22.

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not arisen spontaneously. Instead, the presence is a natural expression of “infection” in an insecure vessel. Ideas pass through the weak border between the real and virtual worlds. Despite restrictions by proprietors:

[a]ccounts may be usefully sold. Anyone in the world who starts the game EverQuest and enters the correct name and password can freely make use of all properties, items and software associated with that account. This means that every avatar, on every server, may be used as a vehicle by [a] new owner of the account.⁵⁸

C. *The Cross-Border Problem*

Inevitably, virtual world participants will compare real-world options with virtual world options, raising a cross-border problem: virtual-world possibilities seem attractive when compared to the real world, the ability to take on different roles, for example, whether as a tailor or an elf, yet it is only natural that virtual world limitations will be compared to instances where the real world is more attractive.

The tendency to isolationism among pioneers of various Internet activities has a long history and so it is natural that it is also present in the sphere of virtual worlds.⁵⁹ The tendency is not restricted to the Internet. It has been suggested that an American tendency to isolationism stemmed from “the sense of having founded a new world, entirely different from the Europe of the past, and very much better,” and the same spirit seemed present in the early days of the Internet when the sense was strongest that the Internet represented a totally new sphere.⁶⁰ Therefore, it is not surprising to find that virtual worlds, the fullest expression to date of a new world on the Internet, would follow the same dynamic in attempting to deny the role of real-world law.

A fundamental power imbalance exists in virtual worlds. The proprietors of these worlds have extraordinary power over participants such that their “magical” level power has led them to be described as wizards or gods.⁶¹ The inability of participants to communicate substantively with proprietors is such “that the political structure of every virtual world consists of a group of all-powerful executives surrounded by mobs of angry, harassing supplicants.”⁶²

⁵⁸ *Id.* at 22.

⁵⁹ See, e.g., John Perry Barlow, *A Declaration of the Independence of Cyberspace*, at <http://homes.eff.org/~barlow/Declaration-Final.html> (last visited June 8, 2005) (proclaiming, “Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.”).

⁶⁰ BRAUDEL, *supra* note 2, at 49.7.

⁶¹ See Lastowka & Hunter, *supra* note 16, at 59-63.

⁶² Castronova, *On Virtual Economies*, *supra* note 24, at 33.

The problem for game proprietors is that this wizardly power is incomplete. The “mobs of angry, harassing supplicants” that Professor Castronova describes are powerless only in the virtual realm.⁶³ In searching for ways to overcome a political structure that renders them powerless, participants of virtual worlds will inevitably seek redress in the real world where their power may be limited compared to corporate proprietors, but is not completely absent as in the virtual realms. Professor Balkin suggests that lawsuits will arise out of commoditization.⁶⁴ Therefore, by avoiding commoditization and commerce generally within virtual worlds, the intrusion of real world law may be limited in virtual worlds, thus reaching a desirable result.⁶⁵ I disagree. It is more likely that participants lacking power or an adequate means of dispute resolution in the virtual world will seek to use law as a means to resolve what Professor Lastowka and Professor Hunter refer to as the “wizard problem.”⁶⁶ Participants have more power in the real world to deal with proprietors than in the virtual world. Since most live primarily in the real world, participants will respond to problems in the virtual world with real world assets and weapons such as lawyers and lawsuits. Virtual world issues like governance, property and the cross-border problem may begin to be addressed meaningfully only upon the recognition of property rights among participants.

III. LEGAL RESPONSES TO VIRTUAL WORLD ISSUES

As I will discuss below, commentators have suggested several possible alternatives to virtual worlds strongly embracing property such as (a) the eventual development of virtual-world norms, (b) legislation in the physical world to govern virtual worlds, and (c) open-source worlds.

A. *Virtual-World Norm Development*

An alternative approach to the legal issues of virtual worlds has been a call to allow the gradual evolution of virtual world norms. In calling for self-created norms to develop among the denizens of virtual worlds Professor

⁶³ *See id.*

⁶⁴ *See Balkin, supra* note 17, at 2070-72.

⁶⁵ *Id.*

⁶⁶ *See Lastowka & Hunter, supra* note 16, at 50-51 (noting that “since there is already so much money and property at stake in these worlds—and since there will be significantly more in the future—we can expect a large number of lawsuits rooted in these property-rights disputes.”). Lawsuits by participants seeking money from proprietors for virtual world items have begun to appear. *See, e.g.,* David Becker, *Game Exchange Suit Goes to Court*, C|NET NEWS.COM, Feb. 7, 2002, at http://news.com.com/Game+exchange+dispute+goes+to+court/2100-1040_3-832347.html; *Lawsuit Fires Up in Case of Vanishing Virtual Weapons*, CHINA DAILY, Nov. 20, 2003, at http://www.chinadaily.com.cn/en/doc/2003-11/20/content_283202.htm.

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Lastowka and Professor Hunter are, as they note, following in the tradition of an earlier group of Internet commentators who suggested that the Internet would be the focus of wholly new law given its novel situation.⁶⁷ Professor Lastowka and Professor Hunter use the terms “cyborg” for the amalgamation of man and machine said to be created when a human being directs a character in a virtual world and “wizard” for the powerful administrators of virtual worlds whose abilities are akin to magic within the confines of the virtual worlds. The use of these terms helps to emphasize the novelty of virtual worlds and lend support to the idea that norms will develop in the unique sphere of virtual worlds. Professor Lastowka and Professor Hunter suggest that “cyborgs” will need to develop their own norms within the context of virtual worlds.⁶⁸ These norms may then be asserted to real world legal authorities and to virtual world authorities (the “wizards”) but which will continue to develop and be asserted independently of existing legal regimes.⁶⁹ Assuming a successful evolution of norms and successful assertion of “cyborg” rights and negotiation with “wizards” then “there may be no need for real-world courts to participate in this process. Instead the residents of virtual worlds will live and love and law for themselves.”⁷⁰ The crucial assumption is that time is available for norms to develop free from real-world laws and interference. In optimistically looking toward an indeterminate future, Professor Lastowka and Professor Hunter avoid focusing on the present and very near future when virtual world issues will be developed.

Professor Lastowka and Professor Hunter suggest that virtual worlds should be left to develop their own norms and laws.⁷¹ An inherent problem is that these norms have not developed sufficiently or robustly yet, and it is not clear when or if they will, given the cross-border problem that constantly forces virtual worlds to confront real-world laws like property regimes. Norms can be slow to develop and it is not clear that norms surrounding issues like property and governance, which have themselves been the subject of sophisticated and gradual evolution in the real world, will develop independently in the virtual world when the participants are confronted with legitimate and logical ordering systems in their real world experiences. The likelihood of norms developing around ownership independent of existing property norms and law is particularly unlikely given the number of virtual

⁶⁷ See Lastowka & Hunter, *supra* note 16, at 73.

⁶⁸ See *id.*

⁶⁹ See *id.* (arguing that “[w]hile cyborg inhabitants will demand that these rights be recognized by real-world courts and virtual-world wizards, they will need to arrive at these right themselves within the context of the virtual worlds. Whether or not the courts and wizards recognize these rights, virtual communities will continue to assert them and attempt to enforce them.”).

⁷⁰ *Id.*

⁷¹ See *id.*

worlds which make use of property-based systems.⁷² Norms and laws within virtual worlds are likely to develop, but they are likely to draw heavily on the real-world examples, particularly the real-world property regime. As Fernand Braudel observes, “Civilizations continually borrow from their neighbors, even if they ‘reinterpret’ and assimilate what they have adopted.”⁷³ This has been the experience with the development of law in the United States borrowing from English law, even in the aftermath of the American Revolution, to develop an American law.⁷⁴

B. Real-World Legislative Action

In a recent paper, Professor Balkin suggests that virtual worlds’ best option for maintaining their freedom from law will be to steer clear of commerce, but also, paradoxically, to embrace regulatory legislation.⁷⁵ Professor Balkin encourages the creation of legislation in the form of “statutes of interrater” that will guarantee participant rights, particularly to free speech, in exchange for proprietor privileges, such as freedom from liability for participant actions. In Professor Balkin’s interpretation of statutes of interrater, a taxonomy of virtual worlds would be created separating commodified virtual worlds from more intellectually inclined worlds.⁷⁶ In his analysis, the focus of many virtual worlds on encouraging commerce, particularly by dealing in virtual goods, practically demand legal attention and government regulation.⁷⁷ He argues that when people can claim value in virtual-world property, it is highly likely they will seek legal or government regulatory solutions when they encounter a problem with a virtual world that destroys the value they have accrued.⁷⁸ Professor Balkin is likely correct in this prediction, but he neglects to consider the extent to which law already heavily influences the environment and attitudes in virtual worlds.

Professor Balkin is particularly concerned about the intrusion of law into virtual worlds, but, he addresses the problem by using law, these statutes of interrater, as a gatekeeper that inevitably affects life within virtual worlds. He warns that “[b]y allowing players intellectual property rights in virtual items, the makers of *Second Life* are essentially inviting the law into their virtual world.”⁷⁹ Yet, Professor Balkin’s approach to ameliorating this concern is itself unavoidably legalistic. He suggests, “that the law should endeavor to

⁷² See *id.* at 30 (noting that “private property is the default” system in virtual worlds).

⁷³ BRAUDEL, *supra* note 2, at 29.

⁷⁴ See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 115 (2d ed. 1985).

⁷⁵ See Balkin, *supra* note 17, at 2090-92.

⁷⁶ See *id.* at 2044, 2046.

⁷⁷ See *id.* at 2046-47.

⁷⁸ See *id.*

⁷⁹ *Id.* at 2064; see *Terms of Service*, *supra* note 44.

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protect designers who devote their game spaces primarily to the exercise of freedom of speech and association.”⁸⁰ These statutes were first suggested by Professor Castronova as a descendant of statutes of incorporation in which the government would register virtual worlds so as to define certain rights within those worlds.⁸¹ Professor Balkin suggests creating a hierarchy of games distinguishing those “designed to allow people to express themselves through the creation of stories and adventures, and still others [that] allow social scientists to experiment with the evolution of norms” from other games “that are ‘non-commercial’ – not in the sense that the owners do not make money from them, but in the sense that they avoid real world commodification” from those virtual worlds whose proprietors accept commodification.⁸²

Professor Balkin focuses primarily on two types of virtual worlds – those that are intended for artistic expression and experimental purposes and those that embrace commodification.⁸³ However, this dichotomy fails to the variety of worlds that players will encounter. While some insightful proprietors will experiment with the extension of property to participants, and other virtual worlds ignore property in an attempt to focus on particular forms of artistic or academic exploration, many more participants will encounter worlds that fall somewhere in between. For example, many visitors to virtual worlds encounter environments with property-based systems where they are forbidden to own property fully. These will be the worlds where the proprietors enable the creation of intellectual property by participants but refuse to allow them to claim ownership of it. It is unclear how statutes of incorporation, as they are described in Professor Balkin’s article, will manage this difficult middle ground. Participants in these worlds, which may well account for the bulk of virtual worlds, will be neither the owners of property, as they would in a world where they could own property, nor willing experimenters in an intellectual co-venture, as they could be in an open-source world where they have donated their property rights in their creations to a common venture. Instead, as I will show below, they will be exploited creators of property for proprietors until lawsuits establish participant rights.

C. *Open-Source Virtual Worlds*

One potential solution for virtual worlds confronting legal issues is to forego many of the ownership and property issues by embracing “open-source” virtual world construction. Open-source virtual worlds are designed and maintained by voluntary contributions of labor and intellectual property by anyone who

⁸⁰ Balkin, *supra* note 17 at 2074.

⁸¹ See Edward Castronova, *The Right to Play*, 49 N.Y.L. SCH. L. REV. 185, 201-05 (2003).

⁸² Balkin, *supra* note 17, at 2044, 2046, 2074.

⁸³ *Id.* at 2091.

wishes to contribute. An example from another media form is Wikipedia, an online encyclopedia whose entries are written by anyone who wishes to contribute, delete, or otherwise write or edit entries.⁸⁴ This system's lack of proprietary ownership would lessen the element of confusion and hypocrisy implicit in the confused approach to property generally prevalent in virtual worlds. Open-source virtual worlds provide the most likely venues for the development of norms unique to virtual worlds of the kind advocated by Professor Lastowka and Professor Hunter.⁸⁵ Neal Stephenson has compared the development of open-source software to the development of the common law, a similarity which may make open-source projects particularly receptive to the gradual evolution of virtual-world specific norms.⁸⁶ Participants will have willingly foregone many of the traditional expectations of law by agreeing to an open-source license similar to the GNU license used by the GNU Project and the Free Software Foundation.⁸⁷ As a result, they may develop more cooperative relations with the diffuse proprietorship stemming from a sense of having voluntarily entered a community of like-minded individuals. Open-source virtual worlds like the Open Source Metaverse Project, the Croquet Project, and Multi-User Programming Pedagogy for Enhancing Traditional Study could represent a solution to legal issues, according to this analysis, by creating an intentional commons.⁸⁸ Using open-source projects might well provide the medium for some of the more artistically inclined or experimental virtual worlds that Professor Balkin appears to prefer.⁸⁹

⁸⁴ See *Wikipedia: Introduction*, at <http://en.wikipedia.org/wiki/Wikipedia:Introduction> (last visited June 8, 2005).

⁸⁵ See Lastowka & Hunter, *supra* note 16, at 73 (arguing that "Courts will need to recognize that these virtual worlds are jurisdictions separate from our own, with their own distinctive community norms, laws, and rights. While cyborg inhabitants will demand that these rights be recognized by real-world courts and virtual-world wizards, they will need to arrive at these rights themselves within the context of the virtual worlds. Whether or not the courts and the wizards recognize these rights, virtual communities will continue to assert them and attempt to enforce them. Virtual-world inhabitants will demand recognition of their cyborg lives and enforcement of their cyborg rights. If these attempts by cyborg communities to formulate the laws of virtual worlds go well, there may be no need for real-world courts to participate in this process. Instead the residents of virtual worlds will live and love and law for themselves.")

⁸⁶ See Jim McClellan, *Neal Stephenson—The Interview*, GUARDIAN, Nov. 4, 2004, at <http://www.guardian.co.uk/online/news/0,12597,1343417,00.html>.

⁸⁷ See *GNU General Public License*, at <http://www.gnu.org/copyleft/gpl.html> (last visited June 8, 2005).

⁸⁸ See Daniel Terdiman, *Gamers Eye Open Virtual Worlds*, WIRED, Dec. 2, 2004, at <http://www.wired.com/news/games/0,2101,65865,00.html>.

⁸⁹ See generally Balkin, *supra* note 17.

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It is unclear, however, whether open-source worlds will prove to be successful venues for communication because they may appeal only to specific tastes. Since it is likely that virtual worlds operated by proprietary companies will remain a major force, it is important to continue with the analysis of proprietary virtual worlds. For example, a politically radical open-source virtual world like *agoraXchange* is likely to attract fewer members than a conventionally fantasy fiction-inspired virtual world like *World of Warcraft*.⁹⁰ In addition, if open-source virtual worlds fail to require participants to agree to an effective license governing the donation of online creations to the virtual world, they may end up faced at a later date with many of the same property-based issues currently plaguing proprietary virtual worlds. The emergence of such issues could cripple the affected open-source virtual world.⁹¹

Open-source virtual worlds may be one of the key developments in the evolution of virtual worlds, however, their future is speculative at this point, given the limited number of open source projects in this area currently in development.⁹² Open-source virtual worlds are still nascent. Game development itself is an increasingly difficult process with virtual worlds being the most complex genre.⁹³ Enacting laws that effectively limit affordable access to virtual worlds by refusing to grant property rights (and the potential to subsidize participation) to non-profit open-source virtual worlds may end up relegating the less affluent to a side branch in the evolution of virtual worlds. An environment with property regimes in the real world engendered the creation of virtual worlds so it is unclear that denying their application within

⁹⁰ Compare *agoraXchange, Manifesto*, at <http://agoraxchange.net/index.php?page=233> (last visited June 8, 2005) (stating that “We put forward *agoraXchange* to elicit collaboration for challenging a world in which myths about birthright result in violence and suffering within and among nations and families. We urge eliminating the laws responsible for nation and marriage because we believe that these institutions misshape our material and psychic lives and constrain the imagination in ways that stunt us all.”), and *The Multi-User Programming Pedagogy for Enhancing Traditional Study*, at <http://muppets.rit.edu/muppetsweb/about/index.php> (discussing MUPPETS, another open-source virtual world that is intended to be devoted to innovative forms of education) with Jenkins, *supra* note 4 (describing *World of Warcraft*’s success in attracting 2 million subscribers).

⁹¹ See Stephen Shankland, *SCO: Linux Lawsuit to be Filed*, C|NET NEWS.COM, Mar. 1, 2004, at http://news.com.com/2100-1016_3-5167829.html (discussing SCO’s claim to intellectual property that open-source Linux also claims).

⁹² See Adam Geitger, *Where Are the Good Open Source Games?*, OPEN SOURCE NEWS, Aug. 31, 2004, at http://www.osnews.com/story.php?news_id=8146; Terdiman, *Gamers Eye Open Virtual Worlds*, *supra* note 88.

⁹³ See Marc Mencher et al., *The Future of Game Development: New Skills and Attitudes, Part 2: MMOGS*, GIGNEWS.COM, May 2004, at <http://www.gignews.com/careerfeatures/skills04part2.htm>; Daniel Terdiman, *Online Games a Massive Pain*, WIRED, July 16, 2004, at <http://www.wired.com/news/games/0,2101,64153,00.html> (discussing the difficulties of developing virtual worlds).

the virtual worlds would be appropriate.

It is not clear that open-source or non-commercial virtual worlds will provide the pre-eminent forums for speech or creative endeavors. Scholarship in other fields has explored the significant intertwining of commercial and aesthetic influences that have shaped primary examples of the world's cultural heritage, even in works that now seem to us examples of pure "high" art.⁹⁴ For example, Professor Lisa Jardine argues that artistic and intellectual development during the Renaissance was a product of economic, financial, and commercial innovations that created wealth, new economies, and greater cultural interaction.⁹⁵ In other arenas, artists and scholars have examined, questioned and broken down the basis for distinctions between high art and low popular culture more often associated with work done for money.⁹⁶ This is not to suggest that art can only be produced through close association with commerce. Instead, this shows that denying that art or meaningful communication can be produced in connection with commerce is also an error.

IV. PROBLEMS WITH LEGAL RESPONSES TO VIRTUAL WORLD ISSUES

A. *Statutory Action in a Nascent Medium*

Sweeping legislation of virtual worlds, such as statutes of intertation as envisioned by Professor Balkin, are unlikely to be a successful means of dealing with the problems of a developing phenomenon.⁹⁷ The development of virtual worlds is an industry which is still nascent and fraught with risk.⁹⁸ A number of virtual worlds developed by prominent companies have failed.⁹⁹

⁹⁴ See generally LISA JARDINE, *WORLDLY GOODS: A NEW HISTORY OF THE RENAISSANCE* (1996) (describing the influence of commercial and financial considerations on Renaissance art and creativity).

⁹⁵ *Id.* at 124 (stating for example that "[a]dmiration – the aesthetic sense of wonder with which the beholder gazes upon the work of art – becomes [in Jan van Eyck's painting, *The Arnolfini Wedding*] a mental response in which sensual delight is strenuously linked with an appreciation of the market value for the goods and the urge to acquire. In the mid-fifteenth century the social rise of the merchant brought with it an aesthetic of expenditure – a visual mode which gave delight through the intrinsic desirability of endlessly varied and exquisitely manufactured belongings, available for purchase. The eye of the onlooker responded with pleasurable longing to the fantasy of possession, which was independent of any real possibility of owning such wonders themselves."). For an examination of a more recent mingling of art and commerce, see DAVID THOMPSON, *THE WHOLE EQUATION: A HISTORY OF HOLLYWOOD* (2004).

⁹⁶ See LAWRENCE LEVINE, *HIGHBROW/LOWBROW: THE EMERGENCE OF CULTURAL HIERARCHY IN AMERICA* 248 (1988).

⁹⁷ See Balkin, *supra* note 17, at 2090.

⁹⁸ See Terdiman, *Online Games a Massive Pain*, *supra* note 93.

⁹⁹ See *id.*

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Norms are developing which, while unlikely to serve as the only means to resolve the issues of virtual worlds, can play an important role. Law should be used by proprietors and participants to establish foundations on which norms and relationships unique to virtual worlds can develop. The recognition of essential and basic legal rights such as property rights among participants will allow virtual world norms to develop from these basic foundations involving all of the parties in virtual worlds while top-down legislation, like statutes of intertation, fails to allow for a substantive role for participants and risks stunting the ongoing development of virtual worlds.

Moving to fix certain formats, as with a statute that prefers commodity-free virtual worlds, is premature, given that virtual worlds still appear to be risky and complicated business ventures. The reasons for the success of some virtual worlds is not clear, as even popular models sometimes fail to meet with success. A number of prominent virtual worlds sponsored by large corporations have proved financially unsuccessful (e.g., Electronic Arts' *Ultima X: Odyssey*, UbiSoft's *Uru Live*, and Electronic Arts' *The Sims Online*), even where the proprietor had a popular existing franchise.¹⁰⁰ Given the high failure rate, it is necessary for proprietors and creators to experiment with a variety of formats rather than have a hierarchy imposed upon them.¹⁰¹ In effect, the prospect of legislation to regulate virtual worlds at this point presents an example of virtual nation-building in which virtual worlds will be shaped by the impressions of outsiders rather than the desires of inhabitants.¹⁰² Virtual worlds that initially fit into one category for statutes of intertation may find themselves interested in developing in another direction but be inhibited by costs of changing categories. A virtual world that originated as artistically oriented according to Professor Balkin's schema could find that a more commoditized environment actually supports its innovation. Experimentation and evolution in situations like this suggest that establishing a hierarchy of values for virtual societies might inhibit the development of virtual worlds. Virtual societies might need to develop organically through trial and error rather than needing to set rules that require new and developing forms of communication to conform to legislation. This is particularly clear when one considers that the true promise of virtual worlds is as a revolutionary forum for communication whose success will depend on participation by citizens of other countries. U.S. legislation may slow the evolution of virtual worlds and overwhelm the participation of participants from other countries.

Virtual worlds are so new that terminology and modes of analysis are still developing.¹⁰³ Examinations of the use of metaphor in describing the Internet,

¹⁰⁰ *See id.*

¹⁰¹ *See id.* (discussing failures in virtual world development).

¹⁰² *See id.*

¹⁰³ *See Kent, supra* note 10 (discussing the lack of standardization in virtual world

such as the idea of the Internet as a place, or the use of western frontier imagery in describing the Internet, demonstrate the continuing difficulty faced when people based in the physical world analyze electronic environments.¹⁰⁴ Professor Balkin touches on the difficulty in distinguishing between speech and action in virtual worlds.¹⁰⁵ If an analysis like this is difficult to perform in a virtual environment, then a solution that distinguishes between different types of speech and fixes them legislatively appears to be premature at this point.

Another problem in using legislation to solve virtual world issues will be the need to garner proprietor support. It is unlikely that companies will be eager to guarantee rights until it is clear that the benefits they receive in protection from liability in participant suits will meet or exceed the value of constraints on their business model created by government statutes. These suits are still relatively rare, and it is not clear that game proprietors would seek out a solution for a problem that does not yet exist. Nor is it clear that game proprietors would not hesitate to take on additional levels of regulation. Liability for virtual world proprietors based on the actions of participants may well become a material problem. However, similar risks are dealt with by companies everyday. Product liability law and tort law are often designed to burden the manufacturer company more than the individual customer.¹⁰⁶ Companies are able to deal with burdens like this, as well as more unpredictable hazards like weather, through a variety of means, including insurance.¹⁰⁷ It is possible that game companies will be able to deal with customer suits through insurance as well. While the possibility of significant proprietor liability for participant actions is a potential problem, the scope is not clear at this point and crafting a legislative solution seems premature.

Legislation like the statutes of intertation conceived by Professor Balkin, introduced while virtual worlds are still developing, might serve to fix the evolution of virtual worlds at a very early stage.¹⁰⁸ Many virtual worlds are centered on science fiction and fantasy environments that do not lend themselves to the innovative communication forums frequently cited by virtual world theorists because of the restrictions necessary to maintain this kind of

terminology).

¹⁰⁴ See, e.g., Dan Hunter, *Cyberspace as Place, and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 439, 442-43 (2003); Alfred Yen, *Western Frontier or Feudal Society, Metaphors and Perceptions of Cyberspace*, 17 BERKELEY TECH. L. J., 1207, 1222-33 (2002).

¹⁰⁵ Balkin, *supra* note 17, at 2089.

¹⁰⁶ See, e.g., RESTATEMENT (SECOND) OF TORTS, § 402A (1965).

¹⁰⁷ See, e.g., Richard Bernero, *The Insurers Move In*, at <http://www.financewise.com/public/edit/energy/weatherrisk/wthr-insurance.htm> (last visited June 8, 2005) (discussing the use of insurance to mitigate weather risk).

¹⁰⁸ See Balkin *supra* note 17, at 2090.

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environment.¹⁰⁹ A prime argument against player-owned property is that it would circumvent the gradual progression of game-level achievement inherent to fun gameplay.¹¹⁰ An emphasis on gameplay is a norm likely to diminish in significance as virtual worlds evolve from being places for amusement and become forums for communication.¹¹¹ Norms that exist in the current limited population of virtual worlds should not be statutorily fixed. Fixing such norms by law may end up maintaining a subculture but negatively affecting wider rights and concerns.

While Professor Castronova stresses the ancient lineage of the corporate form while arguing for statutes of interration, it is more accurate to consider that the dominance of the modern corporate form is a relatively recent one and that corporations are a derivation of millennia of vigorous economic experimentation through trade.¹¹² Most businesses in the United States were owner-operated until the 1840s, and the adoption of the multi-unit corporate enterprise became standard only after 1900 in the United States.¹¹³ The use of the corporate form became widespread to address the evolving needs of businesses.¹¹⁴ This process argues for a degree of caution in moving to use legislative means to fix virtual world forms.

Statutes of interration, as conceived by Professor Castronova and Professor Balkin, also seem to confuse the purpose of statutes of incorporation.¹¹⁵ Prominent beneficiaries of statutes of incorporation are not only the corporations, but also the members of the public who can be stockholders with limited liability for a venture in which they do not actively participate. In contrast, statutes of interration purporting to protect the mass of individual participants are actually an endorsement of top-down rule by already powerful proprietor corporations; participants gain no increased powers or abilities.

Ironically, with the onset of statutes of interration, virtual worlds hailed as a model for future freedoms will become burdened by increasing layers of

¹⁰⁹ See Au, *Showdown in Cyberspace*, *supra* note 15. For instance, the World of Warcraft Terms of Service stipulate that participants “may not do anything that Blizzard Entertainment considers contrary to the ‘essence’ of World of Warcraft.” *World of Warcraft Terms of Use*, *supra* note 21. Such a requirement makes it extremely difficult for participants to change the virtual world in a way their proprietors do not approve.

¹¹⁰ See *Selling World of Warcraft*, *supra* note 44.

¹¹¹ See Au, *Showdown in Cyberspace*, *supra* note 19 (noting that this level achievement structure was “originally invented by Gary Gygax for *Dungeons & Dragons* more than 25 years ago”).

¹¹² ROBERT CHARLES CLARK, *CORPORATE LAW* 1 (1986).

¹¹³ See ALFRED CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* 14, 345 (1977).

¹¹⁴ See *id.* at 345-46.

¹¹⁵ See Balkin, *supra* note 17, at 2090; Castronova, *The Right to Play*, *supra* note 81, at 201-05.

regulation. Virtual worlds will be regulated by the real-world laws that affect their owners plus an additional layer of law added through interration statutes. Although interration has a protective intention, the respective rights granted by the statute of interration will be decided by game proprietors rather than participants. In this scenario, the denizens of virtual worlds are subject to increasing amounts of regulation from virtual world proprietors and endorsed by real-world governments.

B. Endorsing the Autocrats

The willingness of commentators to consider highly restrictive EULAs, such as those requiring the participant to surrender all intellectual property rights to the game proprietor, is a striking endorsement of a strong power hierarchy as a way to create a virtual society free of intellectual property restrictions.¹¹⁶ Commentators reason that free play will flourish if participants are forced to give up their rights to their property. Yet, when participants relinquish their intellectual property rights in the characters they create, they are giving these intellectual property rights not to the public domain but to proprietors. In fact, Professor Balkin acknowledged this, arguing that a “complete monopoly on intellectual property rights by the platform owner” is preferable because monopolization “prevents the players from employing intellectual property law as hold-ups that inhibit the right to play.”¹¹⁷ This reasoning starts to sound like an intellectual property version of the Vietnam-derived paradox that a village must be destroyed in order that it be saved.¹¹⁸ Here, proprietors must own virtual worlds outright in order that they be free. In contrast, open-source worlds would require conscious individual donations to the community.

Professor Balkin notes that “the only caveat” to complete ownership by virtual world proprietors is “that the platform owner must, in turn, not use its intellectual property rights to arbitrarily limit the players’ freedom of play.”¹¹⁹ But this is a significant caveat, one that might swallow the entire premise, and

¹¹⁶ See, e.g., Balkin, *supra* note 17, at 2065 (“Ironically, perhaps, a EULA that requires the players to surrender all rights in intellectual property in the game space may actually promote the right to play better than allowing players to hold traditional intellectual property rights in what they create in the virtual world. A complete monopoly on intellectual property rights by the platform owner prevents the players from employing intellectual property laws as hold-ups that inhibit the right to play. The only caveat is that the platform owner must, in turn, not use its intellectual property rights to arbitrarily limit the players’ freedom of play.”).

¹¹⁷ *Id.* at 2065, 2068.

¹¹⁸ See NEIL SHEEHAN, *A BRIGHT SHINING LIE: JOHN PAUL VANN AND AMERICA IN VIETNAM* 719 (1988) (describing how journalist Peter Arnett was told by an American military officer that the town of Ben Tre was destroyed because “it became necessary to destroy the town in order to save it.”).

¹¹⁹ *Id.*

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in fact illustrates the entire problem with the idea of creating a property-free commons in virtual worlds through an endorsement of proprietor rule. Property has not been avoided and law is still present in virtual worlds even if participants are discouraged from owning a virtual peppercorn. However, instead of law serving as a tool to protect the rights of virtual world participants in order to structure and develop their relationship with virtual world proprietors, legal power would be reserved solely to the proprietors. While Professor Balkin purports to argue against the influence of property rights in virtual worlds, the result of his proposed scenario is that proprietors retain all the property of virtual worlds. In other words, Professor Balkin is not arguing against property and for a true commons; rather he is arguing for property held by proprietors.

C. *Ownership and the Absent Commons*

This notion risks creating an egregiously unfair situation. In most virtual worlds the creation of characters results in a non-rivalrous good. Participants who have paid their entry fee are free to create a character as they wish, subject to the world's character creation software. However, this character radically changes with the amount of time and creativity that the participant devotes to it. Value attributable to the character is likely to be directly proportional to the participant's ability to develop a successful and interesting character.¹²⁰ Ms. Stephens has suggested that confusion arises as to who is more justifiably considered the owner of virtual property, while Professors Lastowka and Hunter have demonstrated the theoretical basis for virtual propertihood generally.¹²¹ Proprietors might conceivably claim that virtual items acquired during the course of the game, but created by proprietors, should be owned by them. This category of virtual property could include the money equivalent or items like virtual swords.

However, the case of virtual characters is much more like the case of weblogs. A weblog company merely provides the tools for a writer to perform his creative work. The value and ownership of the writing itself belongs to the author not the hosting company.¹²² A participant in a virtual world uses tools provided by the proprietor in exchange for his entry fee and uses those tools to create and operate a character. The virtual world's proprietors serve to host the character just as a weblog company hosts a writer's weblog.

Professor Balkin regards a complete surrender of intellectual property rights

¹²⁰ See Stephens, *supra* note 39, at 1529-30.

¹²¹ See *id.* at 1534; Lastowka & Hunter, *supra* note 16, at 42-50.

¹²² See, e.g., *Typepad Terms of Services* § 10, at http://www.sixapart.com/typepad_terms (last visited June 8, 2005) (stating that "Six Apart does not claim ownership of the Content you place on your Six Apart Blog Site.").

as preferential because it may increase the freedom of play.¹²³ However, it is worth considering that the freedom of play is a very limited kind of freedom in the wide range of virtual worlds, particularly the most heavily populated ones that are run as profit-seeking businesses. One can only play after paying the substantial user fee in many virtual worlds.¹²⁴ One missed credit card payment and the freedom of play disappears. In contrast, some forms of intellectual property rights have a constitutional value. Although these rights may be contracted away, they should not be idly disposed of through click-wrap agreements, where there is little opportunity for the potential participant to consider what value he or she discards. The point at which access to virtual worlds becomes a right is highly speculative.

Professor Balkin attempts to balance freedom to play with freedom to design but seems to sympathize with the side of the designers, and consequently endorses the idea of keeping power in proprietor hands. For example, he notes that “the idea of a bankruptcy trustee taking over a game is likely to disturb game designers, who have often believed that they always hold the sovereign power to turn off the switch and end the simulation.”¹²⁵ Of course, many virtual worlds, as assets of their corporate owners, are already potentially subject to the decisions of a bankruptcy trustee in the event of their corporate parent’s bankruptcy. Professor Balkin’s analysis seems to equate a game designer with the Romantic image of an individual artist in conjuring the sense that the designer should maintain this level of control. A general problem facing much analysis of virtual worlds is that many critics’ apparent identification with individual game designers seems to lead to a video-game version of film criticism’s auteur theory. The auteur theory suggests that movies were principally the product of a director’s vision.¹²⁶ This approach minimizes the collaborative nature of the movie-making process in favor of a model that makes it possible to equate a movie director with individual artists like poets and painters.

A similar tendency in analysis of virtual worlds leads to a corresponding de-emphasis of collaboration and for a sympathetic view of game designers as individual artists.¹²⁷ In fact, given the complexity and expense of virtual world design, most game designs are likely to be the product of group efforts and

¹²³ See Balkin, *supra* note 17, at 2065.

¹²⁴ For example, the virtual world *Star Wars Galaxies: An Empire Divided* charges a \$14.95 per month subscription fee (although the monthly fee can be lower if you purchase a longer subscription in advance). See *Star Wars Galaxies Knowledge Base*, at http://help.station.sony.com/cgi-bin/soe.cfg/php/enduser/std_adp.php?p_faaid=5872 (last visited June 8, 2005).

¹²⁵ Balkin, *supra* note 17, at 2071.

¹²⁶ See generally ANDREW SARRIS, NOTES ON THE AUTEUR THEORY (1962).

¹²⁷ See Balkin, *supra* note 17, at 2048 (suggesting the idea of a Freedom to Design).

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corporate ownership.¹²⁸ In most cases, the game designers have already surrendered control over the game to their employers (or, more likely, never had control of it in the first place), as the creation of a virtual world is frequently a work for hire. Where the ultimate employer is frequently a corporation, the virtual world is a corporate asset. Recognizing the frequently decentralized ownership of virtual worlds through layers of artificial persons, assigned rights and shares of ownership presents a different sense of the relationships in virtual worlds. Indeed, it is very important to consider that on both the proprietor and participant sides, the camps in virtual worlds are different sets of groups with varying degrees of control, interacting through the virtual world. For example, the corporate owners of many virtual worlds may be even more distressed than work-for-hire designers at the prospect of not being able to ameliorate shareholder discontent by disposing of a money-losing corporate venture like an unsuccessful virtual world. While the interaction is inevitably experienced by individuals, the role of groups is a key aspect of virtual worlds, and one that can be inaccurately elided over when considering the designer only as an individual role.

But consider a variation of the bankrupt virtual world situation raised by Professor Balkin and discussed above. If proprietors own the intellectual property in a virtual world, then bankruptcy of virtual worlds will also affect the creations of participants. As a proprietor approaches bankruptcy, it is likely to try to maximize revenue by any means available to it, including through exploiting the intellectual property it owns. Approaching bankruptcy could mean that a proprietor could sell to another company characters created by a participant without the approval of the creator-participants. A similar decision to sell intellectual property might be made by the trustee of a bankrupt proprietor. While game developers may recoil at the idea of a virtual world maintained beyond their wishes, the more egregious situation would occur when characters created by a proprietor could be sold off against the wishes of their creators.

In order to remain free from the chaos of law and market, commentators like Professor Balkin and James Grimmelman seem to endorse the rule by a Hobbesian Leviathan state in the form of game proprietors who would own all property in virtual worlds and thus would “keep them all in awe”¹²⁹ to prevent disputes between participants. A problem with the statutes of intertation, as they have been conceived by Professor Castronova and Professor Balkin, is that they neglect to consider all of the rights of the most powerless entities in virtual worlds, the players. Statutes of intertation would be, effectively, an agreement between the real-world government and game developers to

¹²⁸ See Geitger, *supra* note 92; Terdiman, *Gamers Eye Open Virtual Worlds*, *supra* note 88.

¹²⁹ THOMAS HOBBS, *LEVIATHAN* ch. 13 (1651).

maintain certain rights in the developers, but would neglect to provide an adequate means for those whose “rights” are being fixed to exercise any sort of power to modify or increase those rights. Professor Balkin and others seem to suggest that allowing participant property rights will result in a disruption of creative speech by owners resembling Thomas Hobbes’ vision of a conflict “of every man against every man.”¹³⁰ A significant problem with this approach is that it seeks to avoid addressing individual rights, seeking instead a solution devised by experts and enacted by corporations, but not allowing for participant autonomy sufficient for participants to play their crucial roles in truly developing a new forum for communication, norms, and interactions. It also suffers from the fact that participants are, and will increasingly grow, discontented with regressively authoritarian rule in the purportedly revolutionary forums of virtual worlds. Absent from virtual worlds is the “fear of death” that Hobbes believed would “incline men to peace.”¹³¹ Participants can choose to leave unsatisfactory virtual worlds, but, depending on how much participants have invested in their virtual world creations and how much they believe they would lose by just departing, more likely they will challenge virtual world proprietors with real world tools like the law.

D. Problems of the U.S. Regulation Model

The statutes creating corporate charters, invoked by Professor Castronova, present an interesting model for statutes of intertation, but the negative aspects of statutes of incorporation should also be considered. If these new statutes follow a model similar to statutes of incorporation, then there might be a race to the bottom in which certain states compete to offer game proprietors the greatest freedom from liability and other benefits while granting only minimal protection for participants. That situation would likely allow proprietors to accrue significant gains while participants receive little benefit. While a federal system of statutes of intertation would prevent this interstate statutory competition, such a system would likely be fraught with perils for participant rights. Given the currently fragmented nature of virtual world gaming, a premature push for intertation statutes might well result in large corporate proprietors dominating the discussion, particularly given the unsettled question of participant demand for this type of legislation. Corporate proprietors, who may operate several virtual worlds simultaneously, would be able to lobby for favorable liability or other treatment before participants and individuals can organize to seek their own desired outcomes. Large corporate proprietors

¹³⁰ *Id.*; see also James Grimmelmman, *Free as in Gaming*, at <http://research.yale.edu/lawmeme/modules.php?name=News&file=article&sid=1290> (Dec. 4, 2004) (stating that virtual world proprietors who recognize participant rights to property do not realize that “IP Rights are about suing the pants off of people”).

¹³¹ HOBBS, *supra* note 129, at ch. 13.

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already have lobbyists and lawyers readily at hand while participants may be scattered among numerous game worlds with consequent fragmentation of voice and power. This would likely result in game proprietors receiving benefits such as tax incentives or liability protection with little guarantee of participant freedom of speech.

Federal legislation in the new arena of virtual worlds also runs the risk of outstripping congressional understanding of the issues and technology of virtual worlds, as it has in other areas of technology. Congress has a poor history of crafting statutes to deal with technological and intellectual property issues and is likely to focus only on issues that are controversial or are raised by large organized lobbies. The move to extend the terms of copyrights in the Sonny Bono Copyright Term Extension Act is widely regarded as a capitulation by Congress to the desires of large media companies.¹³² Similarly, recent efforts to restrict file-sharing are seen as technologically unsophisticated, legally flawed, and resulting from lobbying by media companies.¹³³ Issues of controversy and technology have also inspired poor lawmaking by Congress. For example, Congress passed the Communications Decency Act of 1996 early in the history of the Internet in an attempt to restrict the transmission of sexual images.¹³⁴ The Supreme Court then struck it down for imprecisely restricting speech protected under the First Amendment.¹³⁵ A desire for legislation in the very new medium of virtual worlds will not necessarily result in a carefully considered bill, and will be even less likely to increase protection of participants' speech.

The difficulty of crafting legislation to protect speech, when even the question of what constitutes speech in a virtual world has yet to be determined, exacerbates the likelihood of confusion in statutory creation. For example, Professor Balkin notes that "when we move to virtual worlds, however, conventional agreements about what is speech and what is conduct quickly break down, because we have not yet developed understandings about what counts as "'acting' versus 'speaking' in a virtual environment."¹³⁶ While

¹³² See Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998); see also *Eldred v. Reno*, 239 F. 3d 372 (D.C. Cir. 2003), *aff'd sub nom.* *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

¹³³ See, e.g., Katie Dean, *Techies Blast Induce Act*, WIRED, July 23, 2004, at http://www.wired.com/news/politics/0,1283,64315,00.html?tw=wn_tophead_2.

¹³⁴ See Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 133 (1996) (codified at 47 U.S.C. § 223 (2000)).

¹³⁵ See *Reno v. ACLU*, 521 U.S. 844, 882 (1997) (holding that the Communication Decency Act's "indecent" and "patently offensive" provisions "places . . . an unacceptably heavy burden on protected speech.").

¹³⁶ See Balkin, *supra* note 17, at 2089 (stating further that "[v]irtual worlds blur the conventional boundaries between speech and conduct as we currently understand them precisely because all conduct in virtual worlds must begin as a form of speech.").

Professor Balkin advises that we will “have to muddle through for a time” until “new conventions arise” the pre-emptive move to legislation in the form of statutes of intertation seems most premature.¹³⁷ The most prominent speakers in the legislative process will likely be corporate proprietors rather than participants leading to an emphasis on game proprietors interpretations of speech before participants have been able to develop their own conventions.

E. The Globe, The Metaverse, and the Statute

The inherently global nature of virtual worlds presents another substantial obstacle to crafting successful intertation statutes for virtual worlds at this stage in their development. A U.S.-led push for other countries to agree to intertation statutes that suit U.S. company interests, but not necessarily the interests of citizens of other countries, could reduce the likelihood of experimentation by other countries and create political controversies in the way drug patents have.¹³⁸ A similar model can be seen in the way in which copyright provisions based on the Digital Millennium Copyright Act’s section 1201¹³⁹ extension of paracopyright are included in free trade agreements with countries such as Jordan and Morocco.¹⁴⁰ A similar spreading of law would be likely if the U.S. established a precedent of intertation statutes that concentrate power in the hands of corporate proprietors most likely to seek additional protection overseas. Allowing a more organic development through the extension of basic property and intellectual property rights to the participants of virtual worlds would create a more horizontal power structure within virtual worlds. Participants, including those from beyond the U.S., would be able to play a greater role in shaping the values of virtual worlds. This process would create an environment in which the values of virtual worlds, while grounded in widely used foundations of law like property, would be free to develop norms and rule-making that reflect values of all community members.

Intertation statutes aimed primarily at promoting free speech values will only work as long as virtual worlds remain virtual “Americas.” It will become increasingly difficult to uphold First Amendment values as virtual worlds

¹³⁷ *Id.* at 2089.

¹³⁸ See, e.g., Donald G. McNeil, Jr., *India Alters Law on Drug Patents*, N.Y. TIMES, Mar. 24, 2005, available at <http://query.nytimes.com/gst/health/article-page.html?res=9C07EED7163FF937A15750C0A9639C8B63> (discussing controversy over drug patents in India).

¹³⁹ 17 U.S.C. § 1201 (2000).

¹⁴⁰ See Electronic Frontier Foundation, *FTAA & Bilateral FTA Resources*, at <http://www.eff.org/IP/FTAA/> (last visited June 8, 2005); Jordan Free Trade Agreement, Oct. 24, 2000, U.S.-Jordan, art. 4(13), available at <http://www.jordanusfta.com/documents/textagr.pdf>; U.S.-Morocco Free Trade Agreement, June 15, 2004, U.S.-Morocco, art. 15.5(8), available at http://www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/Final_Text/Section_Index.html.

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develop sufficiently to become communications forums for worldwide participants. The move toward a universe of virtual worlds or a universal virtual world, a “metaverse,” has been a goal of online communities since before the term was first coined by Neal Stephenson.¹⁴¹ While participants may not fully realize this goal, the idea of even small-scale virtual worlds functioning effectively as small-scale metaverses, where interactions will take place among a geographically varied and international group of participants, should be encouraged. Explorations of liberty and regulation in virtual worlds must acknowledge the international scope of virtual worlds. Professor Balkin notes the problem of other countries’ laws potentially conflicting with the First Amendment but does not fully explore the implications raised by this.¹⁴² The problem of global participation renders a push for statutory free speech protection in virtual worlds premature. Although the goal of maximizing free speech in virtual worlds should be of great importance, the use of intertation statutes at this point might result in the banning of virtual world games in a number of countries.¹⁴³

The inability of statutes of intertation to deal effectively with laws restricting freedom of speech in other countries suggests that game proprietors will be reluctant to surrender the ability to generate income by commodifying their virtual worlds in exchange for scanty protection. Game proprietors with global aspirations must acknowledge that they will face government regulation in other countries even if they avoid commodification, and particularly if they focus on freedom of speech issues. The statutes of intertation would award an avoidance of commerce and protection of free speech, which would likely trigger a wide range of regulation from other countries. In addition, some countries might regulate to the extreme and deny their citizen’s access to certain virtual worlds altogether.¹⁴⁴

¹⁴¹ See NEAL STEPHENSON, *SNOW CRASH* 24 (1992).

¹⁴² See Balkin, *supra* note 17, at 2061-62:

America has the most protective free speech laws, and therefore it will probably also have the most speech-protective rules for game designers and game players. Nevertheless, countries which have more stringent rules about hate speech, pornography, and so on, might worry that their citizens are violating these restrictions while playing in these virtual worlds, and will want to regulate them accordingly. Thus, the same issues that we face in Internet speech generally will arise with speech in virtual worlds.

¹⁴³ See, e.g., *Harrying the Nazis*, *THE ECONOMIST*, Jan. 22, 2005, at 49 (discussing the implications of banning Nazi symbols in Europe).

¹⁴⁴ See CASS SUNSTEIN, *REPUBLIC.COM* (2001), for the idea that denial of access is a form of regulation.

V. BENEFITS OF PROPERTY IN VIRTUAL WORLDS

A. *The Value of Free Speech*

Property ownership by participants could act as a necessary first step in the development of virtual world norms, the emancipation of participants, the creation of more participatory models of virtual world governance, and the strengthening of free speech values within virtual worlds, which may eventually allow for the crafting of sophisticated statutes governing virtual worlds. Allowing participants to own property in virtual worlds might act to give greater international weight to free speech values than would solely providing protection of free speech. An emphasis on free speech laws could be a positive development, but focusing on First Amendment doctrine may appear parochial in the context of virtual worlds that aspire to develop international participation. The value of virtual property, like characters, would reflect the free speech values of a virtual world. The virtual worlds with the most value would draw participants eager for profit. Even countries that neither value nor protect free speech could see economic value in their citizens participating in virtual worlds that earned income. Allowing economic participation in virtual worlds will work to increase the power of virtual worlds as international forums, and countries that might wish to restrict citizen participation on speech grounds may be more reluctant to outlaw participation when it is a source of citizen income. In addition, allowing participants to earn real-world money will increase the likelihood that citizens of diverse countries will be attracted to the forum of a virtual world even if some regulations in their home countries discourage participation. The ability to profit from virtual world items might also lead to increased circulation of information about them.¹⁴⁵

B. *The Re-Ordered Society*

Rather than seeking to avoid or postpone the law that is already omnipresent in virtual worlds, virtual worlds should take the next step in the evolution of their domain and embrace a widespread recognition of participant property rights in their characters and creations. If virtual worlds are truly to provide revolutionary forums for communication, then they must embrace an evolution from the total control model. Alfred Yen has suggested that it is enlightening to explore a feudal society metaphor for the Internet rather than the more familiar western frontier imagery commonly invoked in Internet institutions like the Electronic Frontier Foundation.¹⁴⁶ A medieval metaphor, however, is

¹⁴⁵ See *Lara Croft Banned in China*, THE PEKING DUCK, Aug. 30, 2003, at <http://pekingduck.org/archives/000441.php> (noting that the movie *Lara Croft Tomb Raider - The Cradle of Life* was banned in China, but pirated DVDs of the movie were widely available for sale in the country).

¹⁴⁶ See Yen, *supra* note 104, at 1239-54.

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even more appropriate for virtual worlds populated by property-less participants. In such worlds, participants pay tribute money to their game proprietor overlords to prevent being killed (account termination), and anything they produce (their intellectual property) belongs to their lord except what participant serfs are allowed to retain for support. This medieval analysis emphasizes the idea of a situation ripe for change. Game designer Raph Koster noted the parallels in the evolution of virtual worlds to early modern European society and speculated about the consequences of the creation of the virtual world equivalent of Magna Carta.¹⁴⁷

The recognition of property rights for game participants will create a new ordering of participant-proprietor relations that helps to establish a new more dynamic system of relations in virtual worlds. Granting property rights to participants will acknowledge the role of participant creativity and give them autonomy. With this autonomy will come increased participant power. Participant property-owners will have increased opportunities that recognize their role in virtual worlds, and control of property within virtual worlds will give participants a foundation from which to develop solutions to governance problems.

C. *Complexity, Autonomy, Democracy*

Granting property rights is a natural extension of the complexity of virtual worlds. Unlike other games, the increased autonomy and creative capabilities of participants in virtual worlds means that participants inevitably play a significant role in creating the virtual world environment. Professor Balkin has suggested that virtual worlds are similar to improvisational theater performances, but he neglects to consider whether the actors in that analogy should be allowed an ownership stake in their creations.¹⁴⁸ A traditional video game company does not depend on the daily use of its products to support and supplement product development any more than a music company depends on the daily listening activities of customers to augment the editing and production of its CDs. The situation is quite different for companies developing virtual worlds. Participants help to create the atmosphere, society, and, to a degree, the virtual environment that all participants use. A grant of property rights is a recognition that virtual worlds cannot succeed without the presence and active participation and creation of other participants.

Participant power will force proprietors to consider the interests and rights of virtual world denizens in a way that will require them to make thoughtful rather than arbitrary decisions. Proprietors will have a greater incentive to listen to participants and provide more than just the closed loop of message board complaints. Participants will be able to act with legitimate markets,

¹⁴⁷ See Koster, *The Man Behind the Curtain*, *supra* note 30.

¹⁴⁸ See Balkin, *supra* note 17, at 2057.

measuring and acknowledging the mass actions of participants. Dissatisfied participants will flood the market with virtual property as they try to reduce the cost of exiting from disappointing virtual worlds, reducing the ability of proprietors to profit from the sale of virtual property. In addition, participants will be able to exit more easily from virtual worlds with acknowledgement of the legitimacy of trading of items on markets signaling the state of affairs within the virtual world. A participant who wishes to exit from a virtual world will no longer have to abandon her characters and items for deletion or possible use by the proprietor. Instead, she can sell them to recoup her investment or subsidize other ventures or adventures.

Property ownership by participants will help to serve as a stepping stone to greater democracy in virtual worlds. The holding of property was a necessary precondition of voting in the early United States. The logic behind that restrictive requirement was that property-ownership was equivalent to independence.¹⁴⁹ While the result in that situation was the wholesale exclusion of vast segments of the population, there is a significant difference in virtual worlds that makes a property-citizenship link appropriate. Anyone can become a property owner in a virtual world upon the creation of a character-avatar. There need not be any property-less participants within virtual worlds because each participant will own his character, thus making him a property-owner in the virtual world. In this situation, the granting of property would be a precondition to greater participant role in governance of virtual worlds much as women first received the right to own property in the United States in 1860 (in New York state) before eventually receiving the right to vote in national elections in 1920.¹⁵⁰

Perhaps the new community that develops in online worlds will consist of relationships between participants within virtual worlds and relationships between company virtual world proprietors and their citizen-customers (participants). The dual role of customer and worker is perhaps more appropriate because of the importance of the “work” done by participants through simply being present within virtual worlds.¹⁵¹ In this sense, granting property rights to participants is recognition of this new relationship where participant creations and presence are integral features of the game. During the 1990s a number of Internet companies attempted to create “communities” in which people would contribute content without compensation while the

¹⁴⁹ See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 214-15 (1997).

¹⁵⁰ See ELEANOR FLEXNER, CENTURY OF STRUGGLE: THE WOMEN’S RIGHTS MOVEMENT IN THE UNITED STATES 88, 306-29 (1996).

¹⁵¹ Woody Allen observed that “80% of success is showing up” and this is particularly apposite in virtual worlds. See The Quotations Page, *Quote Details: Woody Allen*, at <http://www.quotationspage.com/quote/1903.html> (last visited June 8, 2005).

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companies were able to profit from the development of this site.¹⁵² The proprietor of the virtual world *Ultima Online* made extensive use of volunteer online player counselors in a quasi-employee role, resulting in lawsuits seeking compensation.¹⁵³ To avoid this situation, proprietors should view the granting of property rights as a way to acknowledge the complicated role that participants play as both customer and worker.

There is also business logic in the recognition of proprietor property rights. While the recognition of rights reduces the rights of game proprietors to arbitrarily delete participant objects, participant ownership of property is likely to increase customer retention in a universe of infinite virtual worlds. As game designer Raph Koster stated:

You have to give players a sense of ownership in the game. This is what will make them stay – it is a “barrier to departure.” Social bonds are not enough, because good social bonds extend outside the game. Instead, it is context. If they can build their own buildings, build a character, win possessions, hold down a job, feel a sense of responsibility to something that cannot be removed from the game – then you have ownership.¹⁵⁴

A stronger business reason for recognition of property rights is that it will potentially prevent disruptive and destructive lawsuits between participants and proprietors. Participants may resent their inability to use their creations outside of the game world. This could lead to lawsuits when proprietors, who claim to own all intellectual property rights in participant characters and items, attempt to profit from or otherwise use this property to the disadvantage of the participant-creator.

Property is a useful means of ordering the complex relationship between players and developers in virtual worlds. Construing virtual property through the common conception of a “bundle of rights” helps to illustrate the usefulness of property in this situation.¹⁵⁵ Rather than claiming that a participant completely owns the virtual hammer he uses virtually, even though that hammer exists only in a world owned by a proprietor, we could consider virtual property as a bundle of rights. This would help to define the claims to it by the parties. A bundle of property rights allows a recognition of the complex role of participants that act simultaneously as workers (manufacturing content and property with value), customers (paying fees to use developer products),

¹⁵² See Janelle Brown, *Must AOL Pay “Community Leaders?”*, SALON, Apr. 16, 1999 at http://dir.salon.com/tech/feature/1999/04/16/aol_community/index.html.

¹⁵³ See Janelle Brown, *Volunteer Revolt*, SALON, Sept. 21, 2002, at http://dir.salon.com/tech/log/2000/09/21/ultima_volunteers/index.html.

¹⁵⁴ Raph Koster, *The Laws of Online World Design*, at <http://www.legendmud.org/raph/gaming/laws.html> (last visited June 8, 2005).

¹⁵⁵ See JOSEPH WILLIAM SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* 6, 9-13 (2000); ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 72 (2d ed. 1997).

and protocitizens (spending extensive time in the virtual world becoming linked and bound to the environment). Virtual world proprietors could experiment with a variety of approaches to ownership of virtual property. Some proprietors might wish to begin by maintaining a limited degree of control over the virtual property in their world. This would allow them to force participants to recognize the role of proprietor tools in creating virtual items or to ease some of the disruption of transactions. Proprietors could address character issues through the trading regulations in the EULA. Limited or shared ownership might be more attractive to proprietors for virtual objects that are primarily a product of the proprietor. The proprietor could then use his or her ownership claims to negotiate a managed economy. The best solution would be to give full ownership.

Real property and intellectual property laws are robust enough to deal with complex relationships and questions of ownership in the real world and would likely be sophisticated enough to deal with varying ownership schemes for virtual property. As Joseph Singer notes, current property law addresses:

[i]n the area of housing . . . individual and joint ownership (tenancy in common, joint tenancy), leasing arrangements, cooperatives, condominiums, subdivisions, home owners associations, ground leases, charitable land trusts, limited equity cooperatives, tribal property (including original Indian title, recognized tribal title and restricted trust allotments), public housing, and government property.¹⁵⁶

Similarly, intellectual property uses copyright law to create performance rights, music publishing rights, transmission rights, and automatic licenses. Intellectual property has been able to encompass revolutionary technology like audio recording, telephony, radio, television and video recording.

While there are obvious models for participant ownership of virtual property in intellectual property law, the diversity of models in the law suggest that exploration with different property schemes could be another means of experimentation and competition among virtual worlds. These different property schemes could help proprietors to distinguish themselves in a competitive marketplace of virtual worlds and ideas. The most obvious ownership model would be for sole ownership by participants under copyright and trademark for their virtual creations. This appears to be the model the Linden Labs uses in its Second Life virtual world.¹⁵⁷ However, more restrictive proprietors might still be able to retain greater control over property while still allowing some ownership by participants. Compulsory licenses, similar to those used for music, could be extended to fellow citizens in virtual worlds to prevent suits between participants in a common virtual world and to provide potential income streams to the creator-participants. In addition, these

¹⁵⁶ SINGER, *supra* note 155, at 86.

¹⁵⁷ See *Second Life Residents to Own Digital Creations*, *supra* note 44.

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approaches will allow property-owning participants to grant licenses to their property to other participants to create intentional commons.

D. Interstate Travel and the Value of Freedom

Along with the limited liability aspect (for proprietors) stressed in Professor Balkin's interpretation of interration statutes, "free transferability of investor interests" is a key characteristic for the success of the corporate form.¹⁵⁸ As it exists now, participants who contribute value to the enterprise of the virtual world have no way to realize that value upon exiting the virtual world. The motivation for virtual world proprietors' recognition of participant property rights need not be entirely altruistic. By recognizing participant property rights and allowing free transferability of property, proprietors would have access to additional income. The income would be earned from managing the intraworld property markets or by taking a percentage of interworld transactions. This income could be used to extend the world itself.

In fact, Sony has recently taken just this approach by creating its own auction site where it can control and profit from the player demand for sales of virtual items.¹⁵⁹ While rival proprietor Mythic Entertainment has decried this development as a disruption of virtual world gaming norms, Sony's decision is an interesting experiment in grappling with the property issues that are ubiquitous in virtual worlds.¹⁶⁰ A defense of the status quo can mask issues of real concern. Professor Hunter speculates that it is not gaming norms that have caused Sony to restrict sales prior to this announcement, but a concern that they could not profit.¹⁶¹ In addition, Professor Castronova points out that Sony is also taking steps to address the concerns of some participants that the sale of virtual property is a disruption of virtual world norms by allowing sales only on some of the servers.¹⁶²

If participants generally had the right to hold property, statutes of interration could then develop from the norms and rule-making derived from the more dynamic relationship which would evolve between participant and proprietor. These statutes, which would recognize participants' property rights and define proprietors' rights and responsibilities, could then govern the use of property

¹⁵⁸ See CLARK, *supra* note 112, at 2 (describing the four key characteristics as "(1) limited liability for investors; (2) free transferability of investor interests; (3) legal personality (entity attributable powers, life span, and purpose); and (4) centralized management").

¹⁵⁹ See Daniel Terdiman, *Sony Gets Real on Virtual Goods*, WIRED, Apr. 20, 2005, at <http://www.wired.com/news/games/0,2101,67280,00.html>.

¹⁶⁰ See *Mythic Rips Into SOE Over Auction Site*, GAMEDAILY BIZ, Apr. 22, 2005, at http://biz.gamedaily.com/features.asp?article_id=9464.

¹⁶¹ See Terdiman, *Sony Gets Real on Virtual Goods*, *supra* note 159.

¹⁶² See *id.*

rights in virtual worlds. The structure of statutes of interration might closely mirror that of statutes of incorporation. Owners might have a fiduciary duty (or equivalent) to participants and their property, as well as to stockholders. In this light, Second Life has not clearly made a mistake, as Professor Balkin suggests, in granting participants intellectual property rights in their virtual creations.¹⁶³ Giving participants an ownership stake should lead to greater recognition of participant rights rather than less and should lead to greater experimentation and creativity.

In fact this seems to be precisely the case with what is occurring within the virtual world which has gone farthest in granting rights to participants.¹⁶⁴ Second Life's grant of property rights to participants seems to have encouraged far greater experimentation and innovation than other virtual worlds.¹⁶⁵ For example, one participant created a video game within the Second Life virtual world and then sold it to a real-world media company, a transaction that would be impossible in most virtual worlds.¹⁶⁶ In addition, a variety of other projects have been initiated in this virtual world, ranging from entrepreneurial experimentation by business school students to therapeutic programs for abused children.¹⁶⁷ Artistic and social experimentation and expression have also taken place in this virtual environment, such as the development by participants of a temporary theme-park homage to J.M. Barrie's Neverland, in-world life-drawing classes, and political dialogue and protest.¹⁶⁸ That this level of innovation and experimentation exists in a virtual world that allows participants to hold property suggests that participant property rights will not mean the end of virtual world innovation and may be an inspiration.

Another motive for proprietors to extend property rights could come through an increased sense of participation and loyalty, a sense of proto-citizenship, in the virtual worlds in which participants hold property. Professor Castronova has observed that "survival in the competitive world of gaming requires that a company remain popular with its gamers."¹⁶⁹ However in the context of

¹⁶³ Balkin, *supra* note 17, at 2064.

¹⁶⁴ See *Second Life Residents to Own Digital Creations*, *supra* note 44.

¹⁶⁵ See, e.g., Ann Grimes, et al., *Tetris Meets Bingo*, WALL ST. J., Mar. 3, 2005, at B3.

¹⁶⁶ See *id.*

¹⁶⁷ See Daniel Terdiman, *Second Life Teaches Life Lessons*, WIRED, Apr. 6, 2005, at <http://www.wired.com/news/games/0,2101,67142,00.html>.

¹⁶⁸ See Wagner James Au, *And Straight On 'Til Morning*, NEW WORLD NOTES, Nov. 11, 2004, at http://secondlife.blogs.com/nwn/2004/11/and_straight_on.html (discussing the J.M. Barrie homage in Second Life); Wagner James Au, *Art for Art's Sake*, NEW WORLD NOTES, Apr. 26, 2005, at http://secondlife.blogs.com/nwn/2005/04/artists_muse.html (discussing an in-world drawing class); Wagner James Au, *Living Memorial*, NEW WORLD NOTES, May 13, 2004, at http://secondlife.blogs.com/nwn/2004/05/living_memorial.html (discussing reactions to the Iraq war).

¹⁶⁹ Castronova, *On Virtual Economies*, *supra* note 24, at 35.

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virtual worlds, popularity will likely mean something other than the novelty since the novelty of any virtual world will eventually go stale,¹⁷⁰ and the extreme complexity of virtual world creation means that proprietors must hope to succeed with a limited number virtual worlds rather than succeed on a model of an endless succession of new and different products. Enduring popularity will require the maintenance of a long-term relationship. By increasing the engagement of participants in virtual worlds, proprietors are likely to find more loyal customers.

Perhaps the proper way to view the new interaction between proprietors and property-owning participants, whose characters inhabit the proprietors' virtual worlds, is as a mutualistic symbiosis. In biology, a mutualistic symbiotic relationship exists where two organisms engage in a mutually beneficial relationship.¹⁷¹ The image of mutualistic symbiosis is more appropriate here than in many other business relationships. Characters are created to exist in the virtual spaces and proprietors are dependent on character presence and sociability for the success of their worlds. A proprietor can eliminate any character, but if he eliminates too many, he succeeds only in turning the entire virtual world into a sterile empty shell. Granting property rights to participants would recognize the essential role participants play in this relationship.

It is likely that participants will receive more value from characters than from virtual objects. Exchanges will develop that attempt to calculate values for characters relative to other characters and relative to currencies. Inevitably, a market for participant characters has developed.¹⁷² Participants' ownership of property, in particular, their characters, could become a means for participants to move easily between worlds, and the facilitation of participant movement between different worlds will allow for greater communication. Currently a participant who has achieved a high level in one game is unable to maintain that level when moving to another game. Instead, current norms and code-based law dictate that a participant new to the virtual world begin a time-consuming climb from the very bottom. While there appears to be a sort of Rawlsian justice about this progression, it does not appear to be a characteristic that will promote the evolution of virtual worlds to communications forums anymore than if a person had to surrender her education, experiences, and assets when she switched from communicating by pen and pencil to

¹⁷⁰ See Koster, *The Laws of Online World Design*, *supra* note 154 (stating that "Even the coolest game mechanic becomes tiresome after a time. You have to supply alternate ways of playing, or alternate ways of experiencing the world. Otherwise, the players will go to another world where they can have new experiences").

¹⁷¹ See BERT HOLDOBLER & EDWARD O. WILSON, *JOURNEY TO THE ANTS: A STORY OF SCIENTIFIC EXPLORATION* (1995).

¹⁷² See, e.g., GAMERSLOOT.NET, at <http://www.gamersloot.net/catalog> (last visited June 8, 2005); IGE.COM, at <http://www.ige.com> (last visited June 8, 2005) (markets for virtual items).

communicating on the Internet.

A legitimate and recognized market for characters would allow participants to more easily transfer between communities by selling one world's characters and acquiring characters of similar level in another world. Market-based valuation of characters would allow efficient comparison of characters from different worlds and serve as a foundation for characters to temporarily transfer between worlds on the equivalent of a visa. The valuation of a character at market could suggest the level at which a temporary second virtual world character might be created in order for the participant to interact in the second virtual world at an appropriate level. Participants with characters of similar value might temporarily exchange characters in the same manner that people in the real world exchange apartments in different cities. This would facilitate cross-border interaction and the development of a metaverse-like forum. Increased cross-border movement is likely to facilitate communication between previously isolated groups. Participating in a virtual world can be expensive and time-consuming, and few participants are likely to be involved in multiple worlds, so transfer between worlds could be especially advantageous in developing new relationships and communication.¹⁷³

Professor Castronova notes that participants sometimes look down on other participants who purchase skills and powers, but this is likely the kind of disdain that occurs on the Internet and blogs when a core group of close community members with closely shared values is suddenly confronted with a rapid expansion of the community's membership.¹⁷⁴ This disdain may be a legitimate reaction to actions that disrupt the virtual world environment, but it is also a significant reflection of norms that have developed in the gaming and virtual world community and, as such, it is far from clear that these should be protected from further evolution as a more diverse membership explores virtual worlds. Norms that exist today in virtual worlds are likely to shift radically as membership increases and as virtual worlds truly become the kind of forums for communication and interaction that observers anticipate. As virtual worlds transition to communication forums, changing norms are likely to provide for increased receptivity to virtual world trading over role-playing game values.

¹⁷³ *C.f. Low-cost Founding Fathers*, THE ECONOMIST, Jan. 29, 2005, at http://www.economist.com/printedition/displayStory.cfm?Story_ID=3598896 (suggesting that low-cost European airlines "have done more to integrate Europe than any number of diplomats and ministers" by making travel to other European countries commonplace).

¹⁷⁴ Edward Castronova, *Theory of the Avatar* 27 (CESifo Working Papers No. 863, 2003), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=385103 (last visited June 8, 2005).

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E. The Value of Freedom and the Value of Speech Revisited

Granting property rights in virtual objects should lead to greater rights generally for participants, including the right to free speech. Virtual objects will then have acknowledged market values that proprietors will must recognize when attempting any sort of deletion, not just the current gray and black market values. If a participant develops a virtual object that is offensive to the proprietor, for example a character whose appearance makes fun of one of the proprietor's emblematic characters, but the character has a market value, the proprietor cannot arbitrarily delete the object. Because the participant has an ownership right in the character, the participant can sue the proprietor for the lost value. Of course, the threat of a suit would be more daunting to a proprietor when the character can be shown to have a high market value.

Due to the possibility of negative publicity, even a suit with a nominal monetary value to a game company could easily dissuade the company from performing arbitrary deletion. Few companies want to be known for the lawsuits initiated by their customers. With weblogs and other communication media available and likely to be used by the technologically adept population that inhabits virtual worlds, word of even small lawsuits over character property could circulate easily among game participants well out of proportion to the financial amount at issue. Because game companies cannot control these discussion forums outside of virtual worlds, notoriety surrounding participant-proprietor disputes is likely to circulate to a wider group including potential participant-customers.

The effects of this dynamic on promoting speech seem clear. Because it is difficult to determine speech from action in virtual worlds, as Professor Balkin has suggested, so too is it difficult to separate speech from property.¹⁷⁵ Each character and object in a virtual world is the result of creative decisions, creating the potential for the speech embodied in these characters and objects to gain protection against ownership and having value that a participant desires to protect. A participant who designs a character whose appearance mocks an emblematic character of a virtual world might displease a humorless proprietor. However, any god-like tendency the proprietor might have to destroy the offending character would be inhibited by fact that the character would be the participant's property. Destruction of that property would have a cost reflecting, at a minimum, the participant's value. In addition, the destruction of a participant's property would likely cause a decline in value of other property associated with that virtual world. Virtual property existing in an environment where it is subject to arbitrary destruction is likely to be worth less than it would be in a more secure environment. This situation would help protect speech, such as the parodic character in the example above, without resorting to the problematic attempt to apply constitutional constraints to

¹⁷⁵ See Balkin, *supra* note 17, at 2089.

corporate proprietors.¹⁷⁶ The significance of the aggregate value of other characters and items throughout the virtual world would serve as a brake on destruction of individual virtual items, even where the value of the item destroyed might not be enormously significant, because of the potential negative effect on other property throughout the world.

Property ownership by participants is likely to enhance speech. Professor Balkin suggests that the most important reason for adopting statutes of intertation prior to the recognition of property rights is to:

protect important free speech interests that may be undervalued by market forces. Securing freedom of speech rights against private parties in virtual worlds has significant positive externalities for society. Markets will likely undervalue those rights because their full value to society cannot be captured by the platform owners and Participants.¹⁷⁷

The difficulty in valuing speech in virtual worlds might be assuaged by granting property rights in virtual world items and characters. A character in a virtual world that values free speech will likely be more valuable than a character in a virtual world that does not recognize free speech or intellectual property rights. The greater opportunities for character capabilities and the more diverse actions available to a character in a freer virtual world suggest that participant property ownership may allow virtual worlds to deal effectively with governments that might otherwise restrict speech. Participant ownership of property will allow valuation of speech such that both corporate proprietors and governments will be encouraged to acknowledge speech as a significant economic issue.

Some commentators have suggested that participant property ownership will be an impediment to speech in virtual worlds.¹⁷⁸ Professor Benkler's suggestion that incorporating intellectual property rules into the virtual worlds will stifle creativity is misleading.¹⁷⁹ Professor Benkler is concerned that the pernicious effects of real-world intellectual property law will work their evil within virtual worlds as well.¹⁸⁰ However, if intellectual property rules in the real world under U.S. law are seen as overly constraining, as many commentators have suggested,¹⁸¹ that is a problem that should be dealt with in the real-world forums. Denying intellectual property rights to participants in

¹⁷⁶ See Balkin, *supra* note 17, at 2084-90 (discussing the difficulty of making this application).

¹⁷⁷ *Id.* at 2092.

¹⁷⁸ See Grimmelmann, *supra* note 130 (describing Professor Benkler's observations).

¹⁷⁹ See *id.*

¹⁸⁰ See *id.* (describing Professor Benkler's reaction to virtual worlds embracing IP rights as creating a "new set of hurdles to creativity.").

¹⁸¹ See, e.g., LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2001).

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virtual worlds will only result in the futile punishment of participants while making no impact in the real world and doing no real harm to the large corporations that are widely seen as the primary beneficiaries of a problematic intellectual property regime.¹⁸² It is not evident that individual ownership of intellectual property rights in the real world has created the problems many people associate with current copyright law term extensions. Denying participants' rights in intellectual property will only serve to create another set of companies and corporations profiting from public creations. In this case, the public will be the group of participants forced to give up rights to their creations. Rather than individual ownership, corporate ownership is responsible for many of the chilling effects associated with cease-and-desist letters and other devices.¹⁸³ Corporate owners of intellectual property have already established their claims of ownership and will not hesitate to make their claims in virtual worlds.¹⁸⁴

F. Overcoming Corporate Rule of the Illusory Commons

Professor James Boyle has characterized the effects of intellectual property laws as leading to a "second enclosure movement."¹⁸⁵ However, an important distinction should be made when comparing this real-world situation to that in virtual worlds. EULAs stipulating that proprietors own all intellectual property rights in a virtual world¹⁸⁶ create a situation in which a commons does not exist and cannot exist until the first copyright terms claimed by the proprietor begin to expire. There will be no possibility for participants to freely license or otherwise donate their virtual property to their fellow participants, and the proprietor is unlikely to do so for them. Even when the copyright terms expire, there is likely to be confusion as to what can be freely available given the massive number of creations that the proprietor of a well-populated virtual world could lay claim to.¹⁸⁷

Large corporations already have established their intellectual property claims and do not hesitate to enforce them against violations in both real and

¹⁸² *See id.*

¹⁸³ *See, e.g., Chilling Effects Clearinghouse*, at <http://www.chillingeffects.org>.

¹⁸⁴ *See infra* Part V.F (describing the lawsuit between Marvel Enterprises, Inc. and NCSoft regarding the copyright infringement by players in a virtual world lacking commoditization or a property system).

¹⁸⁵ James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 LAW & CONTEMP. PROBS. 33, 37 (2003).

¹⁸⁶ *See, e.g., Selling World of Warcraft In-Game Content for Real Money*, *supra* note 45.

¹⁸⁷ *See, e.g., Lawrence Lessig, et al., Save the Music/Creative Commons Orphan Works Comments*, at <http://www.copyright.gov/orphan/comments/OW0643-STM-CreativeCommons.pdf> (Mar. 25, 2005) (in response to the U.S. Copyright Office's request for comments in addressing the dilemma of orphan works).

virtual worlds.¹⁸⁸ For example, the proprietors of a virtual world, *City of Heroes*, have recently been sued for contributory infringement of Marvel's copyrighted comic-book characters. *City of Heroes* is a virtual world developed by NCSoft Corp. and Cryptic Studios, Inc. in which participants can design and play with their own comic-book superhero characters. Marvel alleges that the program which allows participants to create their own characters encourages them to create characters based closely on Marvel's copyrighted characters like the Incredible Hulk, and thus infringe on Marvel's copyrights.¹⁸⁹ What is notable about this case for the purposes of this article is that *City of Heroes* does not allow its participants to own property.¹⁹⁰ Corporations like Marvel Enterprises will sue virtual world proprietors and participants for violating their intellectual property rights whether or not the virtual world is commoditized. Copyright law again rears its head in virtual worlds, no matter how much proprietors and commentators wish it otherwise.

As corporations enforce and expand their property rights, participants will be forced into a gray area if their own property rights remain unrecognized. The arbitrage analysis discussed above suggests that people will continue to buy characters in virtual worlds through unrecognized auctions. Not legitimizing the property ownership expressed in these auctions will only serve to punish those who might be able to realize gain from their virtual world achievements. The virtual world, in addition to serving as a mode of communication, might also serve as an additional arena for people to earn income. Denying property rights in virtual worlds risks permanently relegating poorer people, who might have participated in virtual world forums while earning money that could subsidize their participation, to the outside of virtual worlds. Allowing property rights in virtual property and creations would allow participation by more than just those with sufficient disposable income to play what can be a fairly expensive activity.¹⁹¹ Allowing property rights in virtual

¹⁸⁸ See Complaint at 2, *Marvel Enterprises, Inc. vs. NCSoft Corp.*, (C.D. Ca. Nov. 11, 2004) (No. 04CV9253), at http://www.eff.org/IP/Marvel_v_NCSoft/20041115_Marvel_NCSoft.pdf (describing copyright infringement by participants in a virtual world without a significant property regime being complained of by a media company).

¹⁸⁹ *Id.* at 8 (arguing that a player can use the *City of Heroes* character-creation software and "can just as easily create an infringing clone of The Incredible Hulk by choosing the 'Science' origin, the 'Tanker' archetype, and the 'huge,' 'muscular,' 'indestructible' and 'powerful' characteristics" and then just "paint the character green, [and] give him short pants that reflect his enormous change in size").

¹⁹⁰ See *City of Heroes Character Copyrights/Ownership Policy*, at http://www.plaync.com/help/eula_posting.html (last visited June 8, 2005) (allowing participants only "noncommercial" uses of "Game Content").

¹⁹¹ For example, the list price for *City of Heroes* software is \$39.99 and the required monthly fee ranges from \$11.95 to \$14.95, depending on the length of subscription purchased. *City of Heroes Knowledge Base*, at <http://support.cityofheroes.com/cgi-bin/>

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property would mean that some participants could subsidize their playing through sales of virtual world goods or services. For example, take the Second Life participant who was able to benefit from the property rights granted by the Second Life proprietor by selling his creative work, an in-world video game.¹⁹² Additionally, barriers to transferability, such as exit costs, could be significantly reduced. Participants might feel more inclined to experiment with a variety of virtual worlds if they felt they could recover some of their investment of time and money through sales of property and accounts. Because barriers to entry in the forms of educational qualifications or traditional real world honors are low in virtual worlds, they could become an important venue for success for people who might face significant barriers in real-world venues.¹⁹³ Therefore a premature denial of commerce in a significant section of virtual worlds could lead to the establishment of substantial economic barriers, creating another digital divide.

G. *Democratizing Technology*

Another argument in favor of increasing participant power can be extrapolated from ongoing trends in online communications and the video game industry. Increased access to communications technology has created an increasingly democratic media structure.¹⁹⁴ For example, the Internet has dramatically lowered publication barriers with a consequent rise in publications, and the further development of weblogs has only furthered the trend.¹⁹⁵ Large-scale communication technologies, such as the Internet and weblogs, have provided the most substantial recent innovations in communication and have altered the media landscape.¹⁹⁶ Video games have undergone a similar evolution of access. The general trend in video game evolution has been to reduce the level of control of game developers over gameplay through increasingly sophisticated environments, as can be seen in the trend of modification, and, more prominently, in the development of virtual

cityofheroes.cfg/php/enduser/std_adp.php?p_faqid=868 (last visited June 8, 2005).

¹⁹² See Grimes, *supra* note 165 (discussing how a participant in Second Life developed and sold his video game).

¹⁹³ Cf. Castronova, *Theory of the Avatar*, *supra* note 174 (suggesting that virtual worlds are a prime environment for increasing happiness among those whose appearance or other real-world characteristics leads them to be unhappy in the real world).

¹⁹⁴ See Benjamin M. Compaine, *The Media Monopoly Myth: How New Competition Is Expanding Our Sources of Information and Entertainment* 10, at http://www.thenmrc.com/archive/Final_Compaine_Paper_050205.pdf (last visited June 8, 2005) (illustrating the more diverse choices available to television viewers in 2003 compared to 1970).

¹⁹⁵ See *id.* at 26 (discussing how geography no longer limits media distribution).

¹⁹⁶ See Lauren Gard, *The Business of Blogging*, *BUS. WEEK*, Dec. 13, 2004, at http://www.businessweek.com/magazine/content/04_50/b3912115_mz016.htm (discussing the impact of Internet publishing).

worlds which grant players far more autonomy than traditional video games. Modification frequently involves the release of the source code of a game by its developers, a relinquishing of control, so that others can modify the game in a variety of ways.¹⁹⁷ For example, the prominent Valve Software has embraced modification of its games by releasing *Day of Defeat* “a multiplayer add-on to Valve’s best-selling first-person shooter (FPS), *Half-Life*.”¹⁹⁸ Valve Software’s game *Counter-Strike* is itself a modification of its own title *Half-Life*. The prominent game developer John Carmack is a proponent of hacker modification and insisted on publicly releasing source code for innovative titles like *Doom*.¹⁹⁹

H. Ending the Serfdom of Virtual Worlds

Assuming the eventual judicial and legislative recognition of virtual property as property, as commentators predict,²⁰⁰ when they are playing in virtual worlds, participants are engaged in the process of creating property with value for proprietors without compensation. This is a familiar phenomenon in the history of the Internet as profit-making companies attempt to harness and sometimes exploit the enormous population and the community ethos that can be found online.²⁰¹ Internet companies have tried to make money by profiting from contributions by volunteers.²⁰² That kind of exploitation should not have a place in virtual worlds. Participants should be able to take some profit from their participation as well.

The idea of game developers as the ideal (or at least preferred) guardians for player rights is somewhat suspect considering their limited development toward enlightened labor relations. The managing editor of *Electronic Gaming Monthly* notes the widespread “overworked-and-underpaid issue” and calls for a “‘Norma Rae’ scene at a few developers around the country.” Furthermore, a recruiter in the game industry argues that “[i]f we want to attract and keep good people, cultivate new ideas, and support innovation as an industry, process management and H.R. practices must evolve.”²⁰³ Similarly, a leading developer of virtual worlds, Electronic Arts, is the subject of a class action

¹⁹⁷ See DAVID KUSHNER, *MASTERS OF DOOM: HOW TWO GUYS CREATED AN EMPIRE AND TRANSFORMED POP CULTURE*, 165-69 (2003).

¹⁹⁸ See Wagner James Au, *Triumph of the Mod*, SALON, Apr. 16, 2002, at www.salon.com/tech/feature/2002/04/16/modding.

¹⁹⁹ See KUSHNER, *supra* note 197, at 166-68.

²⁰⁰ See Lastowka & Hunter, *supra* note 16, at 43.

²⁰¹ See Janelle Brown, *Volunteer Revolt*, SALON, Sept. 21, 2002, at http://dir.salon.com/tech/log/2000/09/21/ultima_volunteers/index.html.

²⁰² See *id.*; Koster, *The Laws of Online World Design*, *supra* note 154.

²⁰³ See Wagner James Au, *The Year in Games*, SALON, Dec. 22, 2004, at http://www.salon.com/tech/feature/2004/12/22/year_in_games.

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lawsuit over uncompensated overtime owed to its programmers and other workers that has attracted widespread attention online.²⁰⁴

Consider a variation on the *Marvel v. NCSoft* scenario. In their complaint Marvel alleges that participants are using *City of Heroes* software to create characters that infringe Marvel's copyrights.²⁰⁵ Consider instead a situation where a proprietor, Frame Studios, claims ownership in all the intellectual property in a hypothetical virtual world, *The Barbarian Chronicles*, including the creations of participants. Jane Dolor, a participant in *The Barbarian Chronicles*, creates a character, Dolor the Barbarian, who becomes extremely popular in the virtual world of *The Barbarian Chronicles*. Ms. Dolor spends hundreds of hours developing the character of Dolor the Barbarian through the virtual world, interacting with hundreds of other participants. It is her creativity that brings value to the character. The warm reception to her character and the dialogue she writes for it inspires Ms. Dolor to write a story about other adventures of Dolor the Barbarian, and to write a book based on the Barbarian's adventures. Enterprisingly, she decides to publish the book herself but she is sued by Frame Studios for violating their copyright in Dolor the Barbarian. Frame Studios then licenses Dolor the Barbarian to a comic book publisher and a TV studio to create a series of adventures based on the character.

When a proprietor refuses to grant granting property rights but is unable to wipe out property transfers effectively,²⁰⁶ there exists a risk of creating a class who have developed creations with economic value but are unable to access a system of law to realize their contribution.²⁰⁷ This phenomenon is similar to the wealth of the poor in countries with ineffective legal systems described by the economist Hernando De Soto.²⁰⁸ Professor De Soto analyzes the unrealizable wealth of the world's poor hampered by lack of legal recognition of the property they have created. Interestingly, one of the developers of the virtual world Second Life, which has been prominent in granting intellectual

²⁰⁴ See Katharine Mieszkowski, *Santa's Sweatshop*, Salon, Dec. 2, 2004, at http://www.salon.com/tech/feature/2004/12/02/no_fun_and_games.

²⁰⁵ See Complaint at 2, *Marvel Enterprises, Inc. vs. NCSoft Corp.*, (C.D. Ca. Nov. 11, 2004) (No. 04CV9253), at http://www.eff.org/IP/Marvel_v_NCSoft/20041115_Marvel_NCSoft.pdf.

²⁰⁶ See Daniel Terdiman, *Virtual Trade Tough Nut to Crack*, Wired, Dec. 20, 2004, at <http://www.wired.com/news/print/0,1294,66074,00.html>.

²⁰⁷ See, e.g., *User Agreement for Ragnarok Online* § 10, at <http://iro.ragnarokonline.com/utility/agreement.asp> (last modified July 29, 2002) (stating that Gravity, the proprietor of the virtual world Ragnarok Online, owns the copyright to the entire contents of the game, and that users cannot "modify, publish, transmit, participate in the transfer or sale, create derivate works, or in any way exploit, any of the content" without permission).

²⁰⁸ See generally HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000).

property rights to participants, has cited De Soto as an inspiration for the justice of participant property rights.²⁰⁹

An analogy to current participants of virtual worlds may seem superficially unappealing. Participants could be considered an elite group financially, possessing technological competence, and utilizing disposable income to maintain their participation in virtual worlds. However the point is to establish a just system for widespread usage. If virtual worlds are to become revolutionary forums for communication, the grounding of rights for participants should be done at the outset. Otherwise participants will develop potentially valuable intellectual property through their imaginative efforts but be unable to realize anything from their achievements. All the while, potentially valuable properties remain under the threat of seizure by proprietors.

I. Real Contact, Virtual Worlds

John Stuart Mill argued that “[i]t is hardly possible to overstate the value, in the present state of human improvement, of placing human beings in contact with other person dissimilar to themselves, and with modes of thought and action unlike those with which they are familiar.”²¹⁰ Companies have already attempted to intervene in worlds to create diversity of experience.²¹¹ Refusing to allow property ownership by participants in virtual worlds will inevitably limit the diversity of the citizenry of virtual worlds to those who do not need to earn money or acquire property in virtual worlds in order to participate. This economic discrimination will have inevitable negative diversity effects particularly if virtual worlds are to become global forums.

We live in a world with relative ease of travel, but borders still exist. Although the transaction costs of travel have diminished markedly, the borders of nation states still have power.²¹² Despite these interruptions we do not consider that much of our travel freedom has been destroyed. In contrast the “borderless” virtual worlds are far more hemmed in. Exit in a virtual world means the loss of a participant’s time and financial investment, and the inability to control the character she has created or any other virtual property she has acquired.

²⁰⁹ See Cory Ondrejka, *Escaping the Gilded Cage: User Created Content and Building the Metaverse*, 49 N.Y.L. SCH. L. REV. 81, 100 (2004).

²¹⁰ JOHN STUART MILL, 3 PRINCIPLES OF POLITICAL ECONOMY 135 (1923).

²¹¹ See Daniel Terdiman, *Heavy Price for Free Speech*, WIRED, Nov. 2, 2004, at <http://www.wired.com/news/games/0,2101,65532,00.html>.

²¹² See Amy Yee, *Travel Industry Says US Loses Billions Because of Bad Image*, FIN. TIMES, May 8, 2005, at <http://news.ft.com/cms/s/74341744-bfe8-11d9-b376-00000e2511c8.html> (describing the economic effects of heightened border procedures which discourage business travel and international students.)

VI. CONCLUSION

Experimentation with the structure, governance, and grant of property rights in virtual worlds should be encouraged because greater freedom in these areas is essential to continued development of the medium. Experimentation will be encouraged by increasing the autonomy of participants who will then play a far more significant role than ever before in the evolution of virtual worlds. One of the best ways to accomplish this goal will be to recognize that participants should have the right to own the property they create, develop, and purchase. Professor Castronova suggests that the reason the “market [in virtual worlds] will probably not be dominated by a few companies can be found in the many competitive strategies that are available even now, but have not yet been exploited by new entrants.”²¹³ The entry of the participant-friendly property regime in Second Life and Sony’s development of a virtual property exchange suggest that this experimentation is beginning to be extended to questions of property. Avoiding restrictive legislation will help to allow this experimentation to flourish. At the same time we should not mistake exploitation for a benign commons. A failure to recognize property ownership by participants will serve only to concentrate power and property; it will not free us from their effects. Recognizing the property rights of participants will allow the organic development of virtual worlds toward their oft-prophesied destiny as revolutionary communications forums. Norms can and will develop in virtual worlds, but it is unlikely that they will develop independent from the pervasive influence of real-world property laws in what is often a pay-to-play medium. Recognition of property rights will provide a basic foundation on which individual participants can assume a material position in virtual worlds. If proprietors could not arbitrarily destroy participant property or sever participant control of property by banning participants, proprietors would be forced to confront participants from a less authoritarian position. Property would also provide a basis through which participants could organize to deal collectively with proprietors. In this situation, the recognition of participant property rights could lead to a new form of joint ownership in virtual worlds. This is essential to recognition of participants’ rights because it acknowledges the symbiotic relationship of proprietors and participants. Recognizing property rights among participants is likely to begin the democratizing path in an autocratic medium. This democratization is necessary if virtual worlds are to fulfill the hopes that they will become new means for people to meet and communicate and not remain as tightly regulated amusement parks run according to the apparently benign despotism of proprietors.

²¹³ Castronova, *On Virtual Economies*, *supra* note 24, at 26.