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## Litigating Second Life Land Disputes: A Consumer Protection Approach.

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### Cover Page Footnote

Thanks to the Fordham IPLJ editorial board and staff for their diligence on this project. Special thanks to Professor Sonia Katyal, a great mentor and friend. The author also appreciates the constant love and support of Elizabeth and the rest of his family.

# Litigating Second Life Land Disputes: A Consumer Protection Approach

Paul Riley\*

A Secondary world may be full of extraordinary beings . . . and extraordinary events . . . but, like the primary world, it must, if it is to carry conviction, seem to be a world governed by laws, not by pure chance.<sup>1</sup>

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<sup>1</sup> W.H. AUDEN, SECONDARY WORLDS 81–82 (1984).

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## INTRODUCTION

Anshe Chung is your typical real estate entrepreneur.<sup>2</sup> Her business, Anshe Chung Studios, employs over eighty designers, architects, and other staff; and the property she has developed houses and provides commercial space for thousands of people on over forty square kilometers of land.<sup>3</sup> With so much development for so many lessees, renters, and purchasers, it is not terribly surprising that Chung's business has made her a millionaire.<sup>4</sup> What may come as a surprise, however, is that neither Chung nor the land she develops actually exists—at least not in the physical, corporeal sense.<sup>5</sup> Though the dollars Chung receives for her parcels of land are real, she is simply an avatar,<sup>6</sup> an online

<sup>2</sup> See Robert D. Hof, *My Virtual Life*, BUS. WK., May 1, 2006, at 72.

<sup>3</sup> See Anshe Chung Studios—Introduction, <http://acs.anshechung.com> (last visited Feb. 18, 2009).

<sup>4</sup> See Hof, *supra* note 2, at 72; Press Release, Anshe Chung Studios, Anshe Chung Becomes First Virtual World Millionaire (Nov. 26, 2006), *available at* [http://www.anshechung.com/include/press/press\\_release251106.html](http://www.anshechung.com/include/press/press_release251106.html) [hereinafter Press Release, Anshe Chung Studios].

<sup>5</sup> Hof, *supra* note 2, at 72.

<sup>6</sup> "Representational proxies in . . . virtual spaces are known as 'avatars,' a word of Hindu religious origin." F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CAL. L. REV. 1, 6 (2004) (citing Edward Castronova, *On Virtual Economies* 6 (CESifo, Working Paper No. 752, 2002), *available at* <http://papers.ssrn.com/abstract=338500>).

representation of the Chinese businesswoman Ailin Graef, and Chung and the land she develops for her customers only exist in the virtual world<sup>7</sup> Second Life. The “land” is in reality nothing more than space on servers located in California, where Linden Research, Inc. (“Linden”), the operator of Second Life, maintains its headquarters.<sup>8</sup>

As against other users of Second Life, Chung seemingly has all of the property rights in the proverbial bundle.<sup>9</sup> She can use the land that she buys from Linden<sup>10</sup> for herself. She can transfer it to others.<sup>11</sup> Indeed, Chung’s entire business model relies on free alienability of her virtual land.<sup>12</sup> Perhaps most importantly,<sup>13</sup> she

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<sup>7</sup> Edward Castronova, an economist, defines “virtual world” as follows:

A virtual world . . . is a computer program with three defining features: [(1)] Interactivity: it exists in one computer but can be accessed remotely (i.e. by an internet connection) and simultaneously by a large number of people, with the command inputs of one person affecting the command results of other people[; (2) p]hysicality: people access the program though an interface that simulates a first-person physical environment on their computer screen[; and (3) p]ersistence: the program continues to run whether anyone is using it or not; it remembers the location of people and things, as well as ownership of objects.

Edward Castronova, *Virtual Worlds: A First-Hand Account of Market and Society on the Cyberian Frontier* 6–7 (CESifo, Working Paper No. 618, 2001), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=294828](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=294828).

<sup>8</sup> See Press Release, Anshe Chung Studios, *supra* note 4 (“The fortune Chung commands in Second Life . . . is supported by 550 servers or land ‘simulators.’”).

<sup>9</sup> The description of property as a bundle of rights is a familiar trope in many law school property classes, and it has been used many times by the Supreme Court. See, e.g., *United States v. Craft*, 535 U.S. 274, 279 (2002) (“A common idiom describes property as a ‘bundle of sticks’—a collection of individual rights which, in certain combinations, constitute property.”).

<sup>10</sup> Linden provides land to its users via an auction system. See *Second Life—Land Auctions*, <http://usd.auctions.secondlife.com> (last visited Feb. 23, 2009).

<sup>11</sup> See *Second Life—Purchasing Land*, <http://secondlife.com/land/purchasing.php> (last visited Feb. 23, 2009) (“Residents are always putting plots of land up for sale. You can see what’s currently on the market by checking out Second Life’s inworld map to view what’s currently for sale . . .”).

<sup>12</sup> See Press Release, Anshe Chung Studios, *supra* note 4.

<sup>13</sup> See generally *Lorretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982) (“[T]he landowner’s right to exclude [is] ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’” (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979))).

can also exclude other users from coming upon it.<sup>14</sup> However, as against Linden, Chung has none of these rights, because in order to use Second Life, she, like all users, agreed to Second Life's Terms of Service ("ToS") that classify her not as an owner of land at all, but instead as merely a licensee of Linden's server space.<sup>15</sup> Thus, according to the ToS, Linden can shut down Chung's Second Life account and seize all of her virtual assets for any or no reason.<sup>16</sup> Moreover, it can do so without paying her compensation.<sup>17</sup> Indeed, Linden's ToS emphasize that Linden has no duty to protect any value purchased or created by Second Life users.<sup>18</sup> Linden, of course, has every incentive to keep Chung happily in business in Second Life. After all, she helps drive its economy by providing other users with developed land, a valuable service that is attractive to current and potential users of Second Life. But what if Chung violated a term of the ToS, and Linden, as a result, terminated Chung's account? What rights, if any, would Chung have to her virtual assets? Moreover, if a court found that Chung had some sort of property rights to her assets, would these rights be trumped by Linden's contract rights under the ToS? These rather

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<sup>14</sup> See Posting of Glyn Moody to Open . . . , *Interview with Second Life's Philip Rosedale, Part II*, [http://opendotdotdot.blogspot.com/2006/11/interview-with-second-lifes-philip\\_28.html](http://opendotdotdot.blogspot.com/2006/11/interview-with-second-lifes-philip_28.html) (Nov. 28, 2006, 1:28 P.M.) (stating that landowners in Second Life have an ability to exclude others from their land if they choose to do so as landowners).

<sup>15</sup> See Second Life—Terms of Service § 3.1, <http://secondlife.com/corporate/tos.php> (last visited Feb. 18, 2009) [hereinafter Second Life—Terms of Service] ("Subject to the terms of this Agreement, Linden Lab grants to you a non-exclusive, limited, fully revocable license to use the Linden Software and the rest of the Service during the time you are in full compliance with the Terms of Service.").

<sup>16</sup> The ToS provide:

Linden Lab reserves the right to interrupt the Service with or without prior notice for any reason or no reason. You agree that Linden Lab will not be liable for any interruption of the Service, delay or failure to perform, and you understand that except as otherwise specifically provided in Linden Lab's billing policies posted at <http://secondlife.com/corporate/billing.php>, you shall not be entitled to any refunds of fees for interruption of service or failure to perform. Linden Lab has the right at any time for any reason or no reason to change and/or eliminate any aspect(s) of the Service as it sees fit in its sole discretion.

*Id.* § 1.6.

<sup>17</sup> See *id.* §§ 1.6, 5.3.

<sup>18</sup> *Id.* § 5.3 ("Linden Lab does not provide or guarantee, and expressly disclaims . . . any value, cash or otherwise, attributed to any data residing on Linden Lab's servers.").

basic questions demonstrate Second Life's new framing of the old struggle between property law and contract law.<sup>19</sup>

Many commentators have made the normative case for why the law should recognize virtual property such as Chung's land or the buildings that sit upon it,<sup>20</sup> and some have suggested, as a practical matter, how a court might overcome the problem of the intangibility of virtual assets.<sup>21</sup> Still other commentators have argued that virtual-world End User Licensing Agreements ("EULAs") and ToS, including the ToS used by Linden for Second Life, should be struck down as unconscionable.<sup>22</sup> While this Note shares the sentiment that courts should recognize virtual property rights, it argues that, at least in the near term, they will not—given

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<sup>19</sup> See generally Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047, 1083–84 (2005) (“[W]hy should we permit consensual agreements that prevent formation of property rights in the first instance any more than we tolerate other consensual restraints on alienation? The function of property law is in large part to resist contractual limitations on property use. If the restraint on alienation limits the property in question to low-value uses, we term it an unreasonable restraint and do not enforce it.”); Molly Shaffer van Houweling, *The New Servitudes*, 96 GEO. L.J. 885 (2008) (describing End User Licensing Agreements, EULAs, as the “new servitudes” and tracing the history of and judicial skepticism toward real covenants and equitable servitudes in the law).

<sup>20</sup> See, e.g., Fairfield, *supra* note 19, at 1048 (“Should computer code that is designed to act like real world property be regulated and protected like real world property? This article contends that it should.”); Lastowka & Hunter, *supra* note 6, at 72 (“[I]t seems clear that virtual assets can be characterized as property for the purposes of real-world law.”); Theodore J. Westbrook, Comment, *Owned: Finding a Place for Virtual World Property Rights*, 2006 MICH. ST. L. REV. 779, 781 (2008) (“[A]n understanding of property theory suggests that property rights in virtual goods are bound to be recognized or created gradually as society increasingly depends on such rights.”). Importantly, treating virtual assets as property would not create a new form of property and, thus, would not violate the common law's ban on the creation of new types of property rights. See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 4 (2000) (“In the common law, the principle that property rights must conform to certain standardized forms has no name. In the civil law, which recognizes the doctrine explicitly, it is called the numerus clausus—the number is closed.”). The numerus clausus principle functions to limit the creation of idiosyncratic property forms and consequently measurement, frustration, and administrative costs. See Merrill & Smith, *supra* at 38.

<sup>21</sup> See Fairfield, *supra* note 19, at 1055–56; Lastowka & Hunter, *supra* note 6, at 42; Allen Chein, Note, *A Practical Look at Virtual Property*, 80 ST. JOHN'S L. REV. 1059, 1075 (2006).

<sup>22</sup> See, e.g., Andrew Jankowich, *The Complex Web of Corporate Rule-Making in Virtual Worlds*, 8 TUL. J. TECH. & INTELL. PROP. 1, 52–53 (2006) (concluding that EULAs and ToS should not be enforced because of their complete one-sidedness).

the doctrinal deficiencies of the property- and contract-based approaches to finding those rights and given the effects of recent developments in the law regarding virtual worlds. Consequently, this Note explores a third approach apart from property and contract law. It examines Second Life, the virtual world that has recently become the subject of heavy judicial<sup>23</sup> and government scrutiny,<sup>24</sup> and argues that consumer protection law provides Chung and other landowners in Second Life with the best means of relief in the event that Linden seizes their virtual assets.

Consumer protection law not only allows a potential plaintiff to avoid having to cut through the doctrinal Gordian knot presented by the contract-based and property-based approaches to virtual property issues, but also has a normative appeal because Second Life, much more than any other virtual world, is so vigorously commodified,<sup>25</sup> and this commodification has largely been driven by Linden's representations to Second Life users. Two of the most glaring examples of Second Life's commodification are Linden's sales of land to Second Life users, which is the primary revenue generator for Linden,<sup>26</sup> and Linden's active fostering of a currency

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<sup>23</sup> A virtual land deal gone awry was the subject of *Bragg v. Linden Research*, 487 F. Supp. 2d 593, 604 (E.D. Pa. 2007). See *infra* Part I.C.1.

<sup>24</sup> See, e.g., Wily Ferret, *Second Life Shuts Down Casinos*, INQUIRER, July 26, 2007, [http://www.theinquirer.net/inquirer/flare\\_author/004/1029004/second-life-shuts-down-casinos/](http://www.theinquirer.net/inquirer/flare_author/004/1029004/second-life-shuts-down-casinos/) (describing Linden's decision to shut down casinos in Second Life after the FBI launched an investigation into their legality); Adam Reuters, *US Congress Launches Probe into Virtual Economies*, REUTERS SECOND LIFE NEWS CENTER, Oct. 15, 2006, <http://secondlife.reuters.com/stories/2006/10/15/us-congress-launches-probe-into-virtual-economies/> (describing Congress's decision to investigate whether it should tax virtual economies).

<sup>25</sup> Jack Balkin explains the fundamental problem of commodification of virtual worlds as follows:

If platform owners encourage real-world commodification of virtual worlds, encourage people in these worlds to treat virtual items like real property, and allow the sale and purchase of these assets as if they were property, they should not be surprised if courts, legislatures, and administrative agencies begin to treat virtual items as property.

Jack M. Balkin, *Law and Liberty in Virtual Worlds*, in *THE STATE OF PLAY: LAW, GAMES, AND VIRTUAL WORLDS* 86, 95 (Jack M. Balkin & Beth Simone Noveck eds., 2006) [hereinafter Balkin, *Law and Liberty in Virtual Worlds*].

<sup>26</sup> See Allen Rappeport, *Second Life's John Zdanowski*, CFO MAGAZINE, Oct. 1, 2007, <http://www.cfo.com/article.cfm/9858165> ("Land sales and maintenance make up about

exchange, the LindeX, where Second Life's currency, the Linden dollar, can be converted into U.S. dollars.<sup>27</sup> The inevitable result of this commodification, when taken together with Linden's representations about its virtual world, is reliance by Second Life users that, among other things, their rights to the virtual land that they believed they had purchased "free and clear," a representation that Linden's former CEO, Philip Rosedale, has made,<sup>28</sup> are the same as their rights to real-world land to which they would actually hold title.

Consumer protection law, unlike contract and property law, has a normative appeal here because Second Life's commodification has transformed users of Second Life from mere "players" who are there to enjoy the world's camaraderie and community into "consumers" who are there to spend and make money. Consumer protection law recognizes the importance of this classification. It jettisons the fiction that all actors in a marketplace have equal bargaining power or sufficient information to bargain at all, and instead affords relief to consumers based upon their classification as such.<sup>29</sup> Markets often are not efficient, market actors are not

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60 percent of our billings."). Interestingly, in an effort to grow its total land sales revenue, Linden increased the land supply in Second Life and lowered its price. *See, e.g.,* Eric Reuters, *Linden to Increase Land Supply, Drop Prices*, REUTERS SECOND LIFE NEWS CENTER, Apr. 8, 2008, <http://secondlife.reuters.com/stories/2008/04/08/linden-to-increase-land-supply-drop-prices/>.

<sup>27</sup> *See* Second Life—Currency Exchange, <http://secondlife.com/whatis/currency.php> (last visited Feb. 16, 2008) [hereinafter Second Life—Currency Exchange] ("Several online resources allow residents to convert Linden Dollars into US Dollars and vice-versa. Rates fluctuate based on supply and demand, but over the last few years they have remained fairly stable at approximately 250 Linden Dollars (L\$) to the US Dollar.").

<sup>28</sup> Posting of Aleks Krotoski to Games Blog, *Second Life and the Virtual Property Boom*, <http://www.guardian.co.uk/technology/gamesblog/2005/jun/14/secondlifeand> (June 14, 2005, 10:41 BST) ("We launched Second Life without out of world trade and after a few months we looked at it and thought, 'We're not doing this right, we're doing this wrong.' We started selling land free and clear, and we sold the title, and we made it extremely clear that we were not the owner of the virtual property." (quoting Second Life's then-CEO and founder Philip Rosedale)).

<sup>29</sup> *See* John Goldring, *Consumer Law and Legal Theory: Reflections of a Common Lawyer*, 13 J. CONSUMER POL'Y 113, 116 (1990) [hereinafter Goldring, *Consumer Law and Legal Theory*] ("A real distinction between those who need the protection of the law and those who do not is based on their relative power. In general, consumers as consumers lack power relative to suppliers and producers. It can be argued that one function of consumer law is to redress this imbalance of power.").

always rational, and market actors often have relatively little bargaining power.<sup>30</sup> Consumer protection law, a legislative product, recognizes these realities while the common law of contract often does not.<sup>31</sup> As discussed in detail below, one only needs to look to the current judicial trend of strictly enforcing EULAs and ToS for prominent examples of judicial failure to recognize the nature of the marketplace and for an example of the effect of this failure: the creation of doctrinal gaps in the common law that can easily ensnare unwitting market participants. Consumer protection law fills these doctrinal gaps and thus can afford relief where the common law cannot.<sup>32</sup> Some land purchasers in Second Life, this Note concludes, have been ensnared, and courts hearing disputes between Linden and aggrieved Second Life users under California's broad and powerful consumer protection law will ignore neither the nature of Linden's representations nor the strong reliance interests that these representations created. Consumer protection law's doctrine is readily available to Second Life users; this Note advocates that they should use it.

Part I of this Note begins by providing context regarding Second Life and explains the characteristics that make Second Life so different from other virtual worlds. Next, Part I describes in detail how the economy of Second Life functions and how Second Life and particularly land sales there generate revenue for Linden. Finally, Part I explores some of the property-based and contract-based arguments for judicial recognition of virtual property and examines (1) *Bragg v. Linden Research, Inc.*, a case holding Linden's ToS unconscionable;<sup>33</sup> (2) the changes Linden made to its ToS in the wake of the court's ruling; (3) how *Bragg* fits into the existing case law regarding the enforceability of EULAs generally; and (4) the likelihood of success of contract- and property-law-based attacks on Linden in the future.

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<sup>30</sup> See *id.*

<sup>31</sup> See John Goldring, *Consumer Protection Globalization and Democracy*, 6 CARDOZO J. INT'L & COMP. L. 1, 3-4 (1998) [hereinafter Goldring, *Consumer Protection Globalization and Democracy*].

<sup>32</sup> See *id.*

<sup>33</sup> See *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593 (E.D. Pa. 2007).

Part II discusses the consumer protection approach in detail. It explains the elements of Second Life's commodification and the troublesome nature of Linden's representations to its users. Moreover, it explains how California's consumer protection law can regulate these representations and how specifically it can provide relief to an aggrieved Second Life user.

## I. SECOND LIFE'S LANDSCAPE, VIRTUAL PROPERTY, AND THE PROBLEM OF CONTRACT

### A. *Brave New World: Second Life's Landscape*

#### 1. Why is Second Life Unique Among Virtual Worlds?

In his seminal cyberpunk thriller *Snow Crash*, Neal Stephenson described an immersive online world in which millions of people could enjoy second lives, existences not all that different from their lives in the real world. He wrote:

Hiro is approaching the Street. It is the Broadway, the Champs Élysées of the Metaverse. . . . It does not really exist. But right now, millions of people are walking up and down it. . . . Of these billion potential computer owners, maybe a quarter of them actually bother to own computers, and a quarter of these have machines that are powerful. . . . That makes for about sixty million people who can be on at any given time.<sup>34</sup>

Stephenson referred to this world as the "Metaverse."<sup>35</sup> Simply put, Second Life represents an attempt by Linden to make Stephenson's vision a reality.<sup>36</sup> Second Life has millions of users

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<sup>34</sup> NEAL STEPHENSON, *SNOW CRASH* 24–26 (2008).

<sup>35</sup> *Id.* at 24.

<sup>36</sup> See Cory Ondrejka, *Escaping the Gilded Cage: User Created Content and Building the Metaverse*, 49 N.Y.L. SCH. L. REV. 81, 87–101 (2004) (stating that the Metaverse will only be fully realized when the free markets are invited into the world and when users are given ownership rights over their intellectual property and describing how Second Life has taken both of these steps).

from around the globe,<sup>37</sup> and in July 2008 alone, economic activity equaling “[o]ver US\$9.5 million was traded on the LindeX.”<sup>38</sup> In Second Life, “residents,” as Linden refers to Second Life users, can take part in many of the same activities as they can in the real world. They take on pursuits as complex as running a business,<sup>39</sup> staging a political rally for a real-world presidential candidate,<sup>40</sup> or engaging in acts of civil disobedience,<sup>41</sup> and as simple as going to a lecture<sup>42</sup> or going for a spin with friends in the newest version of Toyota’s Scion.<sup>43</sup>

These types of activities are quite different from the more purely gaming activities carried out in traditional “leveling” virtual worlds or massive multiplayer online role-playing games (“MMORPGs”), as they are often called.<sup>44</sup> In MMORPGs, such as the hugely popular games World of Warcraft and EverQuest, a

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<sup>37</sup> See Second Life—FAQ, <http://secondlife.com/whatis/faq.php> (last visited Feb. 23, 2009) [hereinafter Second Life—FAQ]. There is, however, some dispute over just how many of those users are logged in at any one time. See Shaun Rolph, *The Phony Economics of Second Life*, REGISTER, Dec. 20, 2007, [http://www.theregister.co.uk/2007/02/20/second\\_life\\_analysis/print.html](http://www.theregister.co.uk/2007/02/20/second_life_analysis/print.html) (stating that there are only 15,000 clients logged in to Second Life at any one time).

<sup>38</sup> Eric Reuters, *Second Life’s User Economy Shows Strong Growth*, REUTERS SECOND LIFE NEWS CENTER, Aug. 27, 2008, <http://secondlife.reuters.com/stories/2008/08/27/second-lifes-user-economy-shows-strong-growth/> (providing statistics on Second Life’s economic activity).

<sup>39</sup> See Adam Reuters, *Surge in High-End Second Life Business Profits*, REUTERS SECOND LIFE NEWS CENTER, Dec. 5, 2006, <http://secondlife.reuters.com/stories/2006/12/05/surge-in-high-end-second-life-business-profits/> (describing the large growth in the number of Second Life residents making more than \$5000 a month).

<sup>40</sup> See Posting of Sarah Wheaton to New York Times Caucus Blog, *Obama is First in Their Second Life*, <http://thecaucus.blogs.nytimes.com/2007/03/31/obama-is-first-in-their-second-life/> (Mar. 31, 2007, 3:52 P.M.) (describing grassroots organizers for Barack Obama in Second Life).

<sup>41</sup> See generally *Second Life: Facts for the Visitor*, WIRED, [http://www.wired.com/wired/archive/14.10/slfacts\\_pr.html](http://www.wired.com/wired/archive/14.10/slfacts_pr.html) (last visited Feb. 23, 2009) (describing the Second Life “Tax Revolt” in which users dressed in colonial garb covered Second Life land with giant tea crates and signs protesting Linden’s tax on user created content). This revolt proved successful, and Linden ultimately “repealed” the tax. *Id.*

<sup>42</sup> For example, Judge Richard Posner gave a lecture in Second Life last year. See John Bringardner, *IP’s Brave New World*, LAW.COM, Feb. 1, 2007, <http://www.law.com/jsp/article.jsp?id=1170237755271>; Alan Sipress, *Where Real Money Meets Virtual Reality, the Jury is Still Out*, WASH. POST, Dec. 26, 2006, at A1.

<sup>43</sup> See *Living a Second Life*, ECONOMIST, Sept. 30, 2006, at 79 (describing Toyota’s decision to give away virtual drivable Scions to Second Life users).

<sup>44</sup> See Lastowka & Hunter, *supra* note 6, at 26–28.

new user starts out the game as a weakling with neither the ability, nor the weapons, to slay powerful foes.<sup>45</sup> Because slaying enemies is often what makes many of these games fun for a user, the user's objective, naturally, is to increase the power or "level" of her avatar by taking on progressively more challenging tasks.<sup>46</sup> For example, in EverQuest, a user interested in increasing her level must progress from killing snakes and rats at a very early stage to slaying much more powerful beasts once her avatar is at an appropriate level for the challenge.<sup>47</sup> Second Life has no levels. Indeed, it has no objective at all. Second Life is not a traditional MMORPG and does not really regard itself as one.<sup>48</sup>

Creativity and ownership are the two greatest differences between Second Life and traditional MMORPGs,<sup>49</sup> and these differences are at the very root of the commodification in the virtual world. Second Life is a place for creativity because its users are responsible for creating the content of the world and everything in it.<sup>50</sup> Indeed, Cory Ondrejka, a former executive at Linden, has even gone as far as unequivocally stating that "[a]ll of the content of Second Life is built by its users inside the world."<sup>51</sup> Users are able to create the content of the world because Linden provides them with tools to manipulate small elements of virtual matter, primitives, which are a sort of virtual-world equivalent to real-world atoms.<sup>52</sup> Using the process of atomistic construction, therefore, Second Life users can create everything from an article of virtual apparel to virtual office buildings. They can create

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<sup>45</sup> *See id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *See* Second Life—FAQ, *supra* note 37 ("Is Second Life a Game? Yes and no. While the Second Life interface and display are similar to most [MMORPGs], there are two key, unique differences: Creativity . . . Ownership.").

<sup>49</sup> *See id.*

<sup>50</sup> *See Living a Second Life*, *supra* note 43, at 77 ("By emphasizing creativity and communication, Second Life is different from other synthetic worlds. Most . . . MMORPGs . . . offer players pre-fabricated or themed fantasy worlds.").

<sup>51</sup> Symposium, *Regulating Digital Environments: Ownership in Online Worlds*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 807, 820 (2006); *see also* Ondrejka, *supra* note 36, at 87 ("Well over 99% of the objects in Second Life are user created . . .").

<sup>52</sup> *See Living a Second Life*, *supra* note 43, at 78.

objects that look and act like real-world objects or objects that defy the laws of physics.<sup>53</sup>

The second difference, ownership, is closely connected with creativity. In order to further spur the creativity of its users and accordingly the growth of in-world content, Linden recognizes Second Life users' intellectual property rights to the content they create in Second Life.<sup>54</sup> This idea is anathema in traditional MMORPGs.<sup>55</sup> In practice, this means that Second Life users have control over the content they create and whether, among other things, the content can be copied, modified or transferred to others.<sup>56</sup> Moreover, users are able to enforce these rights pursuant to the Digital Millennium Copyright Act ("DMCA").<sup>57</sup> Interestingly, however, users have very few rights to their creations as against Linden.<sup>58</sup> An exploration of the legal implications of

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<sup>53</sup> See *id.*

<sup>54</sup> See Second Life—Terms of Service, *supra* note 15, § 3.2 ("Linden Lab acknowledges and agrees that, subject to the terms and conditions of this Agreement, you will retain any and all applicable copyright and other intellectual property rights with respect to any Content you create using the Service, to the extent you have such rights under applicable law."); Second Life—IP Rights, [http://secondlife.com/whatis/ip\\_rights.php](http://secondlife.com/whatis/ip_rights.php) (last visited Feb. 9, 2008) ("Linden Lab's Terms of Service agreement recognizes Residents' right to retain full intellectual property protection for the digital content they create in Second Life, including avatar characters, clothing, scripts, textures, objects and designs. This right is enforceable and applicable both in-world and offline, both for non-profit and commercial ventures. You create it, you own it—and it's yours to do with as you please."). Interestingly, one Second Life user recently trademarked her avatar. See Benjamin Duranske, 'Aimee Weber' (TM) Gets USPTO Stamp of Approval for Pigtails, Tutu, Wings, Tights, Stompy Boots, VIRTUALLY BLIND, Sept. 21, 2007, <http://virtuallyblind.com/2007/09/21/aimee-weber-trademark/>.

<sup>55</sup> See Richard A. Bartle, *Virtual Worldliness*, in THE STATE OF PLAY: LAW, GAMES, AND VIRTUAL WORLDS 31, 37 (Jack M. Balkin & Beth Simone Noveck eds., 2006) (arguing from the perspective of a virtual-world designer that the designer of the virtual world should have absolute control over her world in order to protect the integrity of the game conceit).

<sup>56</sup> *Living a Second Life*, *supra* note 43, at 78.

<sup>57</sup> See Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.); Second Life—DMCA: Digital Millennium Copyright Act, <http://secondlife.com/corporate/dmca.php> (last visited Feb. 21, 2009).

<sup>58</sup> The ToS grant Linden Labs "a royalty-free, worldwide, fully paid-up, perpetual, irrevocable, non-exclusive right and license to . . . use, reproduce and distribute [the] Content within the Service . . . and . . . [the right to] use and reproduce (and to authorize third parties to use and reproduce) any of [the] Content in any or all media for marketing and/or promotional purposes . . ." Second Life—Terms of Service, *supra* note 15, § 3.2.

this contractual provision is beyond the scope of this Note, though it seems likely that this provision will be a source of litigation in the future.<sup>59</sup>

Ownership and creativity in Second Life foster commodification because they allow for the creation of not only innovative products by users, but also a scarcity of those products and, consequently, creation of a marketplace where users can sell the in-world items that they create for Linden dollars, which they can then exchange for real-world dollars.<sup>60</sup> Since April 2007, the trading activity of LindeX, Second Life's currency exchange, has averaged around \$250,000 a day.<sup>61</sup> Users have been attracted to the commercial aspect of Second Life; running a business has become one of the most popular activities that take place in the virtual world.<sup>62</sup> This is especially so given that in Second Life there are very few of the barriers to entry that exist in the real world and that the marginal cost of producing virtual inventory for sale is literally nothing. Unsurprisingly, an entire cottage industry has developed around helping Second Life residents open and run in-world businesses.<sup>63</sup>

## 2. The Importance of Land in Second Life

Running a Second Life business, however, has its costs. Importantly, only landowners in Second Life can sell their virtual

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<sup>59</sup> See generally Benjamin Duranske, *Commentary: Second Life's Terms of Service Stifle Innovation by Making Patents Worthless In-World*, VIRTUALLY BLIND, Sept. 27, 2007, <http://virtuallyblind.com/2007/09/27/patent-rights-second-life>.

<sup>60</sup> See Second Life—Currency Exchange, *supra* note 27.

<sup>61</sup> See Second Life Grid—Economics, <http://secondlifegrid.net/spt/resources/factsheet/economics> (last visited Feb. 11, 2008).

<sup>62</sup> See *Living a Second Life*, *supra* note 43, at 78 (stating that as of 2006, there were about 7,000 profitable businesses in Second Life); Second Life—Business Opportunities, <http://secondlife.com/whatis/businesses.php> (last visited Feb. 25, 2008) (“There are as many opportunities for innovation and profit in Second Life as in the Real World. Open a nightclub, sell jewelry, become a land speculator; the choice is yours to make. Thousands of residents are making part or all of their real life income from their Second Life Businesses.”).

<sup>63</sup> One can see this simply by searching “second life business” on Amazon.com. There are many books dedicated to the topic of running a business on Second Life. A cursory search yields such titles as *How to Make Real Money in Second Life* and *The Entrepreneur's Guide to Second Life*.

creations.<sup>64</sup> In order to own land, a user must pay a monthly membership fee, pay a land use fee, and purchase the land from Linden or another Second Life user, such as Anshe Chung, who has purchased the land from Linden.<sup>65</sup> In this, Linden has incentivized the user's purchase of land in Second Life. This point is particularly important because Linden's primary source of revenue is land sales.<sup>66</sup> Again, this business model is markedly different from that of traditional MMORPGs, where the providers earn a bulk of their revenue from subscriptions.<sup>67</sup> Linden also charges a monthly subscription for its "premium" accounts, and these accounts make up a substantial portion of the balance of Linden's revenue;<sup>68</sup> however, even this revenue is intertwined with the acquisition and ownership of land. The primary benefit of a premium account, after all, is that it provides a "land ownership opportunity."<sup>69</sup> While a user with a basic (free) account can join Second Life, customize an avatar, interact with others, and even use Second Life's atomistic construction tools, she cannot own land, and thus run a business, without upgrading to a premium membership.<sup>70</sup> Land ownership, therefore, is not only very important to Second Life users, but also to Linden. For users, land ownership provides the opportunity to run a business and in some cases, as with Ms. Chung, serves as the basis of the business. For Linden, land and services connected with land generate a substantial majority of its revenue.

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<sup>64</sup> See Second Life—Frequently Asked Questions from Beginning Landowners, <https://support.secondlife.com/ics/support/default.asp?deptID=4417&task=knowledge&questionID=5198> (last visited Feb. 21, 2009) [hereinafter Second Life—FAQ from Beginning Landowners] ("Residents use their land to build homes and businesses.").

<sup>65</sup> *Id.*

<sup>66</sup> Rappoport, *supra* note 26; Linden Lab—Factsheet: Economics, <http://lindenlab.com/pressroom/general/factsheets/economics/> (last visited Feb. 21, 2009) [hereinafter Linden Lab, Factsheet: Economics] ("Linden Lab's primary revenue stream comes from the lease of virtual land.").

<sup>67</sup> See EDWARD CASTRONOVA, *EXODUS TO THE VIRTUAL WORLD* 32–33 (2007) ("In the late 1990s, all games were based on a monthly subscription model. . . . But new revenue models have been introduced . . . . Second Life, for example, offers free registration to anyone who wants it.").

<sup>68</sup> See Linden Lab—Factsheet: Economics, *supra* note 66.

<sup>69</sup> See Second Life—Membership Plans, <http://secondlife.com/whatis/plans.php> (last visited Feb. 21, 2009).

<sup>70</sup> *See id.*

Because land sales are Linden's lifeblood, it is unsurprising that Linden actively markets its land to users with many different representations. Part II.C of this Note explores those representations, their limits, and their consequences in its discussion of the benefits of consumer protection law for aggrieved Second Life users. First, however, the next Section briefly examines some of the property-based arguments for judicial recognition of virtual property.

### *B. Virtual Property Scholarship*

Though the leading scholars on virtual property issues explain why and to what extent a court *should* protect virtual property under property law, these commentators fail to address, as a practical matter, *how*, given the current state of both property and contract law, a court would go about finding a virtual property right. This *how* question is particularly important given that all virtual worlds are governed by ToS and EULAs that have the function of inextricably intertwining property and contract law issues.<sup>71</sup> Put simply, in order to find a user's property rights in land or other virtual assets in Second Life, a court must take two steps. First, it must strike down or otherwise refuse to enforce Linden's ToS. Second, it must articulate the property law basis of its decision. This Section provides a brief overview of some of the property-based justifications for judicial recognition of virtual property.

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<sup>71</sup> Lastowka and Hunter do acknowledge the general problems posed by EULAs and ToS. See Lastowka & Hunter, *supra* note 6, at 72. But they do not adequately explain that before a court is able to find a property right in virtual assets, it must first strike down the contract between the user and the world operator. Fairfield also recognizes that perhaps because of EULAs and ToS, courts have yet to recognize virtual property rights. See Fairfield, *supra* note 19, at 1050. But he sees ToS and EULAs as unreasonable, and thus unenforceable, restraints on property use. See *id.* at 1083. However, he, like Lastowka and Hunter, does not discuss the current case law and the general reluctance of courts to strike down EULAs and ToS.

### 1. Normative Justifications for Recognition of Virtual Property

Professors Dan Hunter and Gregory Lastowka were among the first commentators to explore the strong normative justifications for legal recognition of user rights in virtual property.<sup>72</sup> Locke's labor-desert theory, Hegel's personhood theory, and Bentham's utilitarian theory, they argue, "all provide strong normative grounds for recognizing that property rights should inhere in virtual assets, whether chattels, realty, or avatars."<sup>73</sup> Additionally, neither metaphysical nor temporal problems, Hunter and Lastowka argue, are problematic to recognition of virtual property.<sup>74</sup> Regarding metaphysical problems, our property system has long been characterized by a shift from the tangible to the intangible.<sup>75</sup> The demise of the livery of seisin is perhaps the oldest example of this shift. Regarding temporal problems, many forms of property have temporal restrictions.<sup>76</sup> Thus, just as a user of Second Life may not participate in land ownership activities if she does not pay her monthly fee, a lessee may only occupy her apartment for the period of her lease, or a copyright owner may only retain that right during the life of the work's author plus seventy years.<sup>77</sup>

Similarly, Professor Joshua Fairfield also provides a normative justification for judicial recognition of virtual property.<sup>78</sup> He argues that three behaviors of property in virtual worlds make it more like physical property than something like computer code: rivalrousness, persistence, and interconnectivity.<sup>79</sup> He describes these three traits as follows:

If I hold a pen, I have it and you don't. [That is]  
[r]ivalrousness. If I put the pen down and leave the

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<sup>72</sup> See generally Lastowka & Hunter, *supra* note 6, at 43–49.

<sup>73</sup> *Id.* at 48–49. But see Stephen J. Horowitz, *Competing Lockean Claims to Virtual Property*, 20 HARV. J.L. & TECH. 443, 457 (2007) (arguing that, from a Lockean perspective, an operator of a virtual world like Linden has a stronger labor-based claim than users).

<sup>74</sup> See Lastowka & Hunter, *supra* note 6, at 40–43.

<sup>75</sup> See *id.* at 40.

<sup>76</sup> *Id.* at 42.

<sup>77</sup> See *id.*

<sup>78</sup> See Fairfield, *supra* note 19, at 1054–55.

<sup>79</sup> *Id.*

room, it's still there. That is persistence. And finally, you can all interact with the pen—with my permission, you can experience it. That is interconnectivity. Why is code trying so hard to mimic these properties? Rivalrousness gives me the ability to invest in my property without fear that other people may take what I have built. Persistence protects my investment by ensuring that it lasts. Interconnectivity increases the value of my property due to network effects—not least of which is the fact that other people's experience of my resource may be such that it becomes desirable, and hence marketable, to them.<sup>80</sup>

Take land in Second Life as an example. It is rivalrous because once a user purchases it, she can exclude others from entering upon it. It is persistent because when a user signs off her Second Life account, the land and the developments she has made to it remain in the virtual world. Finally, it exhibits interconnectivity because the user can allow others to interact with the land by allowing them to come upon it or lease a portion of it.

Fairfield proposes property rights recognition at the level of code for virtual property<sup>81</sup> because at the level of code “the power of an owner persists over the use of the virtual property regardless of the system or chattel currently connected to it.”<sup>82</sup> In Second Life, for example, the owner of a piece of virtual land consisting of code on a server would own that code regardless of the intellectual property rights inherent in the underlying code and regardless of

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 1077–78 (“Since virtual property operates as a unified whole only at the level of code, the appropriate package of property also appears at the level of code. That is the right that matters. . . . The code right is what is important, no matter what system or chattel the code runs on. So, when considering where to make the slice between online property rights, we will preserve useful bundles of rights by granting rights to virtual property at the level of code.”).

<sup>82</sup> *Id.* at 1078. Fairfield's argument that the code level is the appropriate level in which to determine property rights to some extent challenges Professor Richard Epstein's “chattel theory” that property affects cyberspace through actual chattel property rights in physical computers or servers. See Richard A. Epstein, *Cybertrespass*, 70 U. CHI. L. REV. 73, 75 (2003).

Linden's ownership of the servers themselves.<sup>83</sup> Moreover, this level of recognition, Fairfield contends, will best prevent an anticommons<sup>84</sup> in virtual property:<sup>85</sup>

[A]lthough the idea of the anticommons is recent, the function of property law in preventing an anticommons is not. The common law of property has long sought to unify marketable title in a single person who has the full incentives to maximize the value, minimize the damage, and alienate the property when someone can put it to better use.<sup>86</sup>

Prevention of the anticommons, Fairfield concludes, can best be achieved by regulating virtual property according to a system like the common law of property.<sup>87</sup>

## 2. A Practical Approach

Another commentator, Allen Chein, departs from the normative justifications of Lastowka and Hunter, and the anticommons argument of Fairfield, and instead explores how, as a practical matter, a court might find a property right in virtual assets. He looks to domain name litigation for this answer.<sup>88</sup> In

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<sup>83</sup> See Fairfield, *supra* note 19, at 1078.

<sup>84</sup> See Michael A. Heller, *The Tragedy of the Anticommons: Property in Transition from Marx to Markets*, 111 HARV. L. REV. 621, 623 (1998) ("Anticommons property [is] a type of property regime that may result when initial endowments are created as disaggregated rights rather than as coherent bundles of rights in scarce resources."). Heller's quintessential example of the anticommons problem at work was the practice of Moscow vendors: the vendors hawked their goods at stands in front of empty storefronts on Russian streets and not in the stores themselves because the stores had impossibly tangled webs of ownership rights and entitlements. *See id.* at 639–42. The vendors were unable to determine who had the rights and entitlements to the storefronts; consequently, the storefronts went unused even though there was market demand for the space they provided. *Id.* Professors Heller and Eisenberg also wrote about the anticommons problems raised by biotechnology patent claims. *See generally* Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698 (1998). They argue that patent claims result in upstream tangles that can possibly hinder downstream technological development. *Id.*

<sup>85</sup> See Fairfield, *supra* note 19, at 1076.

<sup>86</sup> *Id.* at 1071.

<sup>87</sup> *Id.* at 1089.

<sup>88</sup> See Chein, *supra* note 21, at 1073–75.

particular, he examines *Kremen v. Cohen*.<sup>89</sup> There, the Ninth Circuit applied a three-pronged test to determine whether a property right existed in the intangible domain name, sex.com, in an action for the name's conversion.<sup>90</sup> The *Kremen* court held that a three-pronged test must be satisfied in order for it to find the existence of a property right in an intangible object: "First, there must be an interest capable of precise definition; second, it must be capable of exclusive possession; and third, the putative owner must have established a legitimate claim to exclusivity."<sup>91</sup> The domain name, sex.com, satisfied this test.<sup>92</sup>

The court reasoned that a domain name was a well-defined interest like a share of corporate stock—also intangible property—or a plot of land because the registrant of the domain name is the only person who decides where on the Internet those who invoke the domain name in a web browser's window are sent.<sup>93</sup> Moreover, the court found that the domain name was capable of exclusive possession and that Cohen had an established claim to exclusivity because the domain name was originally registered under his name.<sup>94</sup> Registering a domain name, like recording a title at the title office, the court maintained, serves a notice function that the domain name is the registrant's and no one else's.<sup>95</sup>

Underlying the court's analysis was the recognition of two other concerns about domain names. First, domain names, like other property interests, could sometimes be worth a considerable amount of money.<sup>96</sup> Second, judicial recognition of a property right in domain names ensures that registrants who have invested labor in developing and promoting their websites reap the benefit of their investments, thus promoting the growth of the Internet overall.<sup>97</sup>

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<sup>89</sup> *Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003).

<sup>90</sup> *Id.* at 1030; see Chein, *supra* note 21, at 1075.

<sup>91</sup> *Kremen*, 337 F.3d at 1030.

<sup>92</sup> *See id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

Virtual assets, Chein declares, especially in a world such as Second Life, could satisfy this test;<sup>98</sup> however, he ultimately concludes that a court would not recognize the interest because it would strictly enforce the ToS or EULA of the virtual world.<sup>99</sup> This issue of the general tendency of courts to enforce EULAs and ToS is an important one, and it foreshadows the contract discussion in the following Section of this Note.

### C. *The Contract Problem*

Some virtual-world commentators assert that virtual-world EULAs and ToS should be attacked by aggrieved litigants on the grounds of unconscionability.<sup>100</sup> Moreover, as discussed above, the assumption of some of the commentators who advance property-based arguments for virtual property is that the ToS and EULAs are indeed unenforceable.<sup>101</sup> Other commentators have taken the opposite position.<sup>102</sup>

This Section briefly examines some of the relevant case law regarding the enforceability of EULAs and ToS generally. First, however, it examines the recent *Bragg* case, which struck down the arbitration provision of Second Life's ToS as unconscionable, and the changes that Linden made to its ToS as a result of the case. Given the state of the law concerning EULAs and ToS and the changes Linden made to its ToS in the wake of the *Bragg* case, this Section maintains that contract-based attacks on Linden will not be successful in the future. And, of course, if an aggrieved litigant cannot successfully attack Linden's ToS, he or she cannot

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<sup>98</sup> See Chein, *supra* note 21, at 1090.

<sup>99</sup> *Id.*

<sup>100</sup> See, e.g., Jankowich, *supra* note 22, at 53.

<sup>101</sup> See *supra* note 71.

<sup>102</sup> See, e.g., Erez Reuveni, *On Virtual Worlds: Copyright and Contract Law at the Dawn of the Virtual Age*, 82 IND. L.J. 261, 303 (2007) (stating that, at least in the near term, it is unlikely that a court will void EULAs as unconscionable); David P. Sheldon, *Claiming Ownership, but Getting Owned: Contractual Limitations on Asserting Property Interests in Virtual Goods*, 54 UCLA L. REV. 751, 777 (2007) ("Existing case law tends to weigh against parties attacking EULA on grounds of unconscionability."); Chein, *supra* note 21, at 1090 (concluding that virtual-world EULAs will be enforced); Bobby Glushko, Note, *Tales of the Virtual City: Governing Property Disputes in Virtual Worlds*, 22 BERKELEY TECH. L.J. 507, 516 (2007) (presuming the general trend of enforceability of EULAs).

successfully establish a property-based justification for judicial recognition of virtual property.

### 1. The *Bragg* Case

Marc Woebegone, the avatar of Pennsylvania attorney Marc Bragg, owned land in Second Life, some of which he purchased for the purpose of speculation.<sup>103</sup> In April 2006, Bragg discovered a glitch in Second Life's land auction system that allowed him to buy a plot of land called "Taessot" for \$300 when such a plot usually costs \$1000.<sup>104</sup> When Linden learned of this exploit, it shut down Bragg's account, deleted his avatar, and confiscated not only Taessot, but also all of the land that Bragg had purchased and developed before the dubious transaction concerning Taessot.<sup>105</sup>

Bragg filed suit in Pennsylvania state court alleging a number of causes of action including fraud, conversion, breach of contract, and violations of consumer protection laws.<sup>106</sup> The common element among all of these causes of actions was a theory of reasonable reliance: Bragg argued that he relied upon Linden's and its CEO's representations purporting to convey rights to virtual property in Second Life equivalent to real-world property rights and was thus induced to purchase land in Second Life.<sup>107</sup> The complaint contained many troublesome representations by Linden.<sup>108</sup> For example, it cited a *Guardian Unlimited* interview with Linden's then-CEO, Philip Rosedale.<sup>109</sup> In response to a question concerning Western capitalism, Rosedale said:

We like to think of Second Life as ostensibly as real as a developing nation. . . . The fundamental basis of a successful developing nation is property

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<sup>103</sup> See Kathleen Craig, *Second Life Land Deal Goes Sour*, WIRED, May 18, 2006, <http://www.wired.com/gaming/virtualworlds/news/2006/05/70909>.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Complaint at 31–46, *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593 (E.D. Pa. 2007) (No. 06-04925) [hereinafter *Bragg Complaint*], available at [http://lawyers.com/BraggvLinden\\_Complaint.pdf](http://lawyers.com/BraggvLinden_Complaint.pdf) (original complaint filed Oct. 4, 2006, in Chester County Court of Common Pleas, then removed to federal court on Nov. 7, 2006).

<sup>107</sup> *Id.*

<sup>108</sup> See *id.* at 6–22.

<sup>109</sup> *Id.* at 9–10.

ownership. . . . We started selling land free and clear, and we sold the title, and we made it extremely clear that we were not the owner of the virtual property.<sup>110</sup>

Additionally, Bragg's complaint seemed to suggest that Linden's recognition of its users' intellectual property rights in their creations caused the Second Life users to conflate their rights to virtual property such as land with their own intellectual property.<sup>111</sup>

Regarding the ToS, which gives Linden the unilateral right to shut down a user's account and seize her land,<sup>112</sup> Bragg maintained that the ToS were an unconscionable contract void as against public policy,<sup>113</sup> and in the alternative, that Linden's representations materially altered the ToS.<sup>114</sup>

In response, Linden removed the case to federal court and shortly thereafter moved to compel arbitration pursuant to a mandatory arbitration clause in the ToS and to dismiss Bragg's lawsuit for lack of personal jurisdiction over Philip Rosedale, Linden's CEO at the time, who was also named as a defendant in the suit.<sup>115</sup> The court rejected both motions.<sup>116</sup> It first held that Rosedale's representations provided sufficient minimum contacts with Pennsylvania for the court to exercise specific personal jurisdiction over him.<sup>117</sup> The court reasoned that it had specific personal jurisdiction over Rosedale for two reasons. First, Rosedale "helped orchestrate a campaign at the national level to

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<sup>110</sup> *Id.* (emphasis omitted) (quoting Krotoski, *supra* note 28).

<sup>111</sup> *See id.* at 11 ("In discussing the importance of land ownership . . . Rosedale stated: '[S]uccessful countries always start by making sure that people can freely own, resell, and mortgage the real-estate on which they live. This is a Very Big Idea . . . [.] This was one of the key things that drove our ideas around land ownership and the introduction of IP rights.'").

<sup>112</sup> *See generally* Second Life—Terms of Service, *supra* note 15.

<sup>113</sup> Bragg Complaint, *supra* note 106, at 25.

<sup>114</sup> *Id.* at 29.

<sup>115</sup> *See* Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593, 597 (E.D. Pa. 2007).

<sup>116</sup> *Id.* at 603, 611.

<sup>117</sup> *See id.* at 598 ("The Court holds that Rosedale's representations—which were made as part of a national campaign to induce persons, including Bragg, to visit Second Life and purchase virtual property—constitute sufficient contacts to exercise specific personal jurisdiction over Rosedale.").

induce persons, including Bragg, to purchase virtual land and property on Second Life.”<sup>118</sup> Second, Rosedale’s marketing efforts were more active than passive.<sup>119</sup> Indeed, the court concluded:

[Rosedale] was the hawker sitting outside Second Life’s circus tent, singing the marvels of what was contained inside to entice customers to enter. . . . Significantly, participants could even interact with Rosedale’s avatar on Second Life during town hall meetings that he held on the topic of virtual property.<sup>120</sup>

The court then held that the arbitration clause in the ToS was both substantively and procedurally unconscionable and, thus, refused to enforce it.<sup>121</sup> The court stated:

Taken together, the lack of mutuality, the cost of arbitration, the forum-selection clause, and the confidentiality provision that Linden unilaterally imposes through the TOS demonstrate that the arbitration clause is not designed to provide Second Life participants an effective means of resolving disputes with Linden. Rather, it is a one-sided means which tilts unfairly, in almost all situations, in Linden’s favor.<sup>122</sup>

Consequently, the case continued, and Linden answered Bragg’s Complaint shortly after the ruling.<sup>123</sup> Interestingly, in its Answer, Linden characterized its representations concerning land as analogies or metaphors.<sup>124</sup> “[S]elling land free and clear,” Linden averred, “and selling ‘title’ are metaphors or analogies to the concept of ownership of real property, as what is ‘owned’ with

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<sup>118</sup> *Id.* at 600.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 611.

<sup>122</sup> *Id.*

<sup>123</sup> Posting of Robin Linden to Second Life Blog, *Linden Lab Files Response to Complaint*, <http://blog.secondlife.com/2007/06/29/linden-lab-files-response-to-complaint> (June 29, 2007, 1:34 P.M.).

<sup>124</sup> Answer at 10–11, *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593 (E.D. Pa. 2007) (No. 06-4925), available at <http://lawyers.com/linden-answer.pdf> [hereinafter *Bragg Answer*].

respect to ‘virtual land’ in Second Life is in fact a license to computing resources.”<sup>125</sup> Moreover, Linden framed the primary issue in the case not as one of virtual property, but as one of fraud and exploitation on behalf of Bragg.<sup>126</sup>

Even though Bragg was not an especially sympathetic plaintiff because his actions were potentially a violation of Linden’s ToS, Linden, shortly after answering the Complaint, decided to confidentially settle the dispute with Bragg.<sup>127</sup> This may have proven to be a wise decision by Linden. At least one mock jury familiar with the issues presented in the case, a Harvard Law School evidence class, found that Linden Lab was not justified in taking the property Bragg had acquired before the Taessot transaction.<sup>128</sup> The students reasoned that Bragg was justified in his reliance on Linden’s representations.<sup>129</sup>

## 2. *Bragg’s Immediate Consequences*

Shortly after the *Bragg* case, Linden altered its ToS.<sup>130</sup> The objective of the change, understandably, was to bring the ToS into line with the *Bragg* ruling and forestall future attempts by Second Life users to attack the agreement and especially its arbitration provision on the grounds of unconscionability. Linden focused its changes on three issues that the *Bragg* Court found problematic in the earlier version of the ToS: the potential cost of arbitration to an aggrieved user; the overall effectiveness and ease of use of the

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<sup>125</sup> *Id.*

<sup>126</sup> *See id.* at 20.

<sup>127</sup> *See* Adam Reuters, *Linden Lab Settles Bragg Lawsuit*, REUTERS SECOND LIFE NEWS CENTER, Oct. 4, 2007, <http://secondlife.reuters.com/stories/2007/10/04/linden-lab-settles-bragg-lawsuit>.

<sup>128</sup> *See* Second Life Herald, *Harvard Law Mock Trial: Jury Votes Bragg 6, Linden Lab 3*, [http://foo.secondlifeherald.com/slh/2007/02/mock\\_trial\\_at\\_h.html](http://foo.secondlifeherald.com/slh/2007/02/mock_trial_at_h.html) (last visited Feb. 24, 2008).

<sup>129</sup> *See* Jury Deliberation Transcript, [http://cyber.law.harvard.edu/cyberone/wiki/Jury\\_deliberation\\_Transcript](http://cyber.law.harvard.edu/cyberone/wiki/Jury_deliberation_Transcript) (last visited Feb. 24, 2008). Stephen Horowitz, one of the class’s students, has also written a law review article on the mock trial and the jury’s deliberations. *See* Stephen J. Horowitz, *Bragg v. Linden’s Second Life: A Primer in Virtual World Justice*, 34 OHIO N.U.L. REV. 223 (2008).

<sup>130</sup> *See* Posting of Robin Linden to Second Life Blog, *A Change to the Terms of Service*, <http://blog.secondlife.com/2007/09/18/a-change-to-the-terms-of-service> (Sept. 18, 2007, 11:07 PST) [hereinafter Robin Linden, *Change to ToS*].

dispute resolution generally; and the arbitration provision was buried in a “General Provisions” section of the ToS.<sup>131</sup> The revised ToS address all of these problems. First, they provide that a user with less than \$10,000 at issue in a dispute with Linden has the option to participate in “binding, non-appearance-based arbitration” that allows the user to choose to have her claim heard by an arbitrator “by telephone, online,<sup>132</sup> or based solely on written submissions.”<sup>133</sup> Second, the ToS, by capping the amount in dispute for the arbitration option at \$10,000, effectively limit a user’s out-of-pocket arbitration expenses to around \$200.<sup>134</sup> The previous version of the ToS, on the other hand, required that binding arbitration be conducted in San Francisco in front of a panel of three arbitrators.<sup>135</sup> Thus, under the old ToS, the cost of travel and arbitration for disputes would in most cases exceed the dollar amount at issue.<sup>136</sup> Finally, the revised ToS now include the arbitration provision within a separate “Dispute Resolution” section.<sup>137</sup> The revised ToS have yet to be tested by a court; however, as discussed below, it is likely that it will not be struck down as unconscionable in subsequent litigation.

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<sup>131</sup> See *Bragg*, 487 F. Supp. 2d at 607–11.

<sup>132</sup> Interestingly, the online dispute resolution option opens the door for arbitration to be conducted within Second Life. See Adam Reuters, *Linden Raises Possibility of Virtual Arbitration in New ToS*, REUTERS SECOND LIFE NEWS CENTER, Sept. 18, 2007, <http://secondlife.reuters.com/stories/2007/09/18/linden-revamps-arbitration-in-new-terms-of-service/> (“We’re extremely excited about arbitration centers coming to Second Life” said Catherine Smith, a spokeswoman for Linden. “If the arbitrator can conduct arbitration in Second Life, we’re very much open to using Second Life to resolve disputes between Residents and Linden Lab.”).

<sup>133</sup> Second Life—Terms of Service, *supra* note 15, §§ 7.1–7.4.

<sup>134</sup> See *id.*; Robin Linden, *Change to ToS*, *supra* note 130 (“[T]he exact cost depends on the ADR provider selected. . . . For example, the National Arbitration Forum’s rules currently provide that consumers will pay at most \$185.00 in disputes between consumers and businesses where the total amount of damages sought is less than \$10,000.00 USD. Businesses pay the remainder of the fees charged by the NAF.”).

<sup>135</sup> See Internet Archive—Second Life’s Terms of Service, <http://web.archive.org/web/20070515014546/http://secondlife.com/corporate/tos.php> (last visited Mar. 8, 2008).

<sup>136</sup> See generally International Chamber of Commerce—Arbitration Cost Calculator, <http://www.iccwbo.org/court/arbitration/id4097/index.html> (last visited Mar. 8, 2007).

<sup>137</sup> See Second Life—Terms of Service, *supra* note 15, §§ 7.1–7.4.

### 3. *Davidson & Associates v. Jung*<sup>138</sup> and Its Implications

Although there is a circuit split regarding the enforceability of EULAs in the general computer software licensing context,<sup>139</sup> *Davidson v. Jung*, an important licensing case, is relevant to Second Life and this Note's analysis for two reasons. First, as a factual matter, *Davidson* dealt specifically with the enforcement of computer game EULAs and thus would apply to Second Life, which a court is likely to regard as a game. Second, the EULA at issue in *Davidson* was a "clickwrap" license. A clickwrap license is one in which an online user clicks "I agree" to contract terms of use for the online program or service she desires to use.<sup>140</sup> Clickwrap licenses differ from "shrinkwrap" and "browsewrap" licenses because the former are actually contained in or on a package (hence the use of the term "shrinkwrap") that contains the software that the user seeks to use.<sup>141</sup> With the latter, the user may never see the contract at all, but the contract's terms nevertheless provide that use of the website constitute assent to them.<sup>142</sup> Importantly, Second Life employs a clickwrap license, and a potential user of Second Life can only enter into the virtual world by clicking "I agree" to the agreement's terms.

In *Davidson*, the Eighth Circuit affirmed the district court's decision to enforce the clickwrap EULAs of CD-ROM computer

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<sup>138</sup> *Davidson & Assocs. v. Jung*, 422 F.3d 630 (8th Cir. 2005).

<sup>139</sup> *Compare ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996) (enforcing the terms of a "shrinkwrap" EULA contained within a software CD), and *I.Lan Systems, Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 329 (D. Mass. 2002) (following *ProCD* and holding that the terms of a "clickwrap" agreement that appeared on defendant's computer screen while defendant was installing plaintiff's software and that defendant clicked "I agree" was also enforceable), with *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 20 (2d Cir. 2002) (refusing to enforce a "browsewrap" EULA that appeared on-screen as plaintiffs installed Netscape's internet browser software and noting that the plaintiffs' "bare act" of downloading the software did not "unambiguously manifest assent" to the provisions of the EULA).

<sup>140</sup> Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 459 (2006) [hereinafter Lemley, *Terms of Use*].

<sup>141</sup> See, e.g., *ProCD*, 86 F.3d at 1449; Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1239-47 (1995).

<sup>142</sup> Lemley, *Terms of Use*, *supra* note 140, at 459 ("[A]n increasing number of courts have enforced 'browsewrap' licenses, in which the user does not see the contract at all but in which the license terms provide that using a Web site constitutes agreement to a contract whether the user knows it or not.").

games created and sold by Blizzard Entertainment that required users to click an on-screen “I agree” button during the installation of the games.<sup>143</sup> Defendants had reverse-engineered Blizzard’s games for multiplayer online use, thus violating the games’ EULAs.<sup>144</sup> Because the Eighth Circuit spent no time discussing the details of the district court’s unconscionability ruling, it is the district court’s reasoning that is most instructive. The district court held that the games’ EULAs were neither procedurally nor substantively unconscionable.<sup>145</sup> Regarding procedural unconscionability, the court reasoned that although the parties in the case did have unequal bargaining power, defendants had the choice to purchase other video games or return the game for a refund if they were unhappy with the contract’s terms.<sup>146</sup> Moreover, the court reasoned, the EULAs’ terms did not “surprise” defendants because defendants had notice that the games were subject to EULAs and had thirty days to decide whether to adhere to the EULAs’ terms or to return the games.<sup>147</sup> Regarding substantive unconscionability, the court, with little accompanying analysis, declared that the EULAs’ terms were not so one-sided so as to “shock the conscience” or “impose harsh or oppressive terms.”<sup>148</sup> This result was not necessarily surprising, for as Professor Lemley notes, “[e]very court to consider the issue has found ‘clickwrap’ licenses . . . enforceable.”<sup>149</sup>

Thus, it is clear that the *Bragg* decision cuts against the prevailing trend in the case law. So, what explains *Bragg*’s outcome? Additionally, are courts in the Ninth Circuit, where future battles regarding Second Life will be litigated,<sup>150</sup> likely to

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<sup>143</sup> Davidson & Assocs. v. Jung, 422 F.3d 630, 634–35 (8th Cir. 2005).

<sup>144</sup> *Id.* at 635.

<sup>145</sup> See Davidson & Assocs. v. Internet Gateway, 334 F. Supp. 2d 1164, 1179 (E.D. Mo. 2004).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 1179–80.

<sup>148</sup> *Id.* at 1180.

<sup>149</sup> See Lemley, *Terms of Use*, *supra* note 140, at 459 (citing cases from years 1998 to 2006).

<sup>150</sup> Linden’s ToS contain a choice-of-law provision that provides that California law governs the agreement. See *Second Life—Terms of Service*, *supra* note 15, § 7.1 (“This Agreement and the relationship between you and Linden Lab shall be governed in all

find Linden's ToS unconscionable given (1) the changes that Linden made to its ToS in the wake of *Bragg* and (2) the unconscionability analysis of *Davidson*, which is not only the most on-point of the "clickwrap" EULA precedents, but also the precedent from the highest court?

#### 4. Explaining *Bragg's* Result

*Bragg's* anomalous result can, at least to some extent, be explained by the court's reliance on *Comb v. Paypal, Inc.*<sup>151</sup> Importantly, the key facts of *Comb* are readily distinguishable from the key facts of *Bragg*. To be sure, *Comb*, like *Bragg*, involved an arbitration clause being challenged as unconscionable; however, *Comb* involved a browsewrap license while *Bragg* involved a clickwrap license. As discussed above, the distinction matters, for courts are generally much more likely to strike down a browsewrap license than a clickwrap license.<sup>152</sup> In *Comb*, unlike in *Bragg*, the user agreement was not automatically displayed to customers prior to their signing up for the service.<sup>153</sup> Instead, the agreement was accessible through a link that was on the same page as the "I agree" button.<sup>154</sup> Thus, the *Bragg* court's statement that the plaintiffs in *Comb* had assented to the agreement "in circumstances similar to this case"<sup>155</sup> requires a somewhat broad reading of that phrase. Moreover, the clickwrap versus browsewrap distinction is particularly important because one of the primary factors that the *Bragg* court assessed in the procedural component of its

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respects by the laws of the State of California without regard to conflict of law principles or the United Nations Convention on the International Sale of Goods.").

<sup>151</sup> *Comb v. Paypal, Inc.*, 218 F. Supp. 2d 1165 (N.D. Cal. 2002).

<sup>152</sup> Compare Lemley, *Terms of Use*, *supra* note 140, at 462 ("The law has paid some attention to the impact of terms of use on consumers: virtually all of the courts that have refused to enforce a browsewrap license have done so to protect consumers."), with *id.* at 459 (indicating that every clickwrap license that had been challenged by the time of the article's publication had been upheld as enforceable).

<sup>153</sup> *Comb*, 218 F. Supp. 2d at 1169.

<sup>154</sup> *Id.* ("A link to the text of the User Agreement is located at the bottom of the application. The link need not be opened for the application to be processed. The User Agreement is lengthy, consisting of twenty-five printed pages and eleven sections, each containing a number of subparagraphs enumerating the parties' respective obligations and duties.").

<sup>155</sup> *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 607 (E.D. Pa. 2007).

unconscionability analysis was the surprise element.<sup>156</sup> One would presumably be more surprised by terms that existed on a completely different web page, as in *Comb*, than terms that were on the same page as the “I agree” button, as in *Bragg*. Because *Comb* was the lynchpin of the *Bragg* court’s analysis, and *Comb* is crucially distinguishable from *Bragg*, the court’s unconscionability analysis seems dubious.

#### 5. Will Linden’s ToS Be Held Unconscionable in the Future?

It is not likely that a future court will find Linden’s ToS unconscionable for two reasons.<sup>157</sup> First, by altering its ToS, Linden successfully addressed all of the issues raised in *Bragg* concerning its arbitration provision.<sup>158</sup> This is particularly important because according to an empirical study, arbitration provisions are struck down as unconscionable at nearly twice the rate as that of other contract provisions.<sup>159</sup> Second, it is likely that a court hearing the case would properly look to *Davidson*, and not *Comb*, for guidance on the issue of unconscionability, as *Davidson* is the leading case on the enforceability of clickwrap licenses, and it, like Second Life, involves the license agreement of what a court would likely regard as a game.

Applying *Davidson*’s procedural unconscionability analysis to Second Life, an aggrieved Second Life landowner has a choice of other virtual worlds to join. She, like the defendants in *Davidson* that could have purchased other computer games, could have chosen to join other virtual worlds such as There.com.<sup>160</sup> Of course, There.com is not Second Life. It offers a different user

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<sup>156</sup> See *id.* at 606 (“The procedural element of unconscionability also ‘focuses on . . . surprise.’” (quoting *Gutierrez v. Autowest, Inc.*, 7 Cal. Rptr. 3d 267, 275 (Cal. Ct. App. 2003))).

<sup>157</sup> But see *Sheldon*, *supra* note 102, at 778 (stating that virtual-world users cannot terminate their agreements as easily as defendants in *Davidson*, that they may be surprised by virtual world EULAs that can be altered at any time, and that the substantive terms of EULAs that allow the virtual-world operator to close user access for any or no reason to her online assets may “shock the conscience”).

<sup>158</sup> See *supra* Part I.C.2.

<sup>159</sup> See Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 186 (2004).

<sup>160</sup> See There.com, <http://www.there.com> (last visited Mar. 28, 2008).

experience just as an alternate computer game would have offered a different gaming experience for defendants in *Davidson*; nevertheless, it is still an alternate choice. Additionally, it is unlikely that an aggrieved plaintiff would be able to successfully deploy an argument for surprise with respect to the specific provisions of the new ToS given the tremendous amount of buzz among Second Life users about the ToS and the changes they received after *Bragg*.

The substantive unconscionability issue under *Davidson* is a closer one. It is not completely clear whether a court might find that the ToS provision providing that Linden can shut down a user's account for any or no reason is so one-sided as to "shock the conscience." The empirical data, however, suggests that a court likely would not find the provision unconscionable, as the doctrine of unconscionability is scarcely used by courts,<sup>161</sup> and as courts had enforced all clickwrap licenses before *Bragg*.<sup>162</sup>

## II. THE CONSUMER PROTECTION APPROACH

### A. *Why Consumer Protection?*

As the above sections indicate, the property-based and contract-based approaches to judicial recognition of virtual assets in Second Life are problematic from a doctrinal perspective. This is because even the most practical and plausible of the property-based approaches discussed above first requires a court to strike down Second Life's ToS, and as the state of contract law, especially in the clickwrap context, seems to indicate, this is unlikely to happen. Consumer protection law thus provides the best doctrinal grounds for aggrieved users of Second Life to

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<sup>161</sup> See, e.g., James R. Maxeiner, *Standard-Terms Contracting in the Global Electronic Age: European Alternatives*, 26 YALE J. INT'L L. 109, 121 n.69 (2003) (stating that the number of unconscionability cases "is in the tens or hundreds"); Robert L. Oakley, *Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts*, 42 HOUS. L. REV. 1041, 1062 (2005) ("Although unconscionability is an available doctrine and is occasionally used, in fact the number of cases in which it has actually been found is relatively small.").

<sup>162</sup> Lemley, *Terms of Use*, *supra* note 140, at 459.

receive judicial relief. The policy arguments in favor of the use of consumer protection law are no less convincing.

On policy grounds, three observations about consumer protection law are instructive: (1) the purpose of statutory consumer protection law has always been to cover those fringes of the law not reached by common-law doctrine;<sup>163</sup> (2) consumer protection law, more than other areas of law, takes into account the effect of a company's representations on consumers;<sup>164</sup> and (3) the more commodified an environment becomes, the more its market participants are able to rely effectively on consumer protection law, because commodification itself transforms these participants into consumers, a group that the legislature has singled out for protection based on their status as such.<sup>165</sup>

First, modern consumer-protection law as it has been articulated by the Federal Trade Commission ("FTC") and state legislatures throughout the country has historically been a legal reform effort addressing the perceived inequities of traditional legal doctrine.<sup>166</sup> In other words, it has traditionally been the purpose of statutory consumer protection law to patrol those areas of the law not covered by the common law of contract, property, or tort. For example, "contract worship[s] the sanctity of the written agreement, and ma[kes] no exception for consumer transactions where the document [is] under total control of the seller and [is] not the subject of real bargaining. Harsh adhesion clauses c[an] be forced on buyers who ha[ve] no viable alternatives."<sup>167</sup> Indeed, contract law assumes that parties to a contract are equal in terms of power and information, when in actuality, consumers have substantially less power and information than the large corporate entities with whom they frequently contract.<sup>168</sup> Consequently, "[t]he common law of contract simply cannot afford consumers the protection they probably would seek if they were rational, fully informed, and equal in economic power to the supplier. Because

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<sup>163</sup> *E.g.*, DEE PRIDGEN, *CONSUMER PROTECTION AND THE LAW* 2–3 (2007).

<sup>164</sup> *Id.*

<sup>165</sup> *See* Balkin, *Law and Liberty in Virtual Worlds*, *supra* note 25, at 95.

<sup>166</sup> PRIDGEN, *supra* note 163, at 2.

<sup>167</sup> *Id.*

<sup>168</sup> Goldring, *Consumer Protection Globalization and Democracy*, *supra* note 31, at 3.

contract law is an inadequate basis for the legal transaction, it must be modified by legislation.”<sup>169</sup> Similarly, tort law places considerable obstacles in the path of consumers seeking redress for deceptive business practices and misleading representations.<sup>170</sup> As a result, statutes such as the federal consumer protection law that prohibits unfair or deceptive practices, Section 5 of the FTC Act,<sup>171</sup> and California’s Unfair Competition Law (“UCL”)<sup>172</sup> contain broad language that was and continues to be flexible enough to effectuate the prophylactic purpose of the statutes and fill in the doctrinal gaps in the common law.<sup>173</sup>

Consumer protection law’s broad purpose and history remain important in a discussion of Second Life because now, like the consumers in the early twentieth century who were the first to benefit from consumer protection laws, consumers in Second Life are not sufficiently protected by common-law doctrines; the likely continued enforceability of clickwrap contracts will render impotent both contract and property arguments by aggrieved Second Life users in the future. Moreover, while a court’s finding of unconscionability of the ToS would be bold indeed, a finding of a violation of consumer protection law requires no such judicial boldness. An unconscionability finding would not only blow against the prevailing winds of current case law, but also require expenditure of a court’s limited institutional capital, which the court may be disinclined to use for a cause like this. Compared to Linden and other businesses that employ ToS and EULAs, Second Life users are poorly organized and politically impotent. Additionally, such a decision would also put a court at risk of being reversed on appeal. This risk, of course, would not be as great if the court heard the case under consumer protection law.

Second, consumer protection law’s focus on the effect of representations on consumers<sup>174</sup> makes it a particularly valuable

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<sup>169</sup> *Id.* at 3–4.

<sup>170</sup> PRIDGEN, *supra* note 163, at 2.

<sup>171</sup> 15 U.S.C. § 45(a)(1) (2000).

<sup>172</sup> CAL. BUS. & PROF. § 17200 (West 1997).

<sup>173</sup> See JEF I. RICHARDS, DECEPTIVE ADVERTISING 12 (1990).

<sup>174</sup> See FTC Policy Statement on Deception, *reprinted in* In The Matter of Cliffdale Assocs., 103 F.T.C. 110 app. at 174–84 (1984) (“Certain elements undergird all deception cases. *First*, there must be a representation, omission or practice that is likely

option to an aggrieved Second Life user. While both contract and property law do contain some features that regulate sellers' representations regarding their products—take for example, fraudulent or material misrepresentation in contract<sup>175</sup> or Section 43(a) of the Lanham Act<sup>176</sup>—these features are either too difficult for a consumer to prove that they are effectively useless (fraud) or not available to consumers at all (the Lanham Act provision). As discussed in further detail below,<sup>177</sup> consumer protection proof requirements concerning the nature and effect of representations are much less rigid than those of the common law. Representations are significant to Second Life users because Linden's representations concerning land sales and the company's recognition of intellectual property are numerous and varied; also, these same representations have fueled Second Life's tremendous growth and its commodification. Linden has had huge incentive to mislead land purchasers with its representations concerning land; indeed, its business model has depended upon it.<sup>178</sup>

Finally, Jack Balkin has argued that the more commodified a virtual world becomes and the more a virtual world's business model is based upon its commodification, the more likely it is that aggrieved users will and should use consumer protection laws in the courts to protect their reliance interests.<sup>179</sup> Commodification of a virtual world, the buying and selling of virtual items in the world using real-world currency, invites the law in.<sup>180</sup> Balkin writes:

Game designers cannot have it both ways. . . .  
The more that people flock to [virtual worlds],  
spend large amounts of time in them, become

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to mislead the consumer. Practices that have been found to be misleading or deceptive in specific cases include false oral or written representations . . . .”).

<sup>175</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 162 (1981) (setting forth the elements of a material or fraudulent representation).

<sup>176</sup> 15 U.S.C. § 1125(a) (2000) (permitting business competitors to sue each other for false advertising, among other things).

<sup>177</sup> See *infra* Part II.B.

<sup>178</sup> As discussed above, land sales generate more than half of Linden's revenue, and in order to run a business in Second Life, one of the most popular activities in the virtual world, one must purchase land. See *supra* Part I.

<sup>179</sup> See Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043, 2046–47 (2004).

<sup>180</sup> *Id.*

enmeshed in them, and spend considerable sums in them—as the business model hopes they will—the more people will demand that the state protect them when they are injured in ways that they think are inappropriate, whether or not the EULA or the TOS give them any remedy. . . . [T]he more that the platform owner attempts to make the game space a new version of the shopping mall, the less likely the First Amendment will or should protect them when the state wants to vindicate the reliance and property interests of the players. . . . Treat the players as consumers, and they will demand consumer protection.<sup>181</sup>

It seems that underlying Balkin’s argument is the notion that commodification transforms mere “players” of Second Life into “consumers,” and that once this transformation has occurred, consumer protection law provides special protection to consumers in a dynamic marketplace based upon the consumers’ classification as such. This idea that “consumers are different” is an important theory underlying consumer protection law.<sup>182</sup> It recognizes that the consumer, a single person, often has neither the power nor the information to appropriately protect her own interests and that the common law often does not adequately protect these interests either.<sup>183</sup> Consequently, the legislature must provide the protection that the common law cannot. The purpose of contract and property law, on the other hand, has little to do with a rightholder’s special status as a consumer.<sup>184</sup>

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<sup>181</sup> *Id.* at 2073.

<sup>182</sup> See Goldring, *Consumer Law and Legal Theory*, *supra* note 29, at 116.

<sup>183</sup> Goldring, *Consumer Protection Globalization and Democracy*, *supra* note 31, at 3–4.

<sup>184</sup> Professors Merrill and Smith’s description of the purpose of contract and property law is instructive:

In personam [contract] rights are an instance of what can be called a governance strategy for determining use rights; in rem [property] rights reflect an exclusion strategy for determining use rights. . . . Governance rules typically specify particular uses in some detail, including often the identity of the rightholder and the dutyholder. Indeed, often the dutyholder will need to know the identity of the rightholder in order to avoid violating the duty. . . . Exclusion

Linden clearly possesses the attributes described by Balkin, and Linden's business model is based upon commodification of Second Life in three respects. First, land sales in Second Life make up more than a majority of the company's revenue.<sup>185</sup> Second, only landowners in Second Life can run businesses, an activity that is one of the primary attractions of the virtual world in the first instance.<sup>186</sup> Finally, Linden has made the business decision to actively commodify Second Life, and the examples of commodification abound: Linden runs a currency exchange for its users;<sup>187</sup> it made the strategic decision to grant its users IP rights in their creations,<sup>188</sup> thus encouraging users to trade their creations via market transactions; and it encourages those who do choose to buy land from Linden to subdivide, resell, or rent it as the owner sees fit.<sup>189</sup> Commodification of Second Life has quickly brought Linden millions of users and much business success; however, it is also what places the company at risk of suit under consumer protection law.

Moreover, Linden's relationship with its users, particularly regarding land, is one in which there is particularly acute information asymmetry. Legislatures enacting consumer protection laws recognized the risks of this very type of asymmetry and that consumer protection law, unlike common law, is meant to protect users from *ex post*. Linden does not make it clear to its users what they are getting when they "buy land" from the company. In fact, it may be so that because land sales are so

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strategies, by contrast, proceed by restricting access to a particular resource rather than by specifying permitted or prohibited uses.

Thomas E. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 791 (2001).

<sup>185</sup> See Rappeport, *supra* note 26.

<sup>186</sup> See *supra* Part I.A.

<sup>187</sup> See Second Life—Currency Exchange, *supra* note 27.

<sup>188</sup> See Ondrejka, *supra* note 36, at 95.

<sup>189</sup> See Second Life—How Do I Join & Split Land?, <https://support.secondlife.com/ics/support/default.asp?deptID=4417&task=knowledge&questionID=4243> (last visited Feb. 21, 2009); Second Life—How Do I Rent Land to Other People?, <https://support.secondlife.com/ics/support/default.asp?deptID=4417&task=knowledge&questionID=4416> (last visited Feb. 21, 2009); Second Life—How Do I Sell Land?, <https://support.secondlife.com/ics/support/default.asp?deptID=4417&task=knowledge&questionID=4530> (last visited Feb. 21, 2009); Second Life—Land: Get Your Land, <http://secondlife.com/community/land-getyours.php> (last visited Feb. 10, 2008).

important to Linden, Linden, as part of its marketing, actually attempts make this as unclear as possible. For example, on the Frequently Asked Questions from Beginning Landowners (“FAQ”) webpage,<sup>190</sup> there is not a single question and answer that explains the rights a user has to land once she has purchased it from Linden or that conveys any information similar to that of the critical provisions of Linden’s ToS.<sup>191</sup> The author of this Note imagines that it would be quite simple for Linden to add a few questions and answers to the FAQ page that communicate, *inter alia*, that purchased land in Second Life is nothing more than licensed space on servers owned by Linden in California and that Linden has the right to seize a user’s land for any or no reason. The communication of these facts, however, does not seem to be in Linden’s business interest as it could result in fewer land sales and consequently less revenue for Linden.

Additionally, the uniqueness of Second Life’s land sales model among virtual-world providers exacerbates a Second Life user’s lack of information because she has few frames of reference from which to know what is common or standard industry practice. Since Linden is only one of the few virtual-world providers that sell land, it is not clear that there is a standard industry practice. Consequently, Second Life users are left at the mercy of Linden and its representations. All they know is what Linden tells them, and what Linden tells them is terribly insufficient.

The following Section shows the ease with which a court can apply consumer protection doctrine to land sales in Second Life and describes in further detail how Linden’s representations ultimately may bring the company liability in the courtroom.

*B. Applicable Law—California’s Unfair Competition Law (“UCL”)*

Linden’s ToS contain a choice-of-law provision that provides that California law governs the agreement.<sup>192</sup> This is, at least from

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<sup>190</sup> See Second Life—FAQ from Beginning Landowners, *supra* note 64.

<sup>191</sup> See *id.*

<sup>192</sup> See Second Life—Terms of Service, *supra* note 15, § 7.1 (“This Agreement and the relationship between you and Linden Lab shall be governed in all respects by the laws of

the consumer protection perspective, an asset to an aggrieved Second Life user because California's consumer protection laws are among the strongest in the country,<sup>193</sup> particularly California's Unfair Competition Law.<sup>194</sup> The UCL broadly defines unfair competition and prohibits it under five prongs: (1) unlawful conduct; (2) unfair conduct; (3) fraudulent conduct; (4) deceptive advertising; and (5) violations of § 17500, California's "false advertising" statute.<sup>195</sup> The "unlawful" prong covers any business practice that violates any statute, regulation, or ordinance,<sup>196</sup> and it, like the "deceptive advertising" and "false advertising" prongs, would be less helpful to an aggrieved Second Life user in an action under the UCL than the "unfair" and "fraudulent" prongs.<sup>197</sup>

There are two tests of a business practice under the "unfair" prong of the UCL. In one, a court must weigh the utility of the defendant's conduct against the nature of the harm to the plaintiff while taking into consideration the motives of the alleged wrongdoer.<sup>198</sup> In the other, the court must determine whether the alleged business practice is "immoral, unethical, oppressive,

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the State of California without regard to conflict of law principles or the United Nations Convention on the International Sale of Goods.").

<sup>193</sup> See, e.g., *Wershaba v. Apple Computer, Inc.*, 110 Cal. Rptr. 2d 145, 160 (Cal. Ct. App. 2001) ("California's consumer protection laws are among the strongest in the country. . . . California's unfair competition law imposes liability without the necessity of showing intent.").

<sup>194</sup> See ABA SECTION OF ANTITRUST LAW, CONSUMER PROTECTION HANDBOOK 76-77 (2004) ("California's consumer protection statute . . . warrants special mention because of the breadth of the statute, California's importance as a commercial state, and the enforcement activism of both the Attorney General's office and private plaintiffs within the state.").

<sup>195</sup> Sharon J. Arkin, *The Unfair Competition Law After Proposition 64: Changing the Consumer Protection Landscape*, 32 W. ST. U. L. REV. 155, 157 (2005); see also CAL. BUS. & PROF. § 17200 (West 2009).

<sup>196</sup> Arkin, *supra* note 195, at 158.

<sup>197</sup> The "deceptive advertising" prong is substantially similar to the "false advertising" prong of the UCL. *Id.* at 163. The "false advertising" prong is less forgiving than the fraud prong because it has a *scienter* requirement. See CAL. BUS. & PROF. § 17500 (West 2009) (prohibiting any advertising "which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading . . ."); Arkin, *supra* note 195, at 161, 164.

<sup>198</sup> *Motors, Inc. v. Times Mirror Co.*, 162 Cal. Rptr. 543, 546 (Cal. Ct. App. 1980).

unscrupulous or substantially injurious to customers.”<sup>199</sup> Though the California Supreme Court has determined the appropriate “unfair” test in competitor-versus-competitor actions,<sup>200</sup> it has yet to determine the standard in consumer actions.<sup>201</sup>

A business practice is fraudulent when “members of the public are likely to be deceived” by the defendant’s conduct.<sup>202</sup> This standard, of course, is quite different from that of a common-law fraud claim, which requires intent to deceive, actual falsehood, and damages to the victim.<sup>203</sup> A business practice is “likely to deceive” under the “fraudulent” prong of the UCL if it is “probable that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.”<sup>204</sup> Where the business practice “is targeted to a particular group or type of consumers [that is] either more . . . or less sophisticated than the ordinary consumer, . . . whether it is misleading to the public” will be judged from the view of members of the targeted group.<sup>205</sup> Moreover, there is no requirement that the alleged fraudulent business practice occur in the context of an advertisement.<sup>206</sup> For example, in *People v. Dollar Rent-a-Car Systems, Inc.*, the California Court of Appeals affirmed the trial court’s conclusion that Dollar’s contract language and its

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<sup>199</sup> *People v. Casa Blanca Convalescent Homes*, 206 Cal. Rptr. 164, 177 (Cal. Ct. App. 1984).

<sup>200</sup> *See Cel-Tech Commc’ns, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 544 (Cal. 1999) (“[T]he word ‘unfair’ in [the UCL] means conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws because its effects are comparable to or the same as a violation of the law, or otherwise significantly threatens or harms competition.”).

<sup>201</sup> Arkin, *supra* note 195, at 160.

<sup>202</sup> *Comm. on Children’s Television v. Gen. Foods Corp.*, 673 P.2d 660, 668 (Cal. 1983).

<sup>203</sup> *See, e.g., Day v. AT&T*, 74 Cal. Rptr. 2d 55, 60 (Cal. Ct. App. 1998) (“A fraudulent deception must be actually false, known to be false by the perpetrator and reasonably relied upon by a victim who incurs damages. None of these elements are required to state a claim for injunctive relief under [the UCL]. A perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable under these sections.”).

<sup>204</sup> *Lavie v. Procter & Gamble Co.*, 129 Cal. Rptr. 2d 486, 495 (Cal. Ct. App. 2003).

<sup>205</sup> *Id.* at 498.

<sup>206</sup> Arkin, *supra* note 195, at 163.

employees' conduct regarding the company's collision damage waiver were a violation of the UCL.<sup>207</sup>

The "primary purpose of [the UCL is] to 'extend[] to the entire consuming public the protection once afforded only to business competitors.'"<sup>208</sup> Consequently, courts should construe the UCL broadly.<sup>209</sup> Nevertheless, despite the broad language of the statute and its public policy underpinnings, the UCL has two shortcomings: (1) it only offers injunctive relief, not monetary damages, to an aggrieved consumer;<sup>210</sup> and (2) it has a standing provision<sup>211</sup> enacted by a voter proposition<sup>212</sup> that can foreclose a claim under the UCL for some potential litigants.

The first shortcoming can be somewhat easily overcome, however, because although the UCL does not provide for monetary damages, it does allow for restitution.<sup>213</sup> As the Supreme Court of California explained in *Cortez v. Purolator Air Filtration Products Co.*, the remedies provision of the UCL

authorizes the court to fashion remedies to prevent, deter, and compensate for unfair business practices. In addition to injunctions, it authorizes orders that are necessary to prevent practices that constitute unfair competition and to make "orders or judgments . . . as may be necessary to restore" to persons in interest any money or property acquired by unfair competition.<sup>214</sup>

Consequently, the court upheld the equitable judgments of trial and appellate courts ordering a business to pay an employee whose

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<sup>207</sup> See *People v. Dollar Rent-a-Car Sys., Inc.*, 259 Cal Rptr. 191, 197–99 (Cal. Ct. App. 1989).

<sup>208</sup> *Bank of the W. v. Superior Court*, 833 P.2d 545, 551 (Cal. 1992) (quoting *Barquis v. Merchants Collection Ass'n*, 496 P.2d 817, 828 (Cal. 1972)).

<sup>209</sup> See *Arkin*, *supra* note 195, at 157.

<sup>210</sup> See CAL. BUS. & PROF. § 17203 (West 2009).

<sup>211</sup> See *id.* § 17204 ("[Standing for an individual is limited to] a person who has suffered injury in fact and has lost money or property as a result of the unfair competition.").

<sup>212</sup> See generally *Arkin*, *supra* note 195, at 167–70 (discussing Proposition 64 and its standing requirement); *Jacquetta Lannan, Saving 17200: An Analysis of Proposition 64*, 46 SANTA CLARA L. REV. 451 (2006) (same).

<sup>213</sup> See *Arkin*, *supra* note 195, at 165.

<sup>214</sup> *Cortez v. Purolator Air Filtration Prods. Co.*, 999 P.2d 706, 714–15 (Cal. 2000).

wages it withheld in violation of California's labor code, and thus, the UCL.<sup>215</sup> The court reasoned that the restitution order was appropriate because it restored the employee to status quo ante<sup>216</sup> and because he had a "vested property right[]" in the withheld salary, even though the employee never had actual possession of it.<sup>217</sup> More recently, the California Supreme Court stated the UCL principle of restitution even more succinctly: "Under the UCL, an individual may recover profits unfairly obtained to the extent that these profits represent monies given to the defendant or benefits in which the plaintiff has an ownership interest."<sup>218</sup> Additionally, a court can order restitution even when injunctive relief is not appropriate;<sup>219</sup> that is, a court can order restitution even when the defendant has stopped engaging in unlawful conduct.<sup>220</sup> Thus, even though the UCL does not technically allow for recovery of monetary damages, an order of restitution, for all intents and purposes, produces the same result as an award of damages to a plaintiff with a vested property interest or ownership right in property that was lost as a result of the violation of the UCL.

Section 17204, the UCL's provision on standing, provides that in order for a private individual to bring a UCL claim the individual must be one who "has suffered injury in fact" and who has "lost money or property as a result of such unfair competition."<sup>221</sup> Previously, the standing requirement was far less stringent and "a private plaintiff who ha[d] himself suffered no injury at all [could] sue to obtain relief for others."<sup>222</sup> The standing provision, therefore, now has important implications for

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<sup>215</sup> *Id.* at 715.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* (quoting *Loehr v. Ventura Cmty. Coll. Dist.*, 195 Cal. Rptr. 576, 581 (Cal. Ct. App. 1983)).

<sup>218</sup> *Korea Supply v. Lockheed Martin Corp.*, 63 P.3d 937, 947 (Cal. 2003).

<sup>219</sup> *See, e.g., ABC Int'l Traders v. Matsushita Elec. Corp.*, 931 P.2d 290, 304 (Cal. 1997) ("[W]e conclude that [the UCL] authorizes a trial court to order restitution of money lost though acts of unfair competition . . . whether or not the court also enjoins future violations.").

<sup>220</sup> Arkin, *supra* note 195, at 165.

<sup>221</sup> CAL. BUS. & PROF. § 17204.

<sup>222</sup> *See Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 950 P.2d 1086, 1091 (Cal. 1998) (internal citations and quotations omitted).

representative actions and situations where harm to a specific person might be hard to prove.<sup>223</sup>

### *C. Application of the UCL to Second Life*

The “fraudulent” prong of the UCL provides the best chance of recovery for an aggrieved Second Life landowner. It has the broadest language of the UCL prongs: unlike the “false advertising” prong, it lacks a scienter requirement; and, unlike the “unfair” prong, its law is well-settled and clear with regard to consumer transactions.<sup>224</sup> The Second Life user would have a strong argument that a significant portion of targeted consumers, acting reasonably in the circumstances, could be misled by the representations of Linden and its executives about land ownership and property ownership in general in Second Life for three reasons.

First, Linden and Philip Rosedale, Linden’s founder and original CEO, have explicitly used real-property terms when discussing what Linden claims is simply licensing of server space by a user. As discussed above, for example, Rosedale has mentioned “selling free and clear” while describing land sales.<sup>225</sup> Even more simply, the Second Life website uses the term “land” to describe the server space and discusses “land sales” and the process of “buy[ing] land” from residents.<sup>226</sup> Nowhere on the Second Life land webpages does it say what exactly land is (server space) and what exactly users are getting when they buy it (a license). Moreover, the ToS do not contain this information either. Additionally, the land “analogy,” as Linden refers to it,<sup>227</sup> is not on the Second Life website or mentioned in any of Linden’s numerous press releases hyping its service. Indeed, from what the author of

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<sup>223</sup> See, e.g., Shannon Z. Peterson, *California Proposition 64 Requires That Pending Actions Based on Unfair Competition or False Advertising Laws Be Dismissed*, 10 STAN. J.L. BUS. & FIN. 73, 73–74 (2005).

<sup>224</sup> See generally Arkin, *supra* note 195, at 160–64.

<sup>225</sup> See Krotski, *supra* note 28.

<sup>226</sup> See Second Life, Land: Get Your Land, *supra* note 189.

<sup>227</sup> Bragg Answer, *supra* note 124, at 10–11.

this Note could find, Linden has mentioned the analogy publicly in only two publications.<sup>228</sup>

Second, and perhaps more important, Linden and its officers have made representations that indicate that they do not regard Second Life as a “game space” at all, but instead, an extension of the real world. Cory Ondrejka, a former Linden executive, said in an academic symposium on virtual worlds, “[t]here are virtually no traditional game elements in Second Life other than if you look at the real world as a game, it looks a lot like that.”<sup>229</sup> In other words, Ondrejka argues that Second Life is not a game at all. Indeed, while discussing Second Life, both Ondrejka and Rosedale have elucidated this principle clearly by comparing Second Life to a developing nation. In one interview, Rosedale said, “[w]e like to think of Second Life as ostensibly as real as a developing nation. . . . When we were developing the idea we . . . were inspired by Hernando de Soto’s *The Mystery of Capital* . . . . The fundamental basis of a successful developing nation is property ownership.”<sup>230</sup> Ondrejka echoed this sentiment in an article he wrote for a virtual-world symposium. He writes:

New insight comes from Hernando de Soto’s work in developmental economics, *The Mystery of Capital*. In brief, de Soto argues that when property

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<sup>228</sup> Linden CFO John Zdanowski explained the analogy to CFO Magazine in 2007: Server space in Second Life is called “land,” using a three-dimensional analogy for land. Each CPU can host, or simulate, 16 acres of land. We sell each region as an island for \$1,675 as an upfront setup fee, and then we charge \$195 a month for the monthly maintenance fee, which is a recurring charge.

Rappeport, *supra* note 26. And, to interviewer Kate Bulkley of *The Guardian*, Linden’s then-CEO Philip Rosedale stated:

It is a virtual real estate business but it is a little less abstract than a lot of people suggest. What we are really selling you is computation. We are selling you CPU core. If you buy a 16-acre piece of land, which is about four city blocks, what you are renting is one processor.

Kate Bulkley, *Today Second Life, Tomorrow the World*, GUARDIAN, May 17, 2007, Technology News & Features, at 5, available at <http://www.guardian.co.uk/technology/2007/may/17/media.newmedia2>.

<sup>229</sup> Symposium, *Ownership in Online Worlds*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 807, 821 (2005).

<sup>230</sup> See Krotzki, *supra* note 28.

does not have recognized titles and proofs of ownership, it is not fungible. Thus, the vast majority of the third world's population, despite having valuable assets like homes, land, businesses, cannot leverage these assets because they do not legally own them. . . . Most relevant to the Metaverse [Second Life], untitled property cannot be used to secure loans or to set up a legal business. On the way to the Metaverse, individuals and businesses will create objects of significant value, and may well be handsomely rewarded for it. . . . In the real world, lack of ownership is a fatal flaw in attempts to establish free markets. It would be a mistake to think that virtual worlds will be any different—free markets and property rights are prerequisites to innovation.<sup>231</sup>

If Linden regards, or at least used to regard,<sup>232</sup> Second Life as an extension of the real world and treats it as such by running a currency exchange,<sup>233</sup> engaging in land sales, and regulating Second Life in compliance with at least some federal laws,<sup>234</sup> it should not be surprising that its users regard and treat it similarly and expect that, as in the real world, land they have purchased from Linden cannot be taken from them without just compensation.

Finally, Linden's representations concerning its grant of intellectual property ("IP") rights to its users are misleading because the representations can cause the users to conflate IP rights

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<sup>231</sup> Ondrejka, *supra* note 36, at 100.

<sup>232</sup> Perhaps realizing the potential liability that such statements may bring, Linden has eschewed making them. For example, in response to a question about whether running Second Life is like running an independent country, Rosedale dodged, stating,

We have learned a lot about monetary policy! I love it. We recognize that the GDP in SL is growing at a rate that is staggeringly fast, relative to real world economies. I call it light central bank functions. We would love to find a great economist to come and join us!

Bulkley, *supra* note 228, at 5.

<sup>233</sup> See Second Life—Currency Exchange, *supra* note 27.

<sup>234</sup> See Ferret, *supra* note 24 (describing Linden's decision to shut down casinos in Second Life in response to an FBI probe).

with rights to their virtual property. For example, Linden founder and then-CEO Philip Rosedale stated in Linden's press release regarding IP rights:

We believe our new policy recognizes the fact that persistent world users are making significant contributions to building these worlds and should be able to both own the content they create and share in the value that is created. The preservation of users' property rights is a necessary step toward the emergence of genuinely real online worlds.<sup>235</sup>

Notably, the phrase "property rights" in the last sentence of the quoted passage is not qualified by the term "intellectual." Thus, a land purchaser seeing such a statement may believe that she has property rights not simply to the objects she creates, but also to the land that she purchased from Linden.

Although Linden has taken steps to strip a majority of the "ownership" language from its website<sup>236</sup> and altered its ToS to make the distinction between IP and virtual property clearer,<sup>237</sup> these actions, particularly because they have been conducted relatively *sub rosa*, will not aid Linden in actions brought by

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<sup>235</sup> Press Release, Linden Lab, Second Life Residents to Own Digital Creations (Nov. 14, 2003), available at [http://lindenlab.com/pressroom/releases/03\\_11\\_14](http://lindenlab.com/pressroom/releases/03_11_14).

<sup>236</sup> For example, the homepage of Second Life used to say, "Second Life is a 3D online digital world imagined, created and owned by its residents"; however, now it simply says, "Second Life is a 3D online digital world imagined and created by its residents." See Second Life—What Is Second Life?, <http://secondlife.com/whatis> (last visited Feb. 28, 2009); Posting of Ren Reynolds to Terra Nova Blog, *Residents No Longer Own Second Life?*, [http://terranova.blogs.com/terra\\_nova/2007/10/residents-no-lo.html#more](http://terranova.blogs.com/terra_nova/2007/10/residents-no-lo.html#more) (Oct. 27, 2007, 06:56). Similarly, the "IP Rights" page on Second Life's site used to say "You create it, you own it—and it's yours to do with as you please." See Posting of Steve O'Hear to ZDnet's The Social Web, *Second Life IP Rights; Here Today, Gone Tomorrow*, <http://blogs.zdnet.com/social/?p=83> (Feb. 3, 2007, 7:38 A.M.). In February 2008, however, it only said, "If you create it, you can sell it, trade it, and even give it away for free, subject of course to our Terms of Service." Second Life—IP Rights, *supra* note 54. Now, the Second Life Terms of Service reads "[Y]ou will retain any and all applicable copyright and other intellectual property rights with respect to any Content you create using the Service, to the extent you have such rights under applicable law." Second Life—Terms of Service, *supra* note 15, § 3.1.

<sup>237</sup> See Second Life—Terms of Service, *supra* note 15, § 3.3 ("Linden Lab retains ownership of the account and related data, regardless of intellectual property rights you may have in content you create or otherwise own.").

Second Life landowners who have already relied upon Linden's past representations.

In response to a complaint, Linden would undoubtedly argue that the ToS clarify that all users only retain ownership of their IP rights and not Linden's server space where the users' land resides. Moreover, the low price of the land compared to real property, Linden would argue, should be a sign to Second Life users that when they bought land from Linden, they were not getting all of the sticks in the property rights bundle. Consequently, as Linden would conclude, it is not reasonable for Second Life users to be confused about the extent of their ownership.

Linden's arguments are unavailing. First, as stated above, the ToS never explicitly mention the word "land" or makes the point that the land language Linden uses is simply an analogy. If Linden is going to rely on its ToS, which in any event most users likely do not read, it should at least make the terms as clear and as explicit as possible. Of course, Linden has an incentive to keep the ToS unclear because as long as users continue buying land and continue believing they own it, Linden's revenue will increase. Second, the price of the land should not necessarily serve a cautionary function to Second Life users. To be sure, it would be absurd in the real world for one to think that she could acquire title to sixteen acres of real property for a couple thousand dollars. It would not be so absurd in Second Life, however, because its market for land is entirely new. Second Life users have no way of knowing what land price seems commensurate with the rights they think they are getting when they buy land.

The two potential pitfalls to litigants under the UCL, standing and damages, also do not appear to pose significant threats to potential aggrieved Second Life users. A Second Life user who had her land stripped away by Linden would suffer the requisite injury-in-fact because she has been directly and personally affected by Linden's actions. Additionally, the termination of her account would amount to the satisfaction of the other requisite for standing—lost money or property as a result of the allegedly unfair business practice—because even if a court does not see the land as property, there is clearly a strong market in real-world currency for

land in Second Life. Thus, the seizure of the land would in fact amount to lost money.

Additionally, although damages are not available to any litigant under the UCL, an aggrieved Second Life user seems to be a likely candidate to recover via restitution. A court, using its equitable powers, would likely find that the Second Life user had a vested property right to or ownership interest in her land and that restitution of the value of the land to the user would return her to status quo ante before she was misled about the nature of her land purchase. Moreover, even though Linden has taken some steps to change the nature of its misrepresentations and, arguably, has stopped engaging in its unlawful conduct, a court could still order restitution even when injunctive relief may no longer be appropriate.

#### CONCLUSION

In their seminal article published more than ten years ago, David Post and David Johnson argued that cyberspace should be governed by its own set of rules apart from the real world.<sup>238</sup> More recently, Post and Johnson applied their argument to virtual worlds, predicting that “territorially-based law will not play a significant role in resolving [virtual-world] disputes; it will prove too complex . . . and too expensive . . . .”<sup>239</sup> Post and Johnson may prove to be right in the long term, and their argument may be particularly applicable to user-versus-user conflicts in virtual worlds; however, it does not seem particularly correct regarding user-versus-operator conflicts, particularly virtual-world operators like Second Life. Linden has actively commodified its world and made misleading representations regarding land ownership in

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<sup>238</sup> See David R. Johnson & David Post, *Law and Borders—The Rise of Law and Cyberspace*, 48 STAN. L. REV. 1367, 1375 (1996) (“If the sysops and users who collectively inhabit and control a particular area of the Net want to establish special rules to govern conduct there, and if that rule does not fundamentally impinge upon the vital interests of others who never visit this new space, then the law of sovereigns in the physical world should defer to this new form of self-government.”).

<sup>239</sup> David R. Johnson & David Post, *The Great Debate—Law in the Virtual World*, FIRST MONDAY, Feb. 6, 2006, <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/1311/1231>.

Second Life because it has been in its business interest to do so. It is inevitable that Second Life users will in the near future call upon real-world law, and particularly consumer protection law, to resolve disputes between themselves and Linden. The California consumer protection regime discussed in this Note, unlike the current contract- and property-based regimes, provides a body of law readily applicable to hold Linden accountable for its misrepresentations. This Note's discussion hopefully will provide those who have sustained a loss of assets with a possible approach to litigation against Linden, as well as prompt further change in Linden's behavior and its representations to its most loyal users. Users who buy land in Second Life have an interest in seeing Second Life continue to thrive. Linden should recognize this and, most of all, make sure that it no longer alienates or misleads those who have come to love their alternate reality, the second life with which Linden has helped provide them.