

2011

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Justin A. Kwong

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Kwong, Justin A. (2011) "Getting the Goods on Virtual Items: A Fresh Look at Transactions in Multi-User Online Environments," *William Mitchell Law Review*: Vol. 37: Iss. 4, Article 2.

Available at: <http://open.mitchellhamline.edu/wmlr/vol37/iss4/2>

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GETTING THE GOODS ON VIRTUAL ITEMS: A FRESH LOOK AT TRANSACTIONS IN MULTI-USER ONLINE ENVIRONMENTS

Justin A. Kwong[†]

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[†] Justin A. Kwong is an attorney with Dennison Tax Law in Edina, Minnesota and an adjunct professor at William Mitchell College of Law where he teaches a course on Social Networks and Virtual Worlds. He received a Juris Doctorate from William Mitchell College of Law in 2009 and a Bachelor of Arts from Carleton College in 2003. He would like to thank Professor Christina Kunz for introducing him to the fascinating community of virtual world legal scholars. Special thanks go to his family and to his wife, Stephanie M. Kwong, whose unending support and law review expertise helped make this article possible.

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I. INTRODUCTION

Virtual worlds have introduced millions of people to expansive spaces where the laws of physics can be rewritten at will, where magic is commonplace, and where creativity is rewarded and cherished. People enter these worlds for many reasons, and the number of participants continues to grow unabated.¹ The number of new virtual worlds and social game platforms is nearly doubling every year.² The growth of virtual worlds introduced into the mainstream consciousness a concept that was relatively unknown outside of investment banking circles just a decade earlier—intangible assets that you buy with *real* money. The idea of paying actual money to get some object that only exists in a computer or digitally created environment may still strike people as lunacy, but there are more people who barely give it a second thought. Virtual items have the potential to change many aspects of online entertainment delivery the way social networking giants Twitter and Facebook changed how people connect and share information. Virtual items can do all this because they facilitate completely new revenue-generation models for entertainment services. Recognizing the potential for incredible profits, several major companies³ have experimented with customized, branded virtual

1. Active accounts for virtual worlds have gone from 414 million in early 2009 to just over one billion in the third quarter of 2010 according to KZero, an analytics firm that monitors virtual world usage. KZero Worldwide, *Virtual Worlds: Industry & User Data: Universe Chart for Q3 2010*, SLIDESHARE, at *7 (Sept. 30, 2010), <http://www.slideshare.net/nicmitham/kzero-universe-chart-q3-2010>.

2. See KZero Worldwide, *Virtual Worlds: 2011 and Beyond: Key Industry Trends and Market Developments*, SLIDESHARE, at *8 (2009), <http://www.slideshare.net/nicmitham/virtual-worlds-2010-2098472>.

3. Companies like McDonalds, Cascadian Farms, and Herman Miller have offered branded virtual items in worlds like FarmVille and Second Life. See, e.g., *McDonald's and FarmVille Join Forces for Special Event Promotion in Most Popular Social Game*, MARKETWIRE (Oct. 7, 2010), <http://www.marketwire.com/press-release/mcdonaldsr-farmville-join-forces-special-event-promotion-most-popular-social-game-1331266.htm>; Jennifer Van Grove, *FarmVille Users Plant 310 Million Virtual Organic Blueberries*, MASHABLE (July 22, 2010), <http://mashable.com/2010/07/22/farmville-organic-blueberries>; *Herman Miller Invites Virtual World Residents to "Get Real,"* HERMAN MILLER (Oct. 8, 2007), <http://www.hermanmiller.com/DotCom/jsp/aboutUs/newsDetail.jsp?navId=194&topicId=51&newsId=554>.

items as a way to raise brand awareness and make money doing it.⁴ This article is about the growing demand for these items beyond the usual virtual worlds and how they will play a major role in the future of online commerce.

There are three major objectives that I wish to pursue in this article. My first objective is to update the literature with respect to developments in the market of virtual items. It should help clarify and dispel some of the idealistic, but misconceived notions about their legal status. Many of the earlier articles about virtual items failed to differentiate between the different contexts in which items may be found, creating confusion among readers trying to understand what they are and what drives people to purchase them. My second objective is to describe the current state of software licensing and consumer rights in the different classes of virtual items. This is important because mistaken beliefs about users' rights may lead some individuals to initiate costly and ultimately fruitless litigation. And finally, I propose a way to improve all users' understanding of their rights through a system that standardizes the organization of standard form contracts that govern virtual items so that consumers of these services have greater certainty about what they are purchasing. In the end, I hope to convey the exciting potential of virtual items to reshape many aspects of virtual worlds, social games, and more.

A. *A Short History of Virtual Items*

The original virtual worlds date back at least thirty years, but they were limited in scope and only accessible by small groups of people with access to the massive mainframe computers that were connected to what eventually became the Internet.⁵ The first virtual worlds to draw substantial numbers of players were role-playing games set in mythical realms.⁶ One common aspect of role-

4. See Ravi Mehta et al., *Branded Virtual Goods Market Report*, VIXIMO, at 10 (Aug. 2010), <http://viximo.com/interior/resources/downloads/082010-branded-market.pdf>.

5. See GREG LASTOWKA, *VIRTUAL JUSTICE* 43 (2010).

6. The first massively multiplayer online role-playing game (MMORPG) is generally recognized to be *Ultima Online*, which debuted in 1997. See *Ultima Online's Release History and Credits*, ULTIMA ONLINE, <http://www.uoherald.com/node/4> (last updated Aug. 21, 2010, 18:05:01 PM). The MMORPG that most people are familiar with, *World of Warcraft*, debuted in 2004. See *World of Warcraft Has Now 1 Million Fans in North America*, SOFTPEDIA (Aug. 29, 2005), <http://news.softpedia.com/news/World-of-Warcraft-Has-Now-1-Million-Fans-in-North>

playing games is a mission-reward system that allots players with experience points and magical items when they defeat enemies.⁷ These items are collected by the players' avatars⁸ and can then be used later or traded for other items. Regardless of the virtual world's theme, most role-playing games use this system because the items enhance the experience of playing and thus keep the person engaged. As they grew in popularity, other online worlds sought to distinguish themselves from the competition. Whether it is a mace, a shield, or a potion, what they all have in common is that each represents some amount of time spent in the world earning it. We all know that time is money, so it was only a matter of time before people started to look for ways around the seemingly endless hours that some games require to get the best items or enough experience to teach their avatars a new skill.⁹ The obvious answer was to either trade the items for some other in-world item or currency, or simply sell the items for real money. Some worlds were open to these exchanges, even if they were not officially meant to be part of the game-play.¹⁰ Even if the creator of the world does not provide for or facilitate markets for users to exchange virtual goods,¹¹ "the residents may take it upon themselves to do so," and do so they have.¹² There is no way to

-America-7174.shtml.

7. In World of Warcraft, for example, killing a hostile, nonplayer "mob" (short for "moveable object") will result in a "drop" of several, randomly generated, level-appropriate items such as gold pieces, weapons, or potions that can be used to heal or increase spell-casting ability. The more difficult the mob, the greater the reward that is dropped, leading to the highest-level enemies, which can take up to twenty players or more to defeat.

8. An avatar is the player's manifestation in the virtual world, originally from the Sanskrit word for "divine incarnation." LASTOWKA, *supra* note 5, at 45.

9. See Andrea Vanina Arias, Comment, *Life, Liberty, and the Pursuit of Swords and Armor: Regulating the Theft of Virtual Goods*, 57 EMORY L.J. 1301, 1302 (2008) ("Because virtual items enhance character attributes but require time to obtain, they have become objects of value to players." (citations omitted)).

10. See LASTOWKA, *supra* note 5, at 23.

11. See, e.g., BENJAMIN TYSON DURANSKE, VIRTUAL LAW 395 (2008) (including as an appendix the complaint against In Game Entertainment (IGE) for violating World of Warcraft rules against selling in-game gold for real money); Benjamin Duranske, Hernandez v. IGE Settles, *IGE U.S. Confirms It Will Not "Engage in the Selling of WoW Virtual Property or Currency" for Five Years; Class Action Still Possible*, VIRTUALLY BLIND (Aug. 27, 2008), <http://virtuallyblind.com/2008/08/27/hernandez-ige-settles> (discussing settlement of the complaint against IGE).

12. F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CALIF. L. REV. 1, 10 (2004) (exploring property rights and avatar rights in virtual worlds); see also DURANSKE, VIRTUAL LAW, *supra* note 11, at 85–86 (describing the open market for items from Ultima Online in 1999).

know when the first person offered to pay a fellow player for an item he had obtained from a virtual world, but before long, entire industries emerged to serve this demand.¹³

B. *Virtual Items Take Many Forms*

The market for virtual items has greatly expanded since the early days of virtual worlds. Today, there are a multitude of objects across an incredible variety of platforms. Some can be as simple as the free gifts apps that were popular in the early days of Facebook.¹⁴ For \$1.00 a user could send an image of a cupcake or a puppy to a friend to celebrate a special occasion.¹⁵ Other services allow users to buy wallpaper, ringtones, decorations, and many other ways to customize their accounts.¹⁶ Some worlds like Habbo.com only permit the purchase of items directly from the provider,¹⁷ while others, namely Second Life, openly encourage users to create their own items and sell them to anyone willing to buy them.¹⁸ One of the goals of this article is to increase awareness about other games and services that offer digital items for purchase among those who are interested in virtual worlds. Facebook is a particularly important platform for virtual items because it also serves as a portal for many dozens of virtual worlds and social games that connect players to other users through their own networks of friends.

13. See, e.g., Julian Dibbell, *The Life of the Chinese Gold Farmer*, N.Y. TIMES, June 17, 2007 (Magazine), available at <http://www.nytimes.com/2007/06/17/magazine/17lootfarmers-t.html> (describing the dark rooms where dozens of Chinese men work twelve hour shifts killing creatures in World of Warcraft so their company can sell the gold to buyers around the world—a practice that is against the rules imposed by World of Warcraft’s maker, Blizzard Entertainment).

14. See, e.g., Jared Morgenstern, *Last Call for Facebook Gifts*, FACEBOOK (July 8, 2010, 6:04 PM), <http://blog.facebook.com/blog.php?post=405727117130> (explaining the cancellation of the Facebook Gift Shop service).

15. Jared Morgenstern, *Give Gifts on Facebook!*, FACEBOOK (Feb. 7, 2007, 9:49 PM), <http://blog.facebook.com/blog.php?post=2234372130>.

16. See MORGAN STANLEY, THE MOBILE INTERNET REPORT 54 (Dec. 15, 2009), http://www.morganstanley.com/institutional/techresearch/pdfs/mobile_internet_report.pdf.

17. See *Terms of Use*, HABBO, <http://www.habbo.com/papers/termsAndConditions> (last visited Mar. 23, 2011).

18. See generally *What is Second Life?*, SECOND LIFE, <http://secondlife.com/whatis/?lang=en-US#Intro> (last visited Mar. 23, 2011) (explaining the logistics of Second Life).

Recent news articles about virtual items express a kind of breathless wonderment at the proliferation of spending on these items, perhaps because of the fact that people are spending real money for intangible creations with no *apparent* value.¹⁹ The economics of virtual items, in terms of the number of transactions and the profit margins, are growing at an astonishing rate.²⁰ Game-based virtual item sales in China alone have gone from \$296 million in 2006 to \$1.3 billion in 2009.²¹ This behavior is not as unreasonable as it might appear, because people have been known to spend vast sums of money for things of nominal value like baseball cards²² or collectible stuffed animals,²³ to name a few.²⁴ And although consumers are spending significant amounts of time and money for swords and armor to slay virtual dragons or for tractors and seeds on imaginary farms, their rights with respect to these items are barely any better defined today than they were a decade ago, when virtual worlds really began their expansion.

II. THE BASIC MECHANICS OF VIRTUAL ITEMS AND ONLINE WORLDS

Throughout their existence, humans have dealt primarily with things that are tangibly, physically real—things that can be seen, held, tasted, smelled, heard, etc. Technological advances, like agriculture, created more leisure time which allowed early humans to study and contemplate abstract ideas and concepts. Money is perhaps the most commonly encountered form of abstract

19. See *Are You Plunking Down Real Money for Virtual Fun?*, NPR (Aug. 28, 2010), <http://www.npr.org/templates/story/story.php?storyId=129496479>.

20. See KZero Worldwide, *supra* note 2, at *45 (graphing virtual goods' revenues for the past five years).

21. MORGAN STANLEY, *supra* note 16, at 53.

22. Associated Press, *Honus Wagner Baseball Card Sold for \$2.35 Million*, NBC SPORTS (Feb. 27, 2007), <http://nbcsports.msnbc.com/id/17355488>.

23. Alan Donahue, *What Is the Most Expensive Beanie Baby?*, EHOW, http://www.ehow.com/about_4579214_what-expensive-beanie-baby.html (last visited Feb. 26, 2011) (discussing the sale of a royal blue elephant called "Peanut" for more than \$3,000 at auction in 2000).

24. If baseball cards and Beanie Babies seem trivial or economically insignificant, consider that major investment firms nearly crashed the global economy by buying and selling credit-default swaps on collateralized debt obligations, two financial instruments that were of questionable value and also have no physical manifestation. Cf. Frank Rich, Op-Ed., *The Other Plot to Wreck America*, N.Y. TIMES, Jan. 9, 2010, available at <http://www.nytimes.com/2010/01/10/opinion/10rich.html?ref=frankrich> (discussing the recent financial meltdown).

property,²⁵ but even money often has a physical component—in the form of metal coins and paper currency. The personal computing revolution brought the truly abstract to the masses. While the study of abstract problems was historically relegated to religious scholars, scientists, and mathematicians, our digital society is making it an everyday activity. Through computers, we have been able to create and visualize entire worlds, where people can manipulate the very environment around their creations. With this power, computerized creations can have a lasting effect on those who interact with them.²⁶ In order to really understand virtual items, I believe it is best to discuss them in the context of the environments in which they originate. I therefore begin the discussion with a brief explanation of virtual items, before discussing the platforms where they can be found, and finally discussing the role of virtual items in supporting the success of those very platforms.

A. *Virtual Items Defined*

A virtual item is generally defined as “a digital representation of objects (real or imaginary) . . . created for use with virtual worlds, video games or other social media applications.”²⁷ What this boils down to is that virtual items are images that look and act like things. They may look and act like real things, but there is nothing truly real about them.²⁸ The most common mistake made with respect to virtual items is the label “virtual goods.”²⁹ Virtual items are not, and can never be, “goods.” This is because “goods” are specially defined in commercial law as existing objects that are

25. Once major countries like the United States abandoned the gold standard, money became something that was only as valuable as people thought it was. See generally Samuel Knafo, *The Gold Standard and the Origins of the Modern International Monetary System*, 13 REV. INT’L POL. ECON. 78 (2006) (describing the transition from gold standard-based economies to economies in which central banks determine value of domestic monies based on international economies).

26. This can be true for anyone, whether they are playing an action-packed video game or watching a heart-warming computer-animated motion picture.

27. James G. Gatto & Seth A. Metsch, *Legal Issues with Virtual Worlds, Virtual Goods and Virtual Currencies*, 1016 PRACTISING L. INST. 837, 849 (2010).

28. See Lastowka & Hunter, *The Laws of the Virtual Worlds*, *supra* note 12, at 40–43 (discussing the relevance (or lack thereof) of something being real for it to be property).

29. See, e.g., *id.* at 10–11 (using the term “virtual goods”); Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043, 2067–73 (2004) (using the term “virtual goods”).

identifiable and movable at the time of purchase.³⁰ Most people engaged in creating, selling, and buying virtual items tend to use terms derived from the real world to describe the exchanges taking place in their digitally rendered communities because it is often easier to use an analogy than it is to create a whole new vocabulary. Easy or not, these colloquialisms convey misleading ideas about what virtual items truly are. Another frequent misnomer is “virtual property.”³¹ This can refer to virtual items, but also to “land” or “real estate” that exists in some virtual spaces.³² Virtual land is beyond the scope of this article, so I want to be sure to differentiate it from virtual items. Some of the aspects of virtual items vaguely resemble aspects of actual tangible property.³³ Despite the persuasive arguments from authors such as Professors Fairfield,³⁴ Lastowka, and Hunter,³⁵ property rights in virtual items remain largely out of reach.³⁶ If the words used by the majority of scholars, designers, players, and marketers are incorrect or inconsistent, they will limit people’s ability to truly understand the full scope of what virtual items are and can do. This makes a complicated concept even more difficult to grasp.

At their core, virtual items are lines of software code that exist within larger computer programs.³⁷ Most of these programs are stand-alone clients used to generate the three-dimensional landscapes and exchange information via the communications protocols of virtual worlds.³⁸ Today, however, they are increasingly becoming part of social networks and other platforms that support multi-user interaction.³⁹ Unlike other previously encountered digital assets, such as MP3 music files or JPEG photos,⁴⁰ virtual

30. U.C.C. § 2-105 (2010).

31. See, e.g., Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047 (2005) (discussing virtual property).

32. See, e.g., *id.* at 1049, 1055 (describing a URL as being similar to land or a type of real estate).

33. See DURANSKE, VIRTUAL LAW, *supra* note 11, at 93–94.

34. Fairfield, *supra* note 31, at 1067–68.

35. See generally Lastowka & Hunter, *supra* note 12, at 29–51 (arguing that virtual items can be recognized as property interests).

36. See DURANSKE, VIRTUAL LAW, *supra* note 11, at 87–88.

37. LASTOWKA, *supra* note 5, at 50–53.

38. *Id.*

39. Examples of these platforms include games playable through any Internet browser using Adobe Flash, such as FarmVille through Facebook or at FarmVille’s own website. FACEBOOK, <http://www.facebook.com> (last visited Feb. 24, 2011); FARMVILLE, <http://www.farmville.com> (last visited Feb. 24, 2011).

40. The MP3 and the JPEG formats are both open standards for file

items can only be encountered through the unique, tightly controlled virtual environment for which they were programmed. In many ways it becomes almost impossible to distinguish the items from the world itself because they are inseparably linked to it. This is a core difference that truly separates virtual items from all other digitally-created files and objects because they cannot be exchanged, traded, or sold outside of their respective worlds, thus further restricting the ability of users to assert property rights over them. Before getting into specifics about property rights, it would be best to discuss the environments in which virtual items can be found.

B. Virtual Worlds and Social Games = Multi-User Online Environments

It may come as a surprise, but there is considerable debate among legal scholars about the right way to describe virtual worlds. “There is no single agreed upon definition of what a virtual world is,”⁴¹ which means that a discussion of certain aspects of these online spaces could mean different things depending on the author’s definition. Benjamin Duranske defines “virtual worlds” as “avatar-based simulations where user alterations of the physical, social, or economic environment of the world are persistent.”⁴² Professor Lastowka’s most recent book defines them as “Internet-based simulated environments that feature software-animated objects and events.”⁴³ This is probably the closest to consensus that exists among scholars at present.⁴⁴ Despite these expansive takes,

compression, meant to be useable across many different platforms. Their very names are abbreviations of groups who created them, i.e., Moving Picture Experts Group and Joint Photographic Experts Group, respectively. ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/754559/MP3> (last visited June 11, 2011) (defining MP3); ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/1213889/JPEG> (last visited June 11, 2011) (defining JPEG).

41. M. Scott Boone, *Ubiquitous Computing, Virtual Worlds, and the Displacement of Property Rights*, 4 I/S: J. L. & POL’Y INFO. SOC’Y 91, 109 (2008) (examining property rights in virtual world technology).

42. DURANSKE, *VIRTUAL LAW*, *supra* note 11, at 4. Persistence is key. The game/world/site continues to change and grow even if a particular user is not logged in. The world/site is not dependent on any one user. *See id.* at 86–87.

43. LASTOWKA, *supra* note 5, at 9 (citing RICHARD A. BARTLE, *DESIGNING VIRTUAL WORLDS* 102–04 (New Riders 2003)).

44. Other definitions are close. *See, e.g.*, M. Scott Boone, *supra* note 41, at 109 (stating that “a persistent, shared intangible space or interface that seeks to mimic the appearance and behavior of the physical world”); Juliet M. Moringiello, *What*

however, some authors like Professor Lastowka deliberately exclude many other sorts of virtual spaces, including many social networks and social games.⁴⁵ I find that, while it is often important to keep the immersive worlds separate from the more casual social games, they share enough similarities when it comes to discussing virtual items that a unifying term will be helpful here. Therefore, instead of wrapping everything into an already over-stuffed term like “virtual world,” I address the collective group of worlds and games that are persistent and shared over the Internet as “multi-user online environments,” or “MOEs.”

Understanding the legal properties of virtual items also requires knowledge about the context of the platforms or MOEs from which they originate. The platform is important because it is the backdrop and the foundation upon which every interaction and transaction depends. It is the program that sets the rules of the world, not just in terms of the scope of possible behavior, but the very physics of the environment.⁴⁶ What can and cannot be done depends on the rules set forth in the programming written by the MOE’s provider. Whether items may be traded, sold, made, bought, copied, destroyed, hidden, stored, or decompiled, all of it is based on the computer code written by the provider and implemented in the overall platform.

III. VIRTUAL ITEM PROPERTIES IN CONTEXT

Virtual items derive their properties from the online environments of which they are a part. The biggest mistake that many people make is in talking about them as a monolithic collection of files that serves only one purpose in a MOE. Many scholars and authors have attempted to paint virtual items or virtual land as a new form of property.⁴⁷ To date, no online

Virtual Worlds Can Do for Property Law, 62 FLA. L. REV. 159, 169 (2010) (“The general definition of a virtual world is an online environment that is both persistent and dynamic. It is persistent because it does not cease to exist when the participant turns her computer off; it is dynamic because it is continually changing.” (citing F. Gregory Lastowka & Dan Hunter, *Virtual Worlds: A Primer, in THE STATE OF PLAY: LAW, GAMES, AND VIRTUAL WORLDS* 13, 15 (Jack M. Balkin & Beth Simone Noveck eds., New York University Press 2006))).

45. LASTOWKA, *supra* note 5, at 31.

46. For example, Second Life permits avatars to fly on command; just press the F key and you are off. *See, e.g.*, Lastowka & Hunter, *supra* note 12 (discussing numerous examples of unique rules of particular gaming worlds).

47. *See, e.g.*, Lastowka & Hunter, *supra* note 44, at 17 (“It is unclear how

environment has expressly acknowledged any such right to items within their world⁴⁸ and no U.S. court or legislature has recognized a right to virtual-world assets.⁴⁹ The arguments made in favor of recognizing property rights in online-environment assets are compelling,⁵⁰ yet the potential risks of doing so remain far greater than the possible rewards.⁵¹ Second Life arguably came the closest of any other online environment to offering users something close to a legitimate right to property when it offered users the right to retain their own intellectual property rights.⁵² The terms as they

existing property rules apply to . . . virtual rights and properties.”); Fairfield, *supra* note 31, at 1050 (“Why is it important that we have a theory of virtual property? The common law of property works to ensure that resources are used well. If we do not have a good theory of virtual property, then virtual property will be poorly used.” (citation omitted)).

48. Proving a negative is usually difficult, but to my knowledge, based on regularly following industry developments and Westlaw searches of news sources, using terms such as “virtual world recognizes grants users players property rights online assets,” no such rights have emerged as of February 24, 2011.

49. Some courts outside of the United States have, however, taken a step further and recognized more rights than those offered by the online environment provider. In China, the case brought by Li Hongchen against Beijing Arctic Ice led to a finding that the loss of items to a hacker was theft and ordered the company to return the items and pay damages because flaws in its servers allowed the theft. Will Knight, *Gamer Wins Back Virtual Booty in Court Battle*, NEW SCIENTIST (Dec. 23, 2003, 2:37 PM), <http://www.newscientist.com/article/dn4510-gamer-wins-back-virtual-booty-in-court-battle.html>. Two separate Dutch courts found that virtual items obtained through hacking or violent coercion were both theft. Benjamin Duranske, *Netherlands Court Finds Criminal Liability and Sentences Two Youths for Theft of Virtual Goods*, VIRTUALLY BLIND (Oct. 22, 2008), <http://virtuallyblind.com/2008/10/22/netherlands-theft-virtual-good>; *Stealing in Virtual Worlds Is a Real Crime*, GOSSIP GAMERS (Jan. 20, 2009 2:59 PM), <http://www.gossipgamers.com/stealing-in-virtual-worlds-is-a-real-crime>. Also, the Supreme Court of South Korea struck down laws that banned real money trading, making it legal where online environment providers chose to offer it. Chris Pollette, *Trading Virtual Money Is Legal in South Korea*, HOW STUFF WORKS (Jan. 20, 2010), <http://blogs.howstuffworks.com/2010/01/20/virtual-money-is-legal>. A wider trend beyond these well-known cases, while plausible, has not arisen.

50. Fairfield, *supra* note 31, at 1057 (discussing email accounts and URLs and describing a bank account as one of the earliest forms of virtual property).

51. See DURANSKE, VIRTUAL LAW, *supra* note 11, at 96–97. If a virtual world offered users property rights, it would have to reimburse them for any lost value if the world were to close or experience some technical problem. See *id.* at 99. It would be feasible to do this, but the costs, which would ultimately be borne by its consumers, would be substantially higher than they would be without such a right. See *id.* at 100.

52. *Terms of Service*, SECOND LIFE, § 7.1 (Dec. 15, 2010), <http://secondlife.com/corporate/tos.php> [hereinafter Second Life TOS]. As discussed above, at the time of this writing, there is currently an on-going lawsuit to resolve whether some of the earliest Terms of Service (TOS) for Second Life

are written today clearly disavow any right or title to any in-game land or items.⁵³ Even if there were some laws that conveyed property rights in virtual items to users, the online environment providers would either adapt their platform parameters or possibly terminate the world altogether.⁵⁴

Virtual items are aspects of the MOE's service that are designed to enhance and customize the user's experience. The scope of the items' ability to modify that experience in-world also depends on the nature of the MOE. Most items acquired in mission-oriented role-playing games such as World of Warcraft or EverQuest grant the bearer increased abilities and powers over the avatar's base characteristics. The primary differences between experienced players are attributable mainly to the items they have acquired during missions they ran and the battles they won.⁵⁵ Not only do they convey greater powers, but because of their rarity (which is also controlled by the world's software), they give the wearer a certain caché and status as someone who is a dedicated and highly skilled player. The other key factor that keeps this level of caché is the fact that the items can only be acquired by playing the game. World of Warcraft does not allow users to purchase any

promised full property rights, but all subsequent TOS have distinctly disavowed any such conveyance. *See* Evans v. Linden Research, Inc., No. 10-1679, 2011 WL 339212 (E.D. Pa. Feb. 3, 2011).

53. *See, e.g., Entropia Universe End User License Agreement (EULA)*, ENTROPIA UNIVERSE § 4.1 (Feb. 2, 2011), <http://legal.entropiauniverse.com/legal/eula.xml> ("Despite the similarity in terminology, all Virtual Items, including virtual currency, are part of the Entropia Universe System and/or features of the Entropia Universe, and MindArk and/or respective Mindark's Planet Partner(s) retains all rights, title, and interest in all parts including, but not limited to Avatars, Skills and Virtual Items."); Second Life TOS, *supra* note 52, § 6 ("Virtual Land is the graphical representation of three-dimensional virtual world space. When you acquire Virtual Land, you obtain a limited license to access and use certain features of the Service associated with Virtual Land stored on our Servers.").

54. *See, e.g., Second Life TOS, supra* note 52, § 4.2 ("Second Life exists only as long as and in the form that we may provide the Service, and all aspects of the Service are subject to change or elimination. Linden Lab has the right to change and/or eliminate any aspect(s), features or functionality of the Service as it sees fit at any time without notice, and Linden Lab makes no commitment, express or implied, to maintain or continue any aspect of the Service.").

55. For example, the items regularly available for purchase in World of Warcraft have substantially fewer enhancements and bonuses, such as "+15 to agility," than ones that are received or obtained from completing quests. *See World of Warcraft Armory*, WORLD OF WARCRAFT, <http://us.battle.net/wow/VirtualWorlds:APrimer/en/game/armory> (last visited Feb. 24, 2011).

in-game items with real money.⁵⁶

Other worlds' items may have completely different purposes or properties. Compare the above system to that of a social world such as Habbo, where items are purely decorative, meant to show off the user's tastes and status.⁵⁷ The items are only available from the world provider, Sulake, through purchase or as prizes from contests and promotions.⁵⁸ FarmVille⁵⁹ is a MOE that lets users earn or buy virtual items that help them with their virtual farming operations, such as special seeds, tractors, or a Zeppelin that prevents crops from withering,⁶⁰ but it also features a considerable number of items with no real purpose other than for decoration or show.⁶¹ There are still other online environments where users can create and market their own virtual items. Second Life⁶² is the most well-known service offering this capability, but others offer it as well.⁶³ The items may also grant the user's avatar-enhanced abilities through short, embedded programs called scripts, such as those made by Eros.⁶⁴ They are not, however, required to advance

56. *World of Warcraft Terms of Use*, BLIZZARD ENTERTAINMENT (Dec. 9, 2010), http://us.blizzard.com/en-us/company/legal/wow_tou.html ("You may not purchase, sell, gift or trade any [World of Warcraft] Account, or offer to purchase, sell, gift or trade any Account, and any such attempt shall be null and void.")

57. See HABBO, <http://www.habbo.com> (last visited Feb. 24, 2011).

58. *Official Parent's Guide*, HABBO, <http://www.habbo.com/groups/officialparentsguide> (last visited Feb. 26, 2011).

59. FARMVILLE, *supra* note 39.

60. Farmers Insurance Offers Coverage in Virtual FarmVille, INSURANCE JOURNAL (OCT. 14, 2010), http://www.insurancejournal.com/news/national/2010/Virtual_Worlds:_A_Primer_/10/14/114046.htm.

61. My wife's FarmVille farm has a large manor-style farmhouse that apparently does nothing but take up valuable growing space, but it looks impressive, which counts for a lot when you are competing with friends—which is the whole point of the game.

62. SECOND LIFE, <http://secondlife.com> (last visited Feb. 26, 2011).

63. *What is Second Life?*, *supra* note 18. Project Entropia is a virtual world that offers players the opportunity to make and sell items to other players as part of the platform's real-cash economy. See *Professions & Activities*, PLANET CALYPSO, <http://www.planetcalypso.com/guides/professions-activities> (last visited Feb. 26, 2011). The professions in Project Entropia's Calypso planet appear to offer a limited range of options, with some room for customized details. See, e.g., *Professions & Activities: Manufacturing*, PLANET CALYPSO, <http://www.planetcalypso.com/guides/professions-activities/crafting/> (last visited Feb. 26, 2011) (showing items, blueprints, process and customization options for manufacturing activities). This, while offering some player creativity, is much less open than Second Life's free-form creation tools. See, e.g., *Wings Marketplace*, SECOND LIFE MARKETPLACE, [https://marketplace.secondlife.com/products/search?search\[category_id\]=18](https://marketplace.secondlife.com/products/search?search[category_id]=18) (last visited Mar. 24, 2011) (showing all avatar accessory options for wings).

64. Eros LLC's products, which allowed Second Life avatars to engage in

through the world as in the above-mentioned mission-oriented worlds, because there is no set objective for Second Life other than what users decide for themselves.⁶⁵

A. *Revenue Models Shape Properties of Virtual Items*

There are many different ways to structure a MOE, but the fundamental difference between these platforms and traditional video games or simulations is that online environments are designed to be ongoing communities with no specified end point. This means that the costs of software development and game design cannot be entirely recouped when a new user creates an account. Rather, MOEs need to continuously generate income in order to pay programmers, manage all the accounts, and keep the servers running. No matter what the objectives described in any service's promotional materials may be, every one is designed to make money. Each virtual environment, therefore, operates in a way that allows it to generate maximum revenue. There are many ways of accumulating this income: it can be directly collected from users as a subscription or by selling virtual items; it can be acquired indirectly by retaining a portion of virtual item transactions between participants as fees; it can come from third parties that deliver advertising messages to participants, or it can come from selling information about users' behavior and preferences. Regardless of the collection methods, virtual items are becoming an integral part of most formulas because of the way users treat them as property, even though they have no recognized property rights in them.

1. *Subscription*

Perhaps the easiest way to generate revenue is to charge a monthly or annual subscription fee.⁶⁶ Participants can then use the service as much as they want with no additional costs required.

simulated sexual activity, were made famous by the lawsuit the company brought against a copyright infringer who sold unauthorized copies of Eros's products. See DURANSKE, VIRTUAL LAW, *supra* note 11, at 423. The Complaint for Eros, LLC v. Simon, No. 07 Civ. 4447 (E.D.N.Y. 2007) is available at <http://www.citmedialaw.org/sites/citmedialaw.org/files/2007-10-24-Eros%20Complaint.pdf>.

65. See SECOND LIFE, *supra* note 62.

66. Subscriptions have worked for many of the most successful online environments like World of Warcraft, EVE Online, Star Wars Galaxies, and kid-oriented worlds like Webkinz.com. LASTOWKA, *supra* note 5, at 53–54.

Some users will want to log on regularly in order to get the most out of their money while others will be happy to log in whenever it suits them. Either way, this method works for many services, not just for virtual worlds, because it guarantees a constant source of revenue for the provider.⁶⁷ Keeping participants from getting bored and leaving, however, is a much greater challenge. The constant pursuit of better and more powerful items is a key motivator for many people to maintain their subscriptions, but there is a reason why gamers call the repetitive tasks of slaying monsters for gold and items “grinding.” Providers must constantly expand the narrative of the game, adapt the game mechanics, keep the competition balanced, and/or release new activities for people to take part in to retain players’ interest. Game creators regularly add new missions and rewards with ever more elaborate designs that everyone else can see—allowing players to demonstrate their status as high-level players.⁶⁸

Other economic principles need to be accounted for also, to keep the world’s economy from becoming unbalanced and unfair.⁶⁹ Inflation is a source of concern, but also a growth strategy just as it is in the real world.⁷⁰ As more people are able to reach the wealth or skill levels needed to possess the once-rare items, the early bearers need to find and acquire even better items in order to keep their elite status.⁷¹ Game worlds like World of Warcraft, which bar

67. Many offline services like public radio and yoga studios are now offering ongoing month-to-month subscriptions, too. See, e.g., *Sustaining Members*, MINNESOTA PUBLIC RADIO, http://minnesota.publicradio.org/support/membership/sustaining_members.shtml (last visited Feb. 26, 2011); *Yoga Class Pricing Information*, CORE POWER YOGA, <http://www.corepoweryoga.com/NewtoCorePowerYoga/Pricing/RegularPricing.aspx> (last visited Feb. 26, 2011).

68. See, e.g., *Cataclysm FAQ*, WORLD OF WARCRAFT, <http://www.worldofwarcraft.com/cataclysm/faq/> (last visited Feb. 6, 2011) (describing Cataclysm, which is World of Warcraft’s third expansion set).

69. Scott Hillis, *Virtual World Hires Real Economist*, REUTERS (Aug. 16, 2007), <http://www.reuters.com/article/2007/08/16/us-videogames-economist-life-idUSN0925619220070816>.

70. See *id.* To put a personal spin on it, I quit playing World of Warcraft when I started law school in 2006. When I logged back on in the summer of 2007 to check in with some old friends, items that used to sell for ten gold were now going for close to thirty gold and the maximum character level had been raised from sixty to seventy, meaning my once rich and powerful character was now weak and middle-class from a year of neglect.

71. This cycle of acquisition has been linked to the same impulses that cause people to crave foods or drugs in the real world. See Chih-Hung Ko, et al., *Brain Activities Associated with Gaming Urge of Online Gaming Addiction*, 43 J. PSYCHIATRIC RES., 739–47 (2009) (discussing a study on the effects of multiplayer role-playing

the use of real money to acquire items, rely on players actually spending time in the game to earn their items.⁷² To prevent cheating, item properties have to be tightly controlled by the game software. Items cannot be traded easily, and there is no way to safely acquire the currency needed to acquire items. If someone could skip the hours and hours of play needed to obtain a rare item, there would be no real incentive for anyone to keep running missions and the system would quickly deteriorate.⁷³ The restrictions reward dedicated users and assure the providers that the subscriptions will continue to flow in.

2. *Free-to-Play*

What one might say is the opposite of a subscription-based system is a free-to-play model that allows anyone to enter the environment without any up-front cost.⁷⁴ Many of the increasingly popular social games are free-to-play.⁷⁵ Within this group there are either leveling-based games or socially oriented spaces. Many of the principles in the leveling games are the same as in the subscription models: players spend time doing tasks and are rewarded with items. The difference comes from the ability to pay

video games—specifically World of Warcraft—on the brain through functional magnetic resonance imaging (fMRI) scanning).

72. See *World of Warcraft Terms of Use*, *supra* note 56 (“Blizzard does not recognize any purported transfers of virtual property executed outside of the Game, or the purported sale, gift or trade in the ‘real world’ of anything that appears or originates in the Game. Accordingly, you may not sell in-game items or currency for ‘real’ money, or exchange those items or currency for value outside of the Game.”).

73. The same goes for any high-status item, especially if you think about it in the reverse. If anyone could obtain an expensive Italian sports car by just spending a few hours playing a game, why would anyone spend several hundred thousand dollars to get it? The objective value might not be affected (it still drives fast), but no one would stare in your direction at a stoplight because there were five more cars just like it at the last light.

74. See, e.g., *FAQ*, HABBO, <http://www.habbo.com/help/26> (last visited Feb. 6, 2011). To the question “Why can’t Habbo Credits be free?” the site states that Habbo Hotel is available to anyone over the Internet. Visiting the Hotel is free—unlike other services that provide the kind of experience we do, you don’t have to buy a CDROM or pay a monthly subscription fee. We only charge for ‘extras,’ such as furniture and games, and we have priced these at an affordable level for everyone—anyone can have a digital TV in the Habbo Hotel! You are welcome in the Hotel, whether you buy Credits or not.

Id.

75. LASTOWKA, *supra* note 5, at 55–58.

real money to the game provider to acquire items or in-game virtual currency.⁷⁶ This ability allows players to quickly advance to higher levels and acquire the rare and powerful items that might take hours or days to obtain otherwise. Compared with a role-playing game like World of Warcraft, where no real money is allowed to change hands between users, paying for items is accepted and expected in these MOEs because the system was specifically designed for it.

In MOEs without a mission to complete or enemies to fend off, the driving force behind many virtual item purchases is their social importance.⁷⁷ There are social worlds whose objectives are thoroughly open-ended.⁷⁸ There are no missions to complete and no crops to harvest; just spaces for people to meet others, chat, flirt, and play simple games for fun.⁷⁹ Inhabitants of these environments rely on virtual items solely for their social and aesthetic value. A poster of a cool band in your Habbo Hotel room might, for example, create a common interest between other users (who like the same popular music) and you, leading to conversations about other cool bands the same way as if it was a poster in a real college dorm room. Revenue from these items is already nearing the billion-dollar range in China alone.⁸⁰ What drives these transactions is the user's desire to express his or her identity through purchases. The "exchange rate" for the virtual currencies also facilitates the purchase of virtual items. When a Linden dollar (frequently abbreviated as "Linden\$") sells for 1/254 of a U.S.

76. Most virtual currencies are more properly called tokens because they are only available for purchase and cannot be redeemed for cash. Compare Second Life TOS, *supra* note 52, § 5, (allowing users to exchange Linden dollars for money, but offering no guarantee from the company itself), with *Entropia Universe Account Terms of Use*, ENTROPIA UNIVERSE, § 7 (May 5, 2011), <http://legal.entropiauniverse.com/legal/terms-of-use.xml> (giving users the ability to deposit and withdraw from its virtual currency system, the PED Card, at any time, for real currency).

77. Rapper Snoop Dogg's branded virtual items sales are up to five times higher "than the highest selling non-branded, comparably priced item[s]" in WeeWorld and fetched a 345 percent premium over non-branded items at auction in Gaia Online. Mehta et al., *supra* note 4, at 5–6.

78. See, e.g., IMVU, <http://www.imvu.com/> ("IMVU is a social game and entertainment site where millions of people meet, chat, play games and have fun. You can dress up your avatar, shop, decorate your room, create your own personalized look, and connect with new people around the world.").

79. *Id.*

80. See MORGAN STANLEY, *supra* note 16, at 53.

dollar, your real money goes a long way.⁸¹ Micropayments, the term for transactions smaller than the minimums most credit card or online payment systems allow, sometimes fractions of a cent, encourage players with lower tolerances for “frivolous” spending to purchase virtual items because of their individually insignificant value.⁸² When multiplied by millions of players, however, even fractions of a cent add up very quickly.

The conspicuous consumption and display of new clothes or furniture as an expression of identity keeps many social world economies going. What makes them thrive is the added utilization of social networks to draw in more players and keep the existing ones interested in keeping up with their friends. FarmVille is one of the most successful examples of this strategy. Each player is encouraged to help other friends by giving them incentives to lend a hand at fertilizing or donating an item to build a shed.⁸³ By strengthening social ties, the world keeps people coming back out of a sense of obligation.⁸⁴ Many of these online environments are typically less technically and graphically sophisticated than are some of the major subscription-only worlds.⁸⁵ There are many reasons for this, such as making the MOE more accessible on less sophisticated computers and appealing to different demographics. But probably the most common reason is keeping overhead costs

81. See LINDEX MARKET DATA, <http://secondlife.com/statistics/economy-market.php> (last visited Feb. 3, 2011) (showing the daily exchange rate of Linden dollars and United States dollars).

82. The provider makes money by taking a portion of each transaction, much like a sales tax or credit card fee. See, e.g., Second Life TOS, *supra* note 52, § 5.1, (describing how Linden may exercise its right to charge fees to acquire or use Linden dollars).

83. Brian Balfour et al., *Virtual Goods & Social Gaming Industry Outlook Report*, VIXIMO, (Sept. 2010), http://viximo.com/interior/resources/downloads/092010_outlook.pdf.

84. See MARCEL MAUSS, *THE GIFT: FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAIC SOCIETIES* (Ian Cunnison trans.) (1967) (explaining that gift-giving is a well-known socio-economic principle).

85. Compare farmville.com with eveonline.com and you see a definite difference in capabilities, in terms of graphics and numbers of simultaneous users visible at a time. There can be many reasons for a less-sophisticated design, including the ability to join in through an Internet browser or on a device that might not be able to handle the advanced graphics required of an immersive three-dimensional world. See, e.g., *FarmVille by Zynga*, APPLE iTUNES PREVIEW, <http://itunes.apple.com/us/app/farmville-by-zynga/id375562663?mt=8> (displaying system requirements for the FarmVille app). Anything that makes it easier for people to join increases the potential for monetization and thus increases revenue.

low, which is important when the rate of converting non-paying users into paying customers (the industry calls this “monetizing”)⁸⁶ is relatively low, such as when there are at least ten non-paying users for each user who does choose to pay.

3. *Other Revenue Models*

Not all online environments are evenly divided between subscriptions and free-to-play. There are many worlds that combine certain aspects of these together. Second Life appeals to many different demographics and takes advantage of several revenue opportunities that each of these various groups find appealing. Those players interested in acquiring and developing land in Second Life must pay regular subscription fees based on the size of the parcel they wish to use.⁸⁷ It is equivalent to a month-to-month lease, which assures that resources are available for maintaining the hardware needed to display the space guests might be expected to visit. Second Life also allows users to buy in-world tokens called Linden dollars that can be used to purchase items from Linden Lab directly or from other sellers, who are third-party individuals and companies, within the realm of Second Life.⁸⁸

An increasingly popular hybrid of the free-to-play and subscription formats for online environments is commonly referred to as the “freemium” model.⁸⁹ Freemium environments allow anyone to join for free, but cap or reduce access after a certain point unless the user pays a fee. Many will tempt users by showing them the enhanced features or abilities that are available if they subscribe.⁹⁰ Another way of collecting the funds that keep the servers running is the traditional media darling—advertising.⁹¹

86. *Understanding the Pieces of the Social Game Monetization Chain*, INSIDE SOCIAL GAMES, <http://www.insidesocialgames.com/2010/01/19/understanding-the-pieces-of-the-social-game-monetization-chain> (last visited Mar. 24, 2011) (describing the factors software developers need to consider when trying to create games that will make money).

87. *Second Life Pricing List*, SECOND LIFE, <http://secondlife.com/corporate/pricing.php> (last visited Feb. 13, 2011).

88. See Second Life TOS, *supra* note 52, § 5.1.

89. Beau Hindman, *Free for All: How Free Is Freemium?*, MMOSITE (Mar. 9, 2010), http://news.mmosite.com/content/2010-03-10/are_freemium_games_just_different_titled_subscription_ones.shtml.

90. *Id.*

91. *New BrandBoost Advertising Platform for Social Games*, MEDIAFREAKS BLOG (Mar. 13, 2010), <http://blog.media-freaks.com/brandboost-advertising-platform-social-games>.

There are many ways of delivering ads to users. The messages can either be woven into the environment's platform itself, such as a world designed to showcase a product or service,⁹² or they can be presented in the background of a third-party site, much like the backstop ads behind the batter in baseball stadiums.

B. The Truth About Virtual Item Purchases: They Are Licenses, Not Sales

The purchase of a virtual item is almost always a license, not a sale. This can be confusing because many industry insiders and scholars refer to them as "virtual goods." Most consumers do not understand that there is a distinction, but legally, goods are specific kinds of commercial items that are addressed by the Uniform Commercial Code (U.C.C.).⁹³ The distinction is sometimes made in the MOE's end user license agreement, but since the vast majority of people skip past license agreements,⁹⁴ consumers maintain their assumptions about the items based on real world analogies. It is not just consumers' fault, either. As one expert put it, "[t]he industry uses terms such as 'purchase,' 'sell,' 'buy,' etc. . . . because [those words] are convenient and familiar, but the industry is aware that all software . . . is distributed under license."⁹⁵ And that is where people start to get confused. Virtual items are acquired by licenses, not sales.⁹⁶ Purchases of virtual items are licenses to access certain features of an ongoing service, rather than acquisitions of goods where there is a formal transfer of title.⁹⁷ This

92. See, e.g., *Stagecoach Island Community*, WELLS FARGO, http://blog.wellsfargo.com/stagecoachisland/what_is_SiC.html (last visited Feb. 13, 2011) (describing a virtual world created by Wells Fargo).

93. The Uniform Commercial Code (U.C.C.) defines "goods" as "all things that are movable at the time of identification to a contract for sale," including specially manufactured goods, unborn young of animals and crops. U.C.C. § 2-103 (2005).

94. See Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 445-50 (2002) (explaining why consumers either do not read standard form contracts or discount what they read in them).

95. *Adobe Sys., Inc., v. One Stop Micro, Inc.*, 84 F. Supp. 2d 1086, 1091 (N.D. Cal. 2000).

96. See *Berthold Types, Ltd. v. Adobe Sys., Inc.*, 101 F. Supp. 2d 697, 698 (N.D. Ill. 2000) (stating that software purchases, without the transfer of title, are not typically governed by the U.C.C.). *But see i.Lan Sys., Inc. v. NetScout Serv. Level Corp.*, 183 F. Supp. 2d 328 (D. Mass. 2002) (applying the U.C.C. to software license agreements).

97. Many TOS agreements now strive to make this point as clear as possible. Second Life's most recent revision of its TOS agreement in September 2010 is the

is not the first article to point out that fact,⁹⁸ but it bears repeating because it is essential to understanding the nature of rights to virtual items. Nearly every aspect of a MOE is in some way a software service that is offered by the provider, which is provided on condition of compliance with the terms of a license agreement.⁹⁹ This is somewhat difficult to fully grasp because the items appear to be discrete objects that are separate, identifiable, and moveable at the time of purchase—that is, they appear to bear all the hallmarks of traditional goods under Article 2 of the U.C.C.¹⁰⁰ Yet, unless title is transferred, there is no true sale.¹⁰¹ Some authors have tried to analogize virtual items to intangible personal property under Article 9 of the U.C.C.¹⁰² The analogy falls short, however, when one recognizes that under the TOS or license agreement, most virtual items actually lack the key characteristics needed to satisfy the conditions of general intangibles under Article 9.

C. *Clearing Up the Confusion Created by Incomplete Analogies*

It may be helpful to consider a few real world analogies that make the license aspect of virtual items much clearer. Many pubs offer loyal patrons the opportunity to join a mug club.¹⁰³ Each year, patrons get the chance to buy into the club by paying a nominal fee, in exchange for which they get a numbered mug. The patron

most explicit of any TOS the author has found to date. See Second Life TOS, *supra* note 52, §§ 4–7.

98. See Michael H. Passman, *Transactions of Virtual Items in Virtual Worlds*, 18 ALB. L.J. SCI. & TECH. 259, 271 (2008) (concluding that transactions in virtual items are licenses not sales of goods).

99. An exception exists for items created by users, as in Second Life, where items can be designed with substantially no direction or input from the provider Linden Lab. Compare this with other worlds, like Project Entropia, where items that can be made are pre-designed by the provider or are simply sold as-is, like in FarmVille.

100. U.C.C. § 2-105 (2004).

101. U.C.C. § 2-106(1) (“A ‘sale’ consists in the passing of title from the seller to the buyer for a price.”).

102. See Moringiello, *supra* note 44, at 191–96 (comparing virtual items to general intangibles such as bank accounts and other financial instruments); see also Joshua A.T. Fairfield, *The End of the (Virtual) World*, 112 W. VA. L. REV. 53, 81–87 (2009) (discussing the possibility of using virtual items as collateral for secured lending).

103. An excellent local example is the Contented Cow in Northfield, Minnesota. THE CONTENTED COW, <http://www.contentedcow.com> (last visited Mar. 24, 2011).

is the only person who can use the mug, but, he or she does not own it—the mug must stay in the pub. However, the patron does receive larger, lower priced drinks throughout the subscription period. The subscription fee guarantees the bar a minimum amount of revenue up front and imputes a certain amount of loyalty from the patron in order to recoup his or her “investment.” The numbered mug is a perfect example of a situation where someone pays money for a separate and identifiable item and has almost exclusive possession of it. It is that “almost” that trips things up because the pub still owns the mug. If the bar shuts down, there is little the patron can do but find another pub and start the process all over again. That makes the membership a license to access a service and not a sale.

Virtual items are analogous to the mugs because they are created by software and cannot be moved outside the realm for which they were created. A piece of Habbo Furni furniture or a FrontierVille Double Rainbow¹⁰⁴ cannot be used outside of Habbo.com or FrontierVille, respectively. This is by design. Each online environment is a separate and discrete software program that uses proprietary computer programming code to generate images and transfer information. Allowing users to move items and avatars from one environment to the next would not only create innumerable technical complications, but it would defeat providers’ goals of keeping users invested in *their* platform.¹⁰⁵

A software purchase is different from a typical sale of goods, because the nature of digital content is such that it can be transferred to someone without affecting the ability of the owner to possess it at the same time.¹⁰⁶ This is common knowledge to anyone familiar with licensing. Licenses allow people to see movies or buy music albums. The typical viewer does not own the movie when she attends a screening at a local cineplex. She cannot walk out of the theater with a copy of it and sell it to a stranger (at least

104. See generally Justin Kwong, *More Signs That Virtual Items Will Play a Big Role in Future Virtual Economies*, VIRTUAL NAVIGATOR (August 21, 2010), <http://virtualnavigator.wordpress.com/2010/08/21/more-signs-that-virtual-goods-will-play-a-big-role-in-future-virtual-economies> (displaying a picture of the Farmville Double Rainbow).

105. Any sensible business person or economist will tell you that having a captive market is far superior to competing with other businesses for customers. It is the same reason that businesses love selling gift cards, because they keep consumers from taking money elsewhere.

106. See RAYMOND T. NIMMER, *LAW OF COMPUTER TECHNOLOGY: RIGHTS, LICENSES, LIABILITIES* §§ 7:1–2 (4th ed. 2010).

not without setting up a video camera and bootlegging it, which is decidedly illegal). The same is true with music albums and pre-recorded videos on DVD, but these pose a slightly different problem—which, I argue, has led to some of the confusion among consumers about their ability to “own” virtual items.¹⁰⁷

Confusion may arise if the purchaser of a music album thinks that he actually owns that album outright. “Why not?,” he might ask, “it fits all of the characteristics of a good under U.C.C. Article 2.”¹⁰⁸ This is essentially true, with the caveat that the right to the *content* on the album is only a limited license, similar to that for a concert ticket. The distinction between the disc and the content made little difference decades ago, when copying content from vinyl LPs was all but impossible at the consumer level. That all started to change when machines with the ability to record music to cassette tapes became affordable and small enough to be clipped to a belt loop.¹⁰⁹ Around that same time, Sony Betamax videotapes revolutionized how people watched television and copyright law had to play catch-up.¹¹⁰ The connection between content and the medium upon which it was delivered finally began to diverge. Anyone who has ever purchased a spindle of blank CD-Rs knows that the actual discs are worth very little without any content on them.¹¹¹ The explosion of personal computers and MP3 players

107. I should point out that there are copyright laws in place that explain why certain forms of multimedia are subject to the first sale doctrine, which allows users to acquire title to the medium on which the content is recorded and then sell it to others free and clear. *See* 17 U.S.C. § 109 (2008).

108. Picking the CD of your new favorite band up off the shelf demonstrates that an album is moveable at the time of identification. U.C.C. § 2-105(a) (2004). It also proves that it actually exists, as according to the U.C.C. *Id.* § 2-105(b).

109. The Sony Walkman debuted in 1979, but even before that, cassette tape recorders permitted consumers to record music with significantly more ease than ever before. *See* Meaghan Haire, *A Brief History of the Walkman*, TIME, July 1, 2009, <http://www.time.com/time/nation/article/0,8599,1907884,00.html>.

110. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984). Commonly referred to as the “Betamax case,” the *Sony* decision revolutionized the delivery of entertainment content by expanding the meaning of “fair use” to include time shifting (recording to watch at a later time) and opening the door for other personal uses. *Id.* at 455.

111. Compare the cost on Amazon.com for a 100-pack of Verbatim 700 MB CD-Rs with the cost of a recent two-CD release from the popular group, Snow Patrol. *See* 100-Disc Spindle of Verbatim CD-Rs, AMAZON.COM, <http://www.amazon.com> (search “Verbatim 94554” then follow hyperlink for 100-Disc Spindle of Verbatim 94554) (showing advertised price of \$13.99 on Feb. 24, 2011); Snow Patrol CD, AMAZON.COM, <http://www.amazon.com/> (search “Snow Patrol Up to Now CD” then follow hyperlink for the Nov. 10, 2009 Audio CD titled “Up to Now”) (showing advertised price of \$17.46 on Feb. 24, 2011).

further separated content from physical objects by removing the need to even purchase a CD. Consumers simply download a track or stream it from an online service¹¹² and store it on whichever medium is most convenient.

The major difference between virtual items and other intangible assets becomes most evident where contract and property law meet.¹¹³ Examples of intangible assets that have been used to analogize the potential viability of virtual property abound: leasehold estates,¹¹⁴ securities,¹¹⁵ and fees simple subject to condition subsequent.¹¹⁶ All are very clever, but insufficient because all of these property interests were specifically created to ensure that certain rights were not eroded by contract.¹¹⁷ To date, however, there has been little to no response from U.S. policymakers regarding rights to most virtual items.¹¹⁸ So far, this benevolent neglect has been a good thing. The absence of any major changes to the law has allowed the market to adapt and incorporate some of the lessons of the early e-commerce laws and court decisions into the diversity of online services that we encounter today.

112. See, e.g., RHAPSODY, <http://www.rhapsody.com> (last visited Feb. 9, 2011) (offering an online music subscription service).

113. See Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 368 (2001) (discussing Coase's property theory; "[W]here contractual exchange is key, property rights serve as baselines from which the process of contractual rearrangement of use rights proceeds.").

114. See Moringiello, *supra* note 44, at 184–85, 196–99 (discussing leases in the context of virtual worlds).

115. See Fairfield, *supra* note 31 (stating "a bank account may be one of the earliest forms of virtual property").

116. The analogy of a shifting executory interest in virtual property came up in a discussion during my Online Games and Virtual Law seminar last year with Professor Mark Edwards at William Mitchell College of Law. It made a lot of sense in that a user could have the right to possess and use the virtual item, but if she violated the terms of use, the online environment provider could execute its right to "enter" the property and sever the user's interest.

117. There are actually many theories about the relationship between property and contract. For an excellent discussion, see Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 565 (2005).

118. This is true even for the foreign courts that have found thieves of virtual items or virtual world accounts criminally liable for theft; it was not the value of the items but the time invested.

IV. CONSUMER RIGHTS ARE DOMINATED BY STANDARD FORM CONTRACTS

All MOEs are governed by extensive end-user license agreements (EULAs) and Terms of Service (TOS) or Terms of Use (TOU) agreements that regulate conduct within the environment and provide a uniform set of rules for users to follow. One consequence of providing services to individuals from around the world is the lack of a predictable and consistent set of laws to control matters if a dispute arises. EULAs reduce the legal uncertainty—and the cost of doing business—by setting out provisions for choice of law, choice of forum, arbitration of disputes, and so on.¹¹⁹ These policies are comprised of standard terms that, although contained in contracts of adhesion,¹²⁰ courts generally find to be enforceable,¹²¹ meaning they are likely to be upheld in the future.¹²² The challenge for most agreements is deciding how detailed the provisions should be. Most EULAs tend toward the concise, spanning six to ten pages.¹²³ In order to avoid

119. See NIMMER, *supra* note 106, § 7:125 (discussing how licensing enables providers to fit software to the market); see also *Entropia Universe Account Terms of Use*, *supra* note 76, § 16, (providing forum and governing law); Second Life TOS, *supra* note 52, § 12 (providing forum and governing law).

120. Adhesion contracts are standardized agreements “which, imposed and drafted by the party of superior bargaining strength, relegate[] to the subscribing party only the opportunity to adhere to the contract or reject it.” *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1172 (N.D. Cal. 2002) (quoting *Armendariz v. Found. Health Psychcare Serv., Inc.*, 6 P.3d 669, 767 (Cal. 2000)).

121. “Minnesota traditionally enforces parties’ contractual choice of law provisions. Minnesota courts have consistently expressed a commitment to the rule ‘that the parties, acting in good faith and without an intent to evade the law, may agree that the law of either state shall govern.’” *Hagstrom v. Am. Circuit Breaker Corp.*, 518 N.W.2d 46, 48 (Minn. Ct. App. 1994) (quoting *Combined Ins. Co. of Am. v. Bode*, 247 Minn. 458, 464, 77 N.W.2d 533, 536 (1956)).

122. DURANSKE, VIRTUAL LAW, *supra* note 11, at 27. The use of unconscionability laws has been a way for advocates to fight back against overly one-sided agreements. Some egregious practices, such as policies that allow the provider to modify the agreement without providing any notice, or hiding arbitration agreements under a heading labeled “General Provisions,” have been ruled unconscionable in cases such as *Comb v. PayPal, Inc.*, 218 F. Supp. 2d at 1174–75 and *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 606–07 (E.D. Pa. 2007), respectively.

123. See, e.g., *Gaia Online Terms of Service*, GAIAONLINE.COM, <http://www.gaiaonline.com/info/index.php?mode=tos> (last visited Feb. 25, 2011); *IMVU, Inc. Internet Web Site Terms of Use*, IMVU.COM, http://www.imvu.com/catalog/web_info.php?topic=terms_of_service (last visited Feb. 25, 2011); *Lineage II User Agreement*, NCSOFT.COM, <http://us.ncsoft.com/en/legal/user-agreements/lineage-2-user-agreement.html> (last visited Feb. 26, 2011); *Zynga Terms of Service*,

lawsuits challenging their EULA's terms as unconscionable,¹²⁴ however, a company may produce a lengthier contract that covers all possible contingencies.¹²⁵ This, too, can present a problem if key terms are buried in lengthy boilerplate.¹²⁶

Just as music albums should be regarded as separate from the media on which they are distributed, so too should virtual items be recognized for what they really are: tiny entries within a larger software program. When you find a battle axe on a World of Warcraft battlefield or add a new row of crops to your FarmVille farm, those virtual items are simply lines of code that are updated by the computer program controlling the information to add them to your account profile directly so that it will reflect the new items and/or abilities conferred by it. This then tells other parts of the program to draw new images of your avatar or farm plot when appropriate so that it looks like your avatar is now holding an axe or farming a row of blueberries.¹²⁷ These changes feel like acquisitions to us, which is precisely the point. If it feels like a virtual item belongs to you, the natural tendency is to treat it as one would any other possession and your loyalty to the service gets a little bit stronger. Once you understand this, the whole concept of virtual items starts to make a lot more sense.

ZYNGA.COM, <http://www.zynga.com/about/terms-of-service.php> (last visited Feb. 25, 2011).

124. Unconscionability, generally recognized as the absence of meaningful choice and analysis, is divided into two parts, procedural and substantive. *See Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965). Procedurally unconscionable terms are those that are either hidden or buried in fine print. *Id.* at 449. Substantively unconscionable terms are those that shock the conscience as unreasonably one-sided, such that no one who was aware of the term would agree to be bound by it. *Id.* at 449–50.

125. The end result can be a clearly worded and well organized—but extensive—document spanning dozens of pages. Second Life's EULA as of October 6, 2010 is twenty-three pages in twelve point font with one-inch margins, not including seventeen additional policies that are incorporated by reference. Second Life TOS, *supra* note 52.

126. *See Bragg*, 487 F. Supp. 2d at 593 (holding that Linden Research, Inc.'s placement of an arbitration clause under a section called "General Provisions" was substantively unconscionable, thus rendering the clause unenforceable).

127. This is an over-simplified description of the processes that go on behind the scenes of rendering a virtual world, but the point is that there are not actual separate files that get transferred to your computer the same way a photo may be emailed to a relative. Everything takes place within the servers of the online environment and the user's computer just displays the changes.

A. Growth in Virtual Items Purchases Will Require Attention

Internet trend analysts predict exponential growth in virtual item transactions in the next three to four years from \$3.1 billion to nearly \$8 billion worldwide by 2015.¹²⁸ More and more Internet designers and programmers will see virtual items transactions as a path to success,¹²⁹ where the only limits are their imaginations. Already there are more than 300 multi-user online environments serving customers with over a billion registered accounts.¹³⁰ Platforms that depend on high traffic volumes will come to see monthly or annual subscriptions as less promising sources of revenue, favoring instead, the metrics-driven models that have made social games so popular and profitable.¹³¹ Social platforms are more dependent on attracting and retaining users, so they have more incentives to present innovative ideas and keep things fresh. The vast majority of development in virtual items will likely be by these pioneers—especially as mobile computing eclipses traditional desktop and laptop usage.¹³² Given the anticipated expansion of virtual environments and the income they can generate, it is increasingly important to be able to present users with standard

128. Mehta et al., *supra* note 4, at 14 (citing predictions from Piper Jaffray).

129. See David King & Siqi Chen, *Metrics for Social Games*, <http://www.slideshare.net/justinsmith/metrics-for-social-games-by-david-king-and-siqi-chen> (last visited Feb. 25, 2011).

130. KZero Worldwide, *supra* note 2, at *8, *12.

131. Metrics-driven social environments are platforms where creators closely monitor the number and demographics of users, then adjust the nature of the environment, economy, or options available based on what attracts the most people and compels them to share with their friends, increasing exposure for the world through viral marketing. They are most frequently associated with social networking services like Facebook and are often free-to-play, dependent on the number of players and finely tuned social pressure to drive the purchases of virtual items or virtual currency. There is an essential cycle that social games depend on for growth and revenue. The first step is to get people to visit the platform's website. When the number of people who visit the site grows, it means there is a greater chance of converting them into regular participants. Once a person is fully engaged with the platform, they are more likely (but not guaranteed) to purchase items that dramatically improve their experience and increase the pressure on those who do not choose to pay. The more people purchase items and share information about their purchases with their online networks of friends, the greater the chance that someone will be interested and visit the site, where the cycle begins anew. See King & Chen, *supra* note 129.

132. See MORGAN STANLEY, *supra* note 16, at 6. Mobile devices, while ever more sophisticated, will not generate revenue in the same ways as more stationary computers. Relying rather on e-commerce and digital content, mobile devices will drive future development of virtual items.

form contracts that are responsive to actual issues that may arise and that are capable of being read and understood more quickly. Clear and concise drafting will be even more important as MOEs shift to being accessible from mobile devices like smartphones¹³³ because of the smaller screens and general inability to easily print or review extensive contracts.¹³⁴

Terms of Use (TOU) and Terms of Service (TOS) agreements are ubiquitous in the Internet age.¹³⁵ The more interactive and open a world is, the more rules that are required to keep order and maintain security for the provider's investment. The longest agreements tend to belong to the most sophisticated platforms—Second Life being the most prominent example. Second Life's TOS contract alone spans twenty-three pages¹³⁶ and incorporates seventeen other policies and additional terms via hyperlink.¹³⁷ Platforms with less interactivity have substantially shorter policies.¹³⁸

133. See generally *id.* at 23, 32 (analyzing the astounding potential increases in mobile device users).

134. Most devices have screens that are between three and four inches across diagonally and the ability to print is very limited as of this writing. Although the statute of frauds, which requires a "writing" for contract enforceability, is typically satisfied by online contracts, it may be found that presentation on a mobile device is inadequate. For example, the cases below discussing enforceability focused on contracts presented on PCs, with features that are not widely available on many mobile devices. See *In re RealNetworks, Inc., Privacy Litigation*, No. 00 C 1366, 2000 WL 631341, at *3–4 (N.D. Ill. May 8, 2000) (finding that although the clickwrap was presented in electronic form, its easily printable and storable nature was sufficient to render it "written"); *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 235–38 (E.D. Pa. 2007) (enforcing Google's AdWords clickwrap contract where there was reasonable notice of and mutual assent to the agreement; the contract was immediately visible in a scrollable text box, was only seven paragraphs long and available in a printer-friendly, full-screen version where the terms were presented in twelve-point font).

135. Terms of service agreements are part of a larger group of standard form contracts called "clickwrap" or "shrinkwrap" agreements that are presented by a website or virtual environment provider to which the user must agree in order to access the service. See Kevin W. Grierson, Annotation, *Enforceability of "Clickwrap" or "Shrinkwrap" Agreements Common in Computer Software, Hardware, and Internet Transactions*, 106 A.L.R. 5th 309 (2003).

136. Second Life TOS, *supra* note 52 (constituting twenty-one pages when copied into Microsoft Word and increased to Times New Roman, twelve-point type). As an interesting side note, Second Life changed its Terms of Service agreement twice during the writing of this article; once on October 5, 2010 and again on December 15, 2010. Prior versions of agreements for 2010 are available at http://wiki.secondlife.com/wiki/Linden_Lab_Official:Terms_of_Service_Archive and with the author.

137. Second Life TOS, *supra* note 52.

138. See, e.g., *Terms of Use*, HABBO, *supra* note 17 (outlining terms of use for Habbo, which is a virtual environment designed to allow users to customize their

The reverse is also true: the fewer options there are for user-created content, the less need there is for extensive discussion of rights and obligations.¹³⁹ Consequently, regardless of how long or short the contracts may be, consumer rights are defined through these standard form contracts. There is no option for negotiation; terms are presented as take-it-or-leave-it.¹⁴⁰ This does not mean, however, that providers always use these agreements to squeeze unfavorable concessions out of users. Most of the terms are phrased as giving the MOE the right to take some action, without necessarily saying that they will always do it.¹⁴¹ There are many advantages for consumers in the use of standard form contracts, such as reduced product cost and faster access to desired materials, versus individually negotiated agreements. Some critics counter that standard form contracts allow drafters to get away with terms that would rarely get consent if presented separately.¹⁴² Pushback from lawsuits,¹⁴³ legislation,¹⁴⁴ and consumer rights advocates¹⁴⁵ have also helped make the presentation and the actual terms of the agreements more balanced over the years.

As virtual items increase in popularity, there will likely be more attention focused on how these agreements affect the status of users' purchases. Most virtual items are merely a small part of the larger service provided by the virtual environment. In the future, however, there may be much more diversity in how virtual items are

experience through virtual item purchases, with limited opportunities for user-generated content); *Terms of Service*, ZYNGA, *supra* note 123 (providing terms of service for Zynga games such as Mafia Wars, a social network-based game with minimal content generation opportunities).

139. *Id.* If you found comparing the two agreements difficult, you are not alone. *See infra* Section IV.

140. CHRISTINA L. KUNZ & CAROL L. CHOMSKY, *CONTRACTS: A CONTEMPORARY APPROACH*, 494–95 (West 2010).

141. *See, e.g.*, Second Life TOS, *supra* note 52, § 8.3 (“Any violation by you of the terms of this Section *may* result in immediate suspension or termination of your Accounts without any refund or other compensation.” (emphasis added)). This provides the service with flexibility to bend the rules a little, but may also lead to aggravation by users if they think the rules are not being fairly or consistently enforced.

142. *See* Peter J. Quinn, *A Click Too Far: The Difficulty in Using Adhesive American Law License Agreements to Govern Global Virtual Worlds*, 27 WIS. INT’L L.J. 757, 759, 770 (2010) (discussing contracts of adhesion in virtual worlds).

143. *See, e.g.*, *Comb v. PayPal*, 218 F. Supp. 2d 1165, 1172 (N.D. Cal. 2002); *see also supra* note 120, and other suits based on unconscionability, such as *In re RealNetworks, Inc.*, No. 00 C 1366, 2000 WL 631341 (N.D. Ill. May 8, 2000).

144. *See* KUNZ & CHOMSKY, *supra* note 140, at 494–95.

145. *Id.*

bought, sold, and used. To be more prepared for that eventual future, I advocate for some simple changes to how standard form contracts are presented to make sure both parties to the agreement can get what they really want.

B. Consumers Need Simple, Consistent Contracts (Even if They Are Not Demanding Them Yet)

The biggest challenge, as I see it, is to find ways to help improve the implementation of standard form contracts without stifling growth or creativity by multi-user online environment providers. In the early days of virtual-world scholarship, many authors called for courts to grant users property rights as a way to push back against overreaching TOS agreements.¹⁴⁶ Many of these proposals would have been a great boon to users and barons of virtual items and virtual property, but would ultimately chill development.¹⁴⁷ Impeding the creativity of the designers and increasing costs that would ultimately be borne by the users is no way to encourage the expansion of MOEs that we find so fascinating. Instead of making demands that would pit users against providers, I propose a system that simply increases the readability of agreements. If, after taking a quick glance at it, people think that the agreement is going to be comprehensible, experts have found that those customers are more apt to actually read it and know what is in it.¹⁴⁸ Readability thereby improves the contract's transparency and, ultimately, higher levels of customer satisfaction (with the added bonus of easier comparison-shopping between platforms and increased competition).

Interestingly, laws that standardize the layout and formatting of contract terms are nothing new. The Truth in Lending Act of 1968¹⁴⁹ revolutionized consumers' rights vis-à-vis creditors. The law

146. See generally Fairfield, *supra* note 31 (arguing that laws must "protect rights in virtual property"); Lastowka & Hunter, *supra* note 12 (arguing in favor of property rights in virtual worlds).

147. Instituting personal property rights in virtual items would require whole new systems of accounting and control by MOE providers in order to assure that virtual assets were reliably accessible.

148. See Chana Joffe-Walt, *Planet Money*, *Why Are Credit Card Agreements So Long?*, NPR (Mar. 18, 2011, 12:01 AM), <http://www.npr.org/blogs/money/2011/03/18/134633336/why-are-credit-card-agreements-so-long> (reporting on a conversation with Susan Kleimann, an expert in simplifying financial contracts).

149. Truth in Lending Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601-1667f (2000)).

stripped away the ability of creditors to devise their own disclosure strategies which were used to make their loan programs more attractive to potential consumers.¹⁵⁰ Once it became law, it became easier for consumers to understand how much they were paying for credit because a loan's "finance charge" no longer meant different things depending on which bank you talked to.¹⁵¹ Consumers were empowered by this information, and the forces of capitalism drove creditors to compete on price and service instead of sneakiness in contract drafting. Although most items purchased virtually are generally not as economically substantial as a home or automobile,¹⁵² standardizing terms of use agreements has a significant potential to revolutionize standard form contracts in a similar fashion. Instead of a freewheeling wild west where no two agreements look anything alike, agreements should be required to conform to a pre-established, standard format. MOE providers and the legal teams who draft their standard form contracts currently have few incentives to work together across the industry on improvements to contract layout.¹⁵³ Just as it did for consumer credit markets, standardizing agreements would allow users to be more easily informed about what exactly they were agreeing to do.¹⁵⁴ In many ways it is just as important for form contracts to be

150. Elwin Griffith, *Lenders and Consumers Continue the Search for the Truth in Lending Under the Truth in Lending Act and Regulation Z*, 44 SAN DIEGO L. REV. 611, 612 (2007) (discussing aspects of the Truth in Lending Act).

151. *Id.*

152. With the exceptions of the \$100,000 and \$330,000 purchases of virtual space stations in Project Entropia back in 2005 and 2009, respectively, of course. See Ben Parr, *Man Pays Record \$330,000 for a Virtual Space Station*, MASHABLE (Dec. 31, 2009), <http://mashable.com/2009/12/31/crystal-palace-space-station-sale>; Daniel Terdiman, *Man Pays \$100,000 for Virtual Resort*, CNET NEWS (Nov. 10, 2005), http://news.cnet.com/Man-pays-100,000-for-virtual-resort/2100-1043_3-5945248.html#ixzz180d4We2Y.

153. It is difficult to discern if there is any collaboration across platforms, although services like Facebook Credits may facilitate such a convergence. Facebook Credits are a "universal" virtual currency issued by Facebook for use among participating virtual environments such as the Zynga family of games, ESPN U: College Town, Nightclub City, or CrowdStar's It Girl. See *Facebook Credits: The Safe and Easy Way to Buy Things on Facebook*, FACEBOOK, <http://www.facebook.com/credits> (last visited Feb. 9, 2011).

154. Before implementation of the Truth in Lending Act, it was considerably more difficult to compare rates between creditors. For example:

Creditors did not use a uniform way of calculating interest, or a single system for defining what additional charges would be included in the interest rate. Thus, a consumer had no way of knowing, for example, that a \$6000 car financed through the dealer at 6% might well have been *more* expensive than financing it at 10% through a credit union.

standardized because consumers have no bargaining power other than to walk away.¹⁵⁵

Just as contracts for houses and cars vary by features and location, MOE platforms will inevitably vary widely in terms of what features they offer, but they should still be able to comport with a few key general requirements. The most important part of improving the consistency and comparability of virtual environments' standard form contracts would be to require provisions that follow a specific sequence. The TOS agreement for Second Life, while long, is fairly close to an ideal scheme for such a standard layout.¹⁵⁶ All agreements should start with a hyperlinked table of contents highlighting the key provisions. The first section should discuss how and when changes may be made to the agreement itself, followed by plain English definitions of key terms that are used throughout the contract.

Discussions of dispute resolution should not be relegated to the later parts of the agreement, but should be prominent and distinctive, at least among the first two or three provisions. They should indicate clearly the choice of law and choice of forum clauses and who will bear the costs if disputes escalate. The dispute resolution clauses deserve prominent placement, because they often replace the user's rights, conferred by their own local laws, with rights that may be fundamentally at odds with what the user might expect. Additionally, each platform that offers virtual items for purchase should state with particularity what rights users retain, if any, in those items. The agreement should explain that the transaction is a license, not a sale, and that traditional consumer protections afforded by sales of goods do not necessarily apply. Following that, any rights to refunds or replacements of virtual items should be covered, especially if they are purchased with real money or in-game currency that is bought with real money. Finally, each agreement should conclude with a link to a red-lined

NAT'L CONSUMER LAW CTR., TRUTH IN LENDING § 1.1.1 (5th ed. 2003 & Supp. 2006).

155. Walking away can be made even more difficult if the MOE requires assent to new terms before logging in because if a user has some virtual items he can sell to another user, the user either has to agree to the new terms or abandon those items as the price for not agreeing. This also raises questions about whether there is adequate consideration for the changed terms. See Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 468 (2006) (discussing ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (Wis. 1996), and stating "Under U.C.C. section 2-209, such proposed new terms can become part of the contract without additional consideration, but not if they make material changes to the contract . . .").

156. See generally, Second Life TOS, *supra* note 52.

document showing any changes made to previous agreements. Simply including links to old agreements is helpful, but without a quick way to see what has changed, consumers will be forced to expend considerable time and energy attempting to discern if and how their rights are affected by the new agreement. I think this is the easiest change to implement and the least likely to illicit objections against it, particularly in light of its value to everyone involved.¹⁵⁷

V. CONCLUSION

Multi-user online environments and virtual items are rapidly increasing in popularity.¹⁵⁸ The growth of social media and the success of social games like FarmVille have demonstrated that virtual items are a viable source of revenue for companies looking for an alternative to subscription-based platforms. As the number of people with Internet access grows, many of those users will be presented with the opportunity to take part in the expanding economy of virtual items, and the legal system needs to be ready. Consumers deserve a better way to make sense of virtual items, rather than guessing or spending hours with a highlighter. Advocating for property rights has only muddied the waters, especially since it is fairly clear that all transactions in virtual environments are just different forms of licenses. Users will become more accustomed to the terminology and the legal boundaries of licenses when they are presented uniformly, the way that credit agreements are now. With more sophisticated and knowledgeable users, providers will be able to anticipate and resolve most problems with these transactions through standard form contracts. Disputes will inevitably arise, but they will be less contentious if users are more engaged and can effectively steer the market toward more equitable provisions, such as the guaranteed ability to get a refund if a glitch erases a user's items, which is

157. If you have any doubts about the value of track changes to make life easier for people trying to review long, complicated documents to see what changes were made, try asking a mergers and acquisitions attorney (or a law review editor, for that matter) to give it up for a week. They would probably pass out from laughter.

158. Virtual world market analyst KZero calculates that there were 136 million active virtual world users in 2009 (excluding duplicate accounts), which was expected to more than double in 2010 and reach nearly 2 billion by 2013. See *Active VW User Forecast: 2009-2013*, KZERO WORLDWIDE, <http://www.kzero.co.uk/blog/?p=3836> (last visited June 11, 2011).

excluded from many agreements. There will soon be a day when virtual items are as common and familiar to consumers as digital music tracks are today. When that day arrives, the law should be ready to make virtual items a reliable source of entertainment and income for users and providers alike.