



2009

The Magic Circle

Joshua A.T. Fairfield

Washington & Lee University School of Law, fairfieldj@wlu.edu

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Recommended Citation

Joshua A.T. Fairfield, *The Magic Circle*, 14 Vand. J. Ent. & Tech. L. 545 (2012).

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The Magic Circle

Joshua A.T. Fairfield*

ABSTRACT

This Article examines the concept of the “magic circle,” the metaphorical barrier that supposedly excludes real-world law from virtual worlds. The Article argues that this metaphor fails because there is no “real” world as distinguished from “virtual” worlds. Instead of a magic circle, this Article advocates a rule of consent: actions in a virtual world give rise to legal liability if they exceed the scope of consent given by other players within the game. The Article concludes that although real-world law cannot reasonably be excluded from virtual worlds, game gods and players can control the interface between law and virtual worlds through their agreements, customs, and practices. This leads to a new conception of the magic circle: the point of interface between community-generated norms and background law, which often adopts local norms as legal rules.

TABLE OF CONTENTS

I.	FANTASY, PLAY, AND THE MAGIC CIRCLE	825
II.	CYBERSOVEREIGNTY AND THE MAGIC CIRCLE	828
III.	DRAWING A NEW MAGIC CIRCLE	831
	A. <i>The Rules of the Game</i>	831
	B. <i>A Case Study: Money and the Magic Circle</i>	837
IV.	CONCLUSION	840

* Associate Professor of Law, Washington & Lee University School of Law. J.D., University of Chicago, 2001; B.A., Swarthmore, 1996. Thanks to Rob Weiss, ITechlaw, and the Canadian Technology Law Association for the opportunity to present prior drafts. Thanks to David Post and Peter Yu for detailed commentary. Thanks also to Professor Steven Hetcher, Vanderbilt University Law School, and the *Vanderbilt Journal of Entertainment and Technology Law* for the opportunity to present these remarks. Many thanks to Richard Bartle, Ted Castronova, Dan Hunter, Greg Lastowka, and Michael Risch for comments and suggestions. Thanks to Steve Mammarella for research assistance.

Recently, a Dutch court found two young boys guilty of theft of virtual property after they threatened a classmate with a knife until he agreed to transfer virtual items to their accounts in the online game *Runescape*.¹ Commenting on the case, legal scholar Eugene Volokh stated,

[T]he theft may have been of virtual goods, but it was accomplished through physical violence in the real world, and against a real person, not an avatar. It's clearly proper to prosecute the physical attack and the threats; and I think it's sensible to prosecute it as theft as well, since the defendants did take from the victim something they had no right to take, using violence in the real world. I'd call this "real-world theft of virtual goods," not "virtual theft."

I continue to think that generally speaking the law shouldn't prohibit purely in-game "theft," "murder," "rape," and so on. But outside-game violence (or even in-game threats of outside-game violence) [is] the proper subject of the criminal law, including when the violence or threats coerce action or transfer of valuable objects within the game.²

The difficulty of maintaining any bright line between "in-game" and "outside-game" acts was demonstrated two days later. A Tokyo woman, angered when her virtual romance in the world of *MapleStory* ended in virtual divorce, logged on to her erstwhile virtual husband's account and deleted his avatar.³ He complained to the police, and as of this writing, she is in police custody.⁴ The action was virtual, and the harmed avatar was virtual—but the act had legal repercussions in the real world.

I do not intend to single out Volokh—I wrote most of this Article before he made the comments above. However, his statement provides an excellent example of the persistence of a legal metaphor, generally termed the "magic circle," which has dogged our ability to understand how the law impacts virtual-world communities. The magic circle is the supposed metaphorical line between the fantasy realms of virtual worlds and what we consider to be the real world.⁵ The purpose of the magic circle is to protect virtual worlds from outside influences—law, real-world economics, real-world money, and

1. See Jacqueline Carver, RADIO NETH. WORLDWIDE, Oct. 22, 2008, available at <http://www.radionetherlands.nl/currentaffairs/region/netherlands/081022-virtual-theft-is-real>.

2. See Posting of Eugene Volokh to The Volokh Conspiracy, *Dutch Youths Convicted of Virtual Theft*, available at http://volokh.com/archives/archive_2008_10_19-2008_10_25.shtml#1224695366 (Oct. 22, 2008, 13:09 EST).

3. See Mike Musgrove, *Tokyo Woman Jailed for Avatar "Murder,"* WASH. POST, Oct. 23, 2008, available at http://voices.washingtonpost.com/posttech/2008/10/tokyo_woman_jailed_for_avatar.html?nav=rss_blog.

4. *Id.*

5. See Edward Castronova, *The Right to Play*, 49 N.Y.L. SCH. L. REV. 185, 200-05 (2004) (describing the concept of the magic circle).

the like. The thrust of the magic circle metaphor is that actions that occur within virtual worlds are not real, and thus cannot be sanctioned using real-world law.⁶ Following this reasoning, real-world law is appropriately left out of virtual worlds.

This Article seeks to debunk the magic circle. The thrust of my argument is simple: There is no “real” world as distinguished from “virtual” worlds. Rather, all supposedly “virtual” actions originate with real people, and impact real people, albeit through a computer-mediated environment.⁷ As a result, the distinction between a “virtual” act and a “real” one is not helpful. This Article advocates replacing the magic circle with a rule of consent. What matters is whether the action taken—be it a bite in a boxing match, a blow to the head in football, or a theft of virtual property—is within the scope of consent of the other players.⁸

Part I of this Article will examine the concept of the magic circle and the reasons it has gained traction within online communities. Part II will discuss the reaction of the legal community to prior claims of legal separatism by online communities, including the Internet cybersovereignty debates of the 1990s. Part III will develop a framework for future interactions between real-world law and online communities. This new model will not depend on claims of online sovereignty or on claims that what happens in virtual worlds is not “real” but will instead build on an analysis of legal consent, community self-regulation, and legal recognition of community norms. Finally, the Article will draw a new magic circle: instead of arguing that the law cannot touch virtual worlds, this Article will argue that virtual worlds may be able to generate community norms usable by real-world courts as a source of legal rules.

I. FANTASY, PLAY, AND THE MAGIC CIRCLE

Before evaluating the magic circle as a legal metaphor, it is useful to understand why the metaphor has proven so durable in virtual worlds. This section discusses some of the reasons why the

6. *Id.* at 201-02.

7. See EDWARD CASTRONOVA, *SYNTHETIC WORLDS: THE BUSINESS AND CULTURE OF ONLINE GAMES* 159 (2005) (“[W]here exactly is the line between game and life? . . . Imagine if someone were to insist on the following rule: if a rabbit attacks [a player] and I help him by casting a spell, we are ‘in the game,’ but if we are not actually interacting with the synthetic world, but rather only with each other, then we are ‘in life.’ . . . Our culture has moved beyond the point where such distinctions are helpful.”).

8. See, e.g., *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516 (10th Cir. 1979) (establishing the traditional rule that intentional violence outside of the scope of consent is an actionable tort).

magic circle metaphor has gained recognition and respect within the virtual-world community.

Protecting virtual play is the first function of the magic circle.⁹ When people play, they often act out scenarios that would be illegal if performed in the real world.¹⁰ In video games, for example, players might kill each others' avatars. An actual murder charge will not be brought when one avatar kills another within a game dedicated to such mayhem. This makes sense: children often play games (for example, cowboys and indians) that represent real-world tragedy, but if society were to prosecute children simply because of the subject matter of their games, they would stop.¹¹ The play is not "real," proponents of the magic circle argue, and thus law does not regulate it. However, there is a problem. As discussed below, if a player departs from the rules of the game and injury results, the law may intervene.¹²

The second function of the magic circle is to protect stories and speech.¹³ In virtual worlds, players telling fantasy stories can act them out without repercussions like actors on a stage. Just as in the theatre, some stories cannot be told without discussing violence or sexuality. In works of fiction, characters commonly engage in illegal acts. Likewise, movies or theatre productions sometimes include depictions of sex or violence that may fall outside the realm of social and legal acceptability. Yet the authors of those plays, books, or movies are not themselves liable for the illegal actions of their characters. Indeed, the artistic expression of acts that would be against the law if actually performed is protected by the First Amendment.¹⁴ There are books about murders, but no one advocates prosecuting these authors for murder. As part of our conception of what it means to be human, we value the ability to tell stories about the worst acts of humankind without fear of prosecution. Tales about sex and violence have traditionally been protected by our free-speech

9. See, e.g., Castronova, *supra* note 5, at 188 ("For Huizinga, nothing can be a game if it involves moral consequence. Whatever is happening, if it really matters in an ethical or moral sense, cannot be a game.") (discussing JOHAN HUIZINGA, *HOMO LUDENS: A STUDY IN THE PLAY-ELEMENTS IN CULTURE* (1938)).

10. In the controversial *Grand Theft Auto* series, for example, players are allowed—even encouraged—to run over pedestrians and beat up prostitutes in addition to the game's namesake crime of stealing cars.

11. See Castronova, *supra* note 5, at 188.

12. See, e.g., *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516 (10th Cir. 1979).

13. See, e.g., *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (holding the Child Online Protection Act unconstitutional for burdening adult access to protected speech).

14. See, e.g., *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (striking down a ban on the virtual depiction of child pornography as violative of the First Amendment).

jurisprudence even though those actions, if actually performed, are not.¹⁵

The third major function of the magic circle is to protect what is known as a “start over,” a “level playing field,” or a “clean slate.”¹⁶ There is a media-influenced perception¹⁷ that some players of virtual worlds are not successful in the real world, and thus deeply desire a new life in a new world. Therefore, it is important to some players that they get an even playing field to begin their virtual lives anew. Even if one rejects the standard media characterization of gamers as young or losers (and I think we must, since studies show that gamers are older and more successful than most had assumed),¹⁸ the level playing field remains an important concept in virtual play.¹⁹ Nobody wants to play a game in which the results are skewed in favor of one’s opponent from the very beginning.

Thus, the basic conception of the magic circle within the virtual-world community includes the following elements: protection of spaces for play, tools for narrative, and the chance to build a new life. Note that this Article does not take issue with these goals, but rather the accuracy and efficacy of the legal metaphor currently advanced to achieve them. As detailed below, virtual communities do not gain any protection by claiming that their actions are not “real” and thus not subject to legal sanctions.

15. See, e.g., *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) (holding that a book describing the life of a prostitute is not constitutionally obscene.); see also *Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964) (plurality opinion) (“[M]aterial dealing with sex in a manner that advocates ideas or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection.” (internal citation omitted)).

16. See 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., 2006); see also Posting of Elizabeth Harper to WoW Insider, <http://www.wowinsider.com/> (Feb. 20, 2008) (“We’ve taken the approach that we want players to feel like it’s a level playing field once they’re in [*World of Warcraft*]. Outside resources don’t play into it—no gold buying, etc.”).

17. See *South Park: Make Love, Not Warcraft* (Comedy Central Network television broadcast Oct. 4, 2006) (making fun of one particular *World of Warcraft* player who had no life and became too powerful, even for the game gods).

18. See, e.g., The Entertainment Software Association – Industry Facts, <http://www.theesa.com/facts/index.asp> (last visited Mar. 20, 2009) (reporting that 26 percent of Americans over the age of 50 play video games and the average age of a gamer is 35).

19. See Lastowka & Hunter, *supra* note 16, at 22 (explaining that every *EverQuest* player begins at the relatively weak “Level 1” and must level up to play most of the game).

II. CYBERSOVEREIGNTY AND THE MAGIC CIRCLE

A second conception of the magic circle is advanced by lawyers and academics rather than players. Claims that the magic circle protects virtual worlds from the incursions of real-world law mirror the claims of cyberseparatism that were advanced in the mid-1990s. The core of the cybersovereignty debate was the tension between cyberseparatist assertions that cyberspace was immune to regulation by real-world governments due to conflicts between sovereigns,²⁰ and cybernationalist claims that national sovereigns could regulate online communities without any special need for new jurisprudential tools.²¹ This section examines the literature of cybersovereignty, asserts that apologists from both sides have failed to capture the essentials, and proposes a better framework for understanding the reasonable and desirable relationship between law and virtual worlds.

Legal academics interested in cyber-regulation began by arguing about whether or not governments could enforce their laws across borders. David Post's "Law and Borders—The Rise of Law in Cyberspace" argued that the problems inherent in extraterritorial enforcement of national laws were such that governments could not regulate internationally.²² Jack Goldsmith's "Against Cyberanarchy" responded with some vim that cross-border law enforcement was no more difficult in the age of the Internet than under prior telecommunications regimes, and that nation-states were perfectly capable of unilateral regulation of online communities.²³ Goldsmith's later work cataloged the fragmentation of the Internet into nation-state intranets (such as China's largely separated space) and argued that the nationalization of cyberspace was largely inevitable and desirable.²⁴

Cyberseparatists and their cybernationalist interlocutors have largely talked past one another. Cyberseparatist arguments are

20. See, e.g., Viktor Mayer-Schonberger, *The Shape of Governance: Analyzing the World of Internet Regulation*, 43 VA. J. INT'L L. 605, 618 (2003) (summarizing the cyberseparatist doctrine as wanting to protect cyberspace from social norms and governance).

21. See *id.* at 613 ("Traditionalists do not respond to this extreme portrayal of unfettered regulatory overlap in cyberspace by denying the theoretical problem of regulatory spillover effects.").

22. See David R. Johnson & David Post, *Laws and Borders – The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996).

23. See Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. CHI. L. REV. 1199 (1998).

24. See Jack Goldsmith & Timothy Wu, *Digital Borders*, LEGAL AFF., Jan.-Feb. 2006, at 40, available at http://www.legalaffairs.org/issues/January-February-2006/feature_goldsmith_janfeb06.msp.

largely normative and cybernationalist arguments are, for the most part, descriptive. Cyberseparatists deny the power of governments to make law that affects online spaces²⁵ while cybernationalists inadequately address the negative consequences of national regulation of online communities.²⁶ Yet nation-states do affect online spaces through the enforcement of laws that impact their citizens.²⁷ This is certainly true of virtual worlds, because such worlds tend to be largely congruent with national borders. Even transnational phenomena, such as *World of Warcraft*, tend to be subject to national governance because servers are typically located in or near the countries of the majority of players.²⁸

On the other hand, cyberseparatists note, with some legitimacy, that national power is at its lowest ebb when it attempts to regulate fantasy games, both because games have traditionally enjoyed some self-regulatory deference from courts, and because exercises of creativity and imagination ought to be freed from government oversight.²⁹ Thus, cybernationalists argue that nation-states can indeed regulate virtual worlds because servers and citizens are close at hand while cyberseparatists argue that nation-states should not interfere with virtual worlds because such worlds are largely fantasy.

As the debate stands, cybernationalists have largely carried the day on descriptive grounds, but they have failed to provide much of a normative basis for their theories. Governments can clearly affect online communities by passing and enforcing applicable laws—but cybernationalists have not demonstrated that such laws will be better or more effective than the customs and norms already in use within online populations.

This Article argues that the debate is at a standstill today largely because the parties began with the wrong question. Sovereignty debates are, at best, tangential to cyber-regulation. The

25. See Mayer-Schonberger, *supra* note 20, at 612.

26. See *id.* at 613 n. 35; see also Goldsmith, *supra* note 23, at 1201 (“It does not argue that cyberspace regulation is a good idea, and it does not take a position on the merits of particular regulations beyond their jurisdictional legitimacy.”).

27. See JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET?: ILLUSIONS OF A BORDERLESS WORLD 65-85 (2006).

28. *World of Warcraft*, for example, has servers located in the United States, Europe, and China. For a listing of current server locations, compiled by the gaming community, see Realms List-WoWWiki, http://www.wowwiki.com/Realms_list (last visited Mar. 20, 2009).

29. See, e.g., F. Gregory Lastowka & Dan Hunter, *Virtual Crimes*, 49 N.Y.L. SCH. L. REV. 293, 294 n.5 (2004) (“[T]alk of a thick cyberspace sovereignty is really convincing only when talking about MUDs, videogames, and other exercises of fantasy . . .” (quoting Tim Wu, *Application-Centered Internet Analysis*, 85 VA. L. REV. 1163, 1199-1202)).

fundamental issue of online regulation is not the balance of power between nation-state sovereigns.³⁰ Rather, it is the balance between sovereign and citizens. Governments must decide how much regulation of citizens' online activities is appropriate and effective and citizens must decide how much government interference they will tolerate.

The focus on nation-state sovereignty has caused academics to overlook other more promising solutions. Online communities do not need sovereignty in order to benefit from some degree of self-rule. Many groups are able to gain some access to legal rules, and to court enforcement of those rules, without benefit of separate legal sovereignty.³¹ For example, industry customs and practices often create default legal rules that courts draw upon in regulating those industries.³² Through the law of contract, private agreements can have the force of law.³³ The regular course of a business often sets a legal standard.³⁴ Even the rules of a game can have the force of law: bite your opponent in a boxing match or cheat in a Las Vegas poker game and legal consequences will follow.³⁵ Punch someone in a boxing match, or bluff in a poker game, and all is well.

30. See Doreen Carvajal, *French Court Tells eBay to Pay for Counterfeits*, N.Y. TIMES, July 1, 2008, at C1, available at <http://www.nytimes.com/2008/07/01/technology/01ebay.html>.

31. See Kevin Kolben, *Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes*, 48 HARV. INT'L L.J. 203, 243 (2007) ("Traditional dichotomies between hard and soft law, informal and formal, public and private, and even law and non-law begin to break down leading to a form of legal hybridity. Law-making and enforcement are created by a diverse range of private and public actors including governments, NGOs, corporations, and private regulatory bodies that sometimes work together to formulate policies and regulate themselves, and each other, both within and *without* the framework of the state.") (emphasis in original).

32. See, e.g., *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1579 (10th Cir. 1984) (applying the knockout rule such that "[t]he ultimate contract . . . includes those non-conflicting terms and any other terms supplied by the [Uniform Commercial Code], including terms incorporated by course of performance (§ 2-208), course of dealing (§ 1-205), usage of trade (§ 1-205), and other 'gap fillers' or 'off-the-rack' terms").

33. Although the use of contracts to create mass public rules does have limits, see generally Joshua A.T. Fairfield, *Anti-Social Contracts: The Contractual Governance of Virtual Worlds*, 54 MCGILL L. J. 427 (2008).

34. See *L & A Contracting Co. v. S. Concrete Servs., Inc.*, 17 F.3d 106 (5th Cir. 1994) (supplanting a contract term definition with the common industry definition); see also *Stender v. Twin City Foods, Inc.*, 510 P.2d 221, 225 (Wash. 1973) ("The definition . . . must be determined in light of reasonable industry custom and usage . . . even though words in their ordinary or legal meaning are unambiguous.").

35. Boxer Mike Tyson, for example, lost his boxing license, was fined \$3 million, and was ordered to pay legal costs after biting off a portion of Evander Holyfield's ear in a 1997 fight. See Mike Downey, *Commission Didn't Pull Any Punches*, L.A. TIMES, July 10, 1997, at C1, available at <http://articles.latimes.com/1997/jul/10/sports/sp-11287>.

Legal commentators have overlooked a lot of this kind of community-based law because of the misplaced focus on sovereignty. In an effort to correct this oversight, the remainder of this Article examines community norms and player consent in virtual worlds as a potential source for real-world legal rules for virtual worlds.

III. DRAWING A NEW MAGIC CIRCLE

For players who wish to see online communities set their own rules, all is not lost. It seems unlikely that real-world nations will recognize online communities as separate and coequal sovereigns. But it is likely that real-world courts will seriously consider the norms generated by online communities as courts take up the task of applying law to virtual worlds. This section discusses several ways in which the rules generated by online communities might gain legal force and effect. The section argues that the relevant inquiry is not whether actions are “real” or “virtual,” but whether a given action falls outside the parties’ scope of consent.

A. *The Rules of the Game*

Game rules are created by the intersection of at least four legal sources: contractual end-user license agreements (EULAs) drafted by game gods (the companies that create and maintain virtual worlds), community-negotiated norms, player consent, and background laws. Since consent in both the contract and torts sense is a core concept in determining how these sources combine to create law, this section will discuss consent in games in detail.

When a player consents to a game by clicking through a contract, she agrees to a package of contract terms whether or not she is familiar with each one.³⁶ Although these terms may be in the form of rules, they are in fact contractual promises, made by the player to the game god. In addition, players agree to conform their actions to a common set of expectations in the torts sense; these expectations can be formally generated (as in the Monopoly ruleset) or informally generated (as in a game of touch football).³⁷ Actions outside the rules

36. See Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800–02 (1941) (describing role of contract doctrine in informing parties that they are about to undertake binding legal relations).

37. RESTATEMENT (SECOND) OF TORTS § 50 cmt. b, illus. 5 (1965) (illustrating that even breaches of the rules of the game—such as an offside tackle—are still within the scope of consent of the game); see also, e.g., *McAdams v. Windham*, 94 So. 742 (Ala. 1922) (boxing); *Gibeline v. Smith*, 80 S.W. 961 (Mo. Ct. App. 1904) (tussling); *Vendrell v. Sch. Dist. No. 26C, Malheur County*, 376 P.2d 406 (Or. 1962) (football tackle).

and also outside the scope of player agreement thus run the risk of being sanctioned by background law.³⁸

One caveat in defining consent: I have previously written about why the model of informed consumer consent to individual contract terms is not useful in mass-market transactions.³⁹ Consumers understandably do not read contracts and the cost of conveying a specific piece of information through the terms of a contract is often greater than the benefits that the information conveys.⁴⁰ Thus, when this Article discusses contractual consent, it refers to blanket consent to EULA terms as a package rather than informed consent to each term.

Further, the consent discussed here has a broader meaning than purely contractual consent. Some claims sound in contract; others sound in tort. In the tort formulation, when one plays a game, one agrees to the rules established by the game community, not just the rules written by the game manufacturer. Monopoly may not be intended as a drinking game, but with a few tweaks of the rules by the community it can become one; the scope of consent given by the player changes to match the variant of game negotiated by the community. Football may be tackle, flag, or touch, depending on the decision of the community, and the scope of player consent varies accordingly.

Unlike contractual notions of consent, in the tort formulation a breach of game rules may still be within the players' consent to the game.⁴¹ A football tackle that is offside is against the rules, but it is within the scope of the expected behavior in the game. As such, injury resulting from a tackle that is only improper because it is offside is not actionable.⁴² There is a spectrum of allowable behavior: if something is technically outside the rules but within the scope of consent, then it will not yield legal liability.

Instead of asking what is "real" or "virtual," lawyers examining actions related to virtual worlds should ask who has agreed to what

38. See *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516 (10th Cir. 1979).

39. See Joshua A.T. Fairfield, *The Cost of Consent: Optimal Standardization in the Law of Contract*, EMORY L.J. (forthcoming 2009).

40. *Id.*

41. The closest contract analogy might be waiver or modification. If party A violates a contract term, and party B takes no action the first several times, there is an argument that B has agreed to change the parties' agreement.

42. See RESTATEMENT (SECOND) OF TORTS § 50 cmt. b, illus. 5 (1965) ("A, a member of a football team, tackles B, an opposing player, while he, A, is "offside." The tackle is made with no greater violence than would be permissible by the rules and usages of football were he "onside." A has not subjected B to a violence greater than, or different from, that permitted by the rules, although he is guilty of a breach of a rule. A is not liable to B.").

and with whom. In a legal conflict between player and game god, the contractual EULA provisions might well prevail.⁴³ For example, suppose that a player used off-color chat in a public chat channel in “The Barrens,” an area within the virtual world *World of Warcraft* that is well known for rough-and-tumble language. In a player/game-god dispute, a court might decide that the game god was well within its contractual rights to ban the player from the game.

However, if player A sued player B for off-color chat in the Barrens, the court may well turn to community norms instead of the EULA. (It might be especially likely to do so if it determined that the EULA is a promise between each player separately and the game god, not between player A and player B.)⁴⁴ Such a court might decide that by continuing to listen to Barrens public chat (players have the option to mute chat channels if they do not wish to hear them), player A consented to a more rough-and-tumble standard of language. Blue chat clearly violates the EULA terms. But some amount of rule-breaking is expected in any game and off-color chat is likely included within the scope of consent that governs what players may say vis-à-vis each other.⁴⁵

Additionally, players may consent to activities beyond both the scope of the EULA and community standards. For example, EULAs forbid hacking into other players’ accounts, and community norms agree.⁴⁶ Thus, hacking another player’s account is likely to sound both in contract and in tort (and, for that matter, in criminal law). In other situations, EULAs and community norms may not align. EULAs forbid sharing accounts between players,⁴⁷ but community norms do not agree. As a result, individual players share account information all the time. If I share my account information with someone else, that person is not liable to me for accessing the account, either under the Computer Fraud and Abuse Act, for unauthorized access of my

43. See, e.g., Complaint, *Blizzard Entm’t, Inc. v. In Game Dollar, LLC*, No. SACV07-0589 (C.D. Cal. May 22, 2007), available at http://virtuallyblind.com/files/in_game_dollar_complaint.pdf; see also Consent Order, *Blizzard Entm’t, Inc. v. In Game Dollar, LLC*, No. SACV07-0589 (C.D. Cal. Jan. 28, 2008), available at http://virtuallyblind.com/files/Peons_Injunction.pdf (shutting down defendant’s business that engaged in systemic EULA violations).

44. See Joshua A.T. Fairfield, *Anti-Social Contracts: The Contractual Governance of Virtual Worlds*, 54 MCGILL L. J. 427 (2008). Cf. Michael Risch, *Virtual Third Parties*, 25 SANTA CLARA COMP. & HIGH TECH. L. J. 415 (2009).

45. See RESTATEMENT (SECOND) OF TORTS § 50 cmt. b.

46. See *World of Warcraft End User License Agreement*, § 2(B)-(C), <http://www.worldofwarcraft.com/legal/eula.html> (last visited Mar. 20, 2009).

47. See *id.* § 6.

system, for conversion, or for any of a number of other common law theories.⁴⁸

EULAs create game-god/player legal obligations and simultaneously propose rules for adoption as community norms.⁴⁹ Separating these functions permits us to understand why EULAs strongly impact community norms and yet are not the sole source of law in virtual worlds. Instead, EULAs interact with community norms, individual consent, and background law to generate legal outcomes.

This analysis opens the door for a new understanding of how legal rules operate within virtual worlds. Whether or not an action in a virtual world gives rise to a viable cause of action depends on the scope of consent granted between each set of parties. Rights will change depending on the relationship between the parties. For example, the virtual property problem has foundered on the assumption that virtual property must be treated the same in the relationship between game god and player as it is in the player-player relationship. Many EULAs claim that no player has ownership rights in virtual property.⁵⁰ However, claims between players are still adjudicated by courts across the world as if such rights did exist.⁵¹ The state of the law at this moment is, essentially, that virtual property rights do not run against game gods but do run against other players. This is not surprising—it is possible to have a contract with the game god that does not affect legal rights between one player and another. Under this approach, between game god and player, the property will be treated as owned by the game god, but if one player steals another player's virtual property, legal liability will result.

Under the old conception of the magic circle, such a result makes no sense: either virtual property is “virtual,” and interests in it are utterly unprotected by law, or it is “real” and fully protected against all comers. Under the new conception articulated by this Article, players in virtual worlds are real, the actions are real, and even the digital objects of their actions are real. The critical question is not whether the property is real or not, or whether a theft of

48. Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2000). Like the common law action of trespass, the Computer Fraud and Abuse Act requires access of a protected computer without authorization in order to give rise to a cause of action; this requirement certainly would not be met if I willingly gave account access to a friend.

49. Indeed, *Second Life* has incorporated a “Community Standards” list into its Terms of Service. This list, while broad, can be changed at the request of the *Second Life* community. See Second Life Community Standards, <http://secondlife.com/corporate/cs.php> (last visited Mar. 20, 2009).

50. See World of Warcraft End User License Agreement, *supra* note 46, § 3(A).

51. See, e.g., Carver, *supra* note 1.

property is real or virtual, but whether a given act as relates to the property is inside or outside the scope of consent of the parties. As between the game god and the player, the EULA may clearly indicate that the god may alter or delete a given digital object at will. But as between players, one player's theft of another's property may well exceed the scope of consent and thus be actionable in fraud or conversion.

Some thought experiments may help to cement this distinction. If person A threatens person B in the real world, that action is subject to the sanction of law.⁵² But what happens if A attacks or threatens B's virtual avatar? The old conception of the magic circle would dictate that an attack on an avatar is not actionable under real-world law. However, varying the hypothetical slightly demonstrates that it does not matter whether an action is in-world or outside-world, but rather whether the A's action is outside of B's scope of consent. If A takes an in-world action that is outside the scope of consent—for instance, if A threatens B's avatar in a way that makes B feel personally threatened—then A's in-world action will be subject to real-world civil and criminal sanction.⁵³

A critic may respond that such an action is, in essence, a real-world action since A's threat was directed at B, a real person. While true, this demonstrates that the sharp distinction between real and virtual worlds has already begun to blur: real people can still harm one another through actions outside of consent through the medium of a computer. A further example blurs that barrier into non-existence. In some games, player-versus-player combat is a feature of the game. In such a game, if player A pulls out a virtual knife and stabs B's avatar, the action is utterly pedestrian and non-actionable. However, suppose instead that A attacks B's avatar by hacking B's account and deleting B's avatar. This form of attack subjects A to criminal penalties.⁵⁴ The difference is that both players have consented to player-vs.-player combat as part of playing the game. Hacking, however, is not part of the game, and thus the action is measured by background, default, real-world law. In each case, the action is virtual and the object is virtual, but hacking falls outside the scope of consent

52. See RESTATEMENT (SECOND) OF TORTS §§ 21-34 (1965).

53. The law makes no distinction between the method of communication, only that A threatened B and that B felt threatened. See, e.g., TENN. CODE ANN. § 39-17-308(a) (2009) (allowing a cause of action for threats made via telephone).

54. See Musgrove, *supra* note 3.

and is subject to real-world legal sanction, whereas player-vs.-player combat is part of the game.⁵⁵

Consider the example of the Dutch boys that began this Article.⁵⁶ They were convicted of theft of virtual property.⁵⁷ It is irrelevant whether the theft of virtual property was accomplished by a real world action or a virtual-world action. Certainly the out-of-game nature of the physical confrontation between the boys underscored the fact that the theft was outside the scope of any possible consent granted by the victim. But it is not hard to construct a counterexample in which a physical confrontation that is within the rules of a game would not be actionable. So-called “alternative reality games” intentionally cross the boundary between virtual and real environments. Many alternative reality games include a significant component of physical confrontation—nothing on the order of pulling a knife, but there is an undeniable physical component. So it is not the nature of a game as “real” or “virtual” that determines whether or not violation of the rules yields legal liability—again, it is whether the action of the player exceeds the scope of consent granted by the other players.

Law in virtual worlds hinges in large part on the consent of players in the “real” world. Virtual-world law has been dominated by industry-drafted EULAs⁵⁸ and, as such, the concept of players determining law is a bit of a novel concept. This should not be the case: EULAs derive what authority they have directly from the agreement of the players to their terms.⁵⁹ This is hardly rocket science, but remembering the role of consent in games vastly simplifies the legal issues affecting virtual worlds. Note too that the opinion of the community also matters. Norms within virtual worlds are not usually negotiated on a person-to-person basis (though

55. Under the Computer Fraud and Abuse Act, for example, such an action would likely be deemed an intent to defraud. 18 U.S.C. § 1030(a)(4).

56. See Carver, *supra* note 1.

57. See *id.*

58. See MDY Indus., LLC v. Blizzard Entm’t, Inc., No. CV-06-2555-PHX-DGC, 2008 WL 2757357, at *1 (D. Ariz. July 14, 2008) (“Use of [*World of Warcraft*] is governed by [a EULA] . . . and [a] Terms of Use Agreement.”); Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593 (E.D. Pa. 2007) (holding the relevant agreement provisions controlling, but unconscionable); see also Joshua A.T. Fairfield, *Anti-Social Contracts: The Contractual Governance of Virtual Worlds*, 53 MCGILL L.J. 427, 429 (2008).

59. As the EULA is a contract, it requires the same basic elements taught in any first year contracts class: offer, acceptance, and consideration. It only gains power and enforceability when the user accepts and consents to its provisions. See, e.g., ProCD v. Zeidenberg, 86 F.3d 1447, 1450 (7th Cir. 1996) (“Following the district court, we treat the licenses as ordinary contracts accompanying the sale of products, and therefore as governed by the common law of contracts and the Uniform Commercial Code.”).

exceptions to the norms are typically negotiated individually). Instead, the judgment of the community sets the baseline. For example, if a group decides to play tackle football, then each individual player has presumably consented to being tackled. Individual negotiations (“no hitting in the face!”) then occur in the shadow of that community norm. If players can give consent, they can then modify that consent on a case-by-case basis. If player A begins a sexually explicit conversation with player B in a club in *Second Life*, player A may soon find that the conversation crosses his boundaries. He can withdraw his consent to further conversation, even though he consented to—and even initiated—the original conversation.

There are limits to this consent-based approach. For example, it is important to ask whether one can consent to a certain activity at all. For example, many virtual worlds are highly sexualized and there is a culture among gamers that can make female players deeply uncomfortable.⁶⁰ Although it is possible to say that the community norm is to overtly sexualize women, it is impossible to argue that female players have consented to sexualized treatment merely by entering the world. In this case, a more important real-world norm may well trump the in-world community norm.

This interaction between community expectations and individual consent generates a large number of real-world legal rules that have true force and effect in online spaces. The scope of consent defines the relationship between the laws of the real world and actions in virtual worlds and, therefore, any conception of the magic circle that excludes real-world law from virtual worlds does not seem accurate. A new conception of the magic circle, which permits players and game gods to define the terms by which law enters virtual worlds, would be more accurate and useful.

B. A Case Study: Money and the Magic Circle

The interaction between money and the magic circle deserves special mention, since it is the intrusion of real-world dollars into virtual worlds that precipitated the current spate of virtual-world litigation. Game gods use the metaphor of the magic circle to justify blocking real dollars from entering virtual worlds, in order to protect

60. See generally Mitch Wagner, *Sex in Second Life*, INFORMATIONWEEK, May 26, 2007, available at <http://www.informationweek.com/news/software/hosted/showArticle.jhtml?articleID=199701944> (describing the rise and prevalence of sexualized behavior in *Second Life*).

play and preserve the level playing field.⁶¹ Yet even a brief examination of the consent principle shows that this traditional understanding is erroneous. Many virtual worlds, both those that are games and those that are not, operate using microtransactions.⁶² To obtain goods or services within the virtual world, one must pay with real-world cash. Further, economics plays a direct role in computer hardware, which has a direct impact on the game experience. It seems odd that the magic circle would block software upgrades by blocking the purchase of virtual property or game accounts for cash, but not block upgrading ones computer to get a significant advantage.

The question is not whether real-world economics can or should impact virtual worlds; they can and they should. The question is how much of an impact the players can expect. Is buying a high-quality tennis racket considered unfair in tennis? Do the New York Yankees cheat the League by having a player payroll nearly five times that of the current American League champions, the Tampa Bay Rays?⁶³ Typically, these questions are decided by their respective communities. I would say that high-end hardware and fast internet connections are considered completely fair by the gaming community, despite the serious advantage that such technology gives to the owners who are willing to invest in it, whereas purchasing a magic sword or an upgraded account is subject to serious debate.

Here, I should expose my personal bias. I believe that the basic exchange of money for time is a bedrock facet of real-world culture. No one complains that I did not build my house for myself. No one complains that I did not assemble my truck by hand. No one even complains when I buy a precision-tooled set of golf clubs. And yet there is a complaint when I ask someone else to create an avatar or an account in a virtual world to my specifications. I think we should question that disparity. It would be considered very strange in our capitalist society to eliminate our ability to trade money for what we

61. See MDY Indus., LLC. 2008 WL 2757357, at *1 (“Blizzard claims that Glider upsets this balance by enabling some payers to advance more quickly and unfairly, diminishing the game experience for other players. Blizzard also contends that Glider enables its users to acquire an inordinate number of game assets—sometimes referred to as ‘mining’ or ‘farming’ the game—with some users even selling those assets for real money in online auction sites, an activity expressly prohibited by the [terms of use].”) (internal citation omitted).

62. See Eric A. Taub, *HDTV Is a New Reality for Game Developers*, N.Y. TIMES, May 16, 2005, at C12, available at <http://www.nytimes.com/2005/05/16/business/16game.html> (“Microsoft hopes to earn additional revenue through an increase in microtransactions, as players purchase game elements such as weapons and tattoos for a few cents each.”)

63. See CBS Sports, *MLB Salaries*, available at: <http://www.cbssports.com/mlb/salaries>.

want. Accordingly, the idea that virtual worlds can survive only by wiping out both private property and the exchange of money for other people's time seems suspect.

The argument that play cannot survive the intrusion of real-world economics does not appear entirely accurate. Instead, the best that one can say is that the norm within some communities is to accept upgrades to both hardware and software; and the norm of other virtual worlds is to permit hardware upgrades but not software upgrades. That is, it is the expectations of the players—either the imported expectations of a capitalist society or the nascent expectations of game players themselves—that determine whether or not private property exists within virtual worlds.

Indeed, it is difficult to overestimate the impact of player expectations on the legal treatment of virtual property. Regardless of EULA provisions, courts worldwide have chosen to treat virtual objects as personal property for the purposes of resolving criminal complaints brought by one player against another.⁶⁴ Again, the example of the Dutch boys is instructive. The *Runescape* EULA indicates quite clearly that players do not own the virtual objects they earn through game play.⁶⁵ If one were to take the EULA as the sole source of operative law, then the perpetrators would have taken nothing from the victim. Yet the Dutch court—as is typical of courts worldwide—chose not take that approach.⁶⁶ This is also the approach taken by South Korea, which has codified a similarly complex set of expectations in statutory form. Under South Korean law, virtual property may not be bought or sold commercially, but it may be exchanged between non-merchant individuals for in-world trade or currency.⁶⁷ Additionally, theft of virtual property is a criminal offense.

This Article does not advocate any particular solution to the problem of the interaction of real-world economics with virtual worlds. I use it here to make two points: first, that it is impossible to separate virtual worlds from the economics of the real world; second, that

64. See, e.g., Will Knight, *Gamer Wins Back Virtual Booty in Court Battle*, NEW SCIENTIST, Dec. 23, 2003, <http://www.newscientist.com/article/dn4510-gamer-wins-back-virtual-booty-in-court-battle.html> (discussing a Chinese case where the court ordered the Internet service provider to replace virtual items that had been hacked and stolen).

65. RuneScape Terms and Conditions, <http://www.runescape.com/terms/terms.ws> (last visited Mar. 19, 2009) (“You agree that all intellectual property or other rights in any game character, account, and items are and will remain our property.”).

66. See supra note 1.

67. Korea’s “Act of the Promotion of Game Business,” Chapter 2, 32-(1)-7, forbids commercial trading of virtual items, yet recognizes the private fun of individual trades if not done commercially.

consumer expectations can be a powerful source of law for virtual worlds.

IV. CONCLUSION

Several points are worthy of reemphasis. The individuals who enter virtual worlds are real, their actions within those worlds are real, and the effects of those actions on other people are real. Thus, it is implausible to say that virtual worlds are not subject to real-world law, since real consent given by real people is the very source of law in virtual worlds.

It is likely that courts will increasingly look to standards developed by virtual communities and that those community standards will come to have the same force and effect as real-world industry customs in creating real-world law. The first steps have already been taken: courts have not been shy about applying basic contract and tort law to virtual worlds.⁶⁸ As the real-dollar value of virtual-world assets grows, courts will not hesitate to apply real-world criminal law to virtual worlds.

The implications for the future of virtual worlds are complex. On one hand, denizens of virtual worlds should hope that the law that ultimately governs virtual worlds will not only take their interests into account in a paternalistic fashion, but also that courts will give the actual solutions worked out by online communities the force of law. On the other hand, players in virtual worlds should understand that their behavior online is not entirely free from real-world scrutiny. This is a bit saddening. It was wonderful to live in the cyber Wild West. However, every new frontier has its civilizing moments. And virtual worlds are an enormous phenomenon that the law cannot afford to ignore.

68. See *supra* note 58.