

From Jack M. Balkin and Beth Simone Noveck, eds., *The State of Play: Law and Virtual Worlds*

Owned!

Intellectual Property in the Age of eBayers, Gold Farmers, and Other Enemies of the Virtual State

Or, How I Learned to Stop Worrying and Love the End-User License Agreement

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I.

Possession, they say, is nine-tenths of the law, and not being a lawyer myself--or even a legal scholar--I'll have to take their word for it. But having spent considerable time in the company of lawyers and legal scholars lately, I do know this: the remaining tenth is storytelling. As a journalist, therefore, I feel at least somewhat qualified to stand before this august body of lawyers and legal scholars and do my professional thing, which is to tell a story. By no coincidence, the story I want to tell right now revolves around a legal case, a case with far-reaching implications for the concepts of property in virtual worlds and of governance in online settings generally. But mostly it's the story of my own evolving understanding of what those implications might be. And if that story happens to move your own understanding forward just a bit, well, as any lawyer will attest, stories can do that.

Ours begins in the year 2001, with a group of enterprising young Southern Californians who at the time were doing business under the name of Black Snow Interactive. And a curious line of business it was: they spent their days acquiring and selling, on eBay and elsewhere, the scarce virtual goods that are the obsessively coveted focus of multiplayer online role-playing games like Ultima Online and Dark Age of Camelot. Mainly they trafficked in "gold coins" and other fictional currencies, and mostly they made piles of profit doing it. But the opening scene of the story finds our heroes suddenly stymied, their operations in the lucrative Dark Age of Camelot space abruptly halted when the owner of that game--a company called Mythic Entertainment--suspended their accounts and, alleging intellectual property infringements, prevailed upon eBay to suspend their auctions for items acquired within the fantasy realms of DAoC.

Now, Black Snow Interactive were hardly the only people engaged in this sort of trade, and they certainly weren't the first to have their goods thus confiscated. And if they'd been more like the rest of their fellow traders, they would most likely have just laid low for a while and returned to the game under some other identity--or moved on to another game altogether. But for some reason Black Snow chose to stand and fight. They filed a federal suit against Mythic for unfair business practices, and then they very publicly announced that they had done so.

“What it comes down to,” declared Black Snow partner Lee Caldwell, “is, does a MMORPG player have rights to his time, or does Mythic own that player's time? It is unfair of Mythic to stop those who wish to sell their items, currency or even their own accounts, which were created with their own time. Mythic, in my opinion, and hopefully the court's, does not have the copyright ownership to regulate what a player does with his or her own time or to determine how much that time is worth on the free market.”

Self-serving as the press release may have been, it did raise an interesting point: Who exactly owns the products of game-world economies--the company that creates the game, or the player whose time and efforts bring the economy into existence? Or to put it another way, did Black Snow's hard-won possession of its virtual goods indeed get them nine-tenths of the way toward legal ownership, or was this peculiar form of property simply (to cite another pertinent adage) theft?

There were other issues at stake. So many, in fact, that by the time word got around about Black Snow's suit, there were very few people with a more than passing interest in the economics of online games who had not thought and/or argued long and hard about it. And I was no exception. Having written passingly about the case for Wired magazine, I was invited to give a talk about it at Stanford Law School in the fall of 2002. There I spoke about the broader issues the case raised, which to my mind were two.

First, and most interesting, was the question of intellectual property in the digital sphere. And given that my invitation to speak at Stanford had come from Lawrence Lessig and his crowd, you can easily guess the direction my thoughts on the subject ran in. To me, Mythic's claim of copyright infringement was not only a weak one but a classic instance of the overapplication of intellectual property claims in digital contexts. After all, to transfer a virtual sword or gold piece from one player to another is not to

duplicate the item but to move it, as it were, from one file folder to another--a procedure involving trivial copying at most and none whatsoever for any economic purposes. Thus, I argued, Mythic's restrictions on the sale of virtual items represented yet another digital-age curtailment of the so-called first-sale doctrine, which for a century has guaranteed the right of second-hand booksellers and weekend yard salesmen, among others, to sell copies of works to which they hold no copyright. Mythic no doubt owned the copyright to its fictional swords and coins, but its claim to own each copy of those fictions, implicit in its maneuverings against Black Snow, plainly ran afoul of a hallowed if increasingly embattled point of law.

Of course, the point was rendered somewhat moot by the fact that the end-user license agreement for Dark Age of Camelot subscribers had obliged Black Snow to waive any right to resell their items at all. And here lay the second and, to my mind, maddeningly less interesting of the case's central questions. For if it was bad enough that the agreement was the usual raw deal one sees in software and network-access licenses--a non-negotiable contract of adhesion granting much to the issuer and little to the user--this one had the additional effect of superseding altogether the piquant intellectual-property issues the case might otherwise provoke. All a judge had to do was rule the relevant terms of the contract valid, and all discussion of Mythic's intellectual-property claims would melt into irrelevance. The end-user license agreement in this case, then, was not only the instrument of iniquity that EULAs tend to be but was, as well, a sort of wet blanket thrown upon the sparks of intellectual controversy flying from the case. It was not only bad but boring.

Thus concluded my analysis of the issues at stake. And there it might have remained had my analysis not been somewhat at odds with certain key facts of the case, heretofore left conveniently unmentioned.

II.

It will not have escaped your notice that up to now I have said nothing about the final ruling in *Black Snow v. Mythic*. This is mainly because, as it turns out, there was no final ruling; not to speak of, anyway. A few months after the initial filing, word got out that the Federal Trade Commission had just issued a \$10,000 judgment against Lee Caldwell and another of Black Snow's principals--something to do with their involvement in a previous

business, an enterprise apparently consisting of the sale, online, of computer systems they neither owned nor intended to deliver. Not long after that, the boys of Black Snow stopped paying their attorney, stopped returning his calls, and more or less disappeared, taking their lawsuit with them.

This had all transpired months before I gave my talk, and while the nature of their earlier operations hardly spoke well for the character of the plaintiffs, it didn't seem to me to diminish the essence of their claim or the gravity of the issues it raised. Neither, for that matter, did a certain almost equally undignified aspect of Black Snow's present business model, the precise workings of which bear some explaining.

I said before that Black Snow were in the business of acquiring and selling virtual goods, but I didn't say how they were acquiring them. This, it seems, involved various methods, none of which was particularly savory, but one of which was of a crassness so naked as to approach genius. To grasp what they were up to, it helps to keep in mind the economist Edward Castronova's calculation that players of EverQuest (the most popular of the multiplayer online role-playing games) can acquire goods within the game at an average rate of about three dollars' worth per hour. Keep in mind as well that there are places in the world where the average laborer makes less than that, and you get the picture: Black Snow had rented an office in Tijuana, equipped it with a T1 Internet connection and eight PC workstations, and hired three shifts of unskilled Mexican workers to power-play Dark Age of Camelot and Ultima Online around the clock, selling off the loot thus accumulated and paying the workers a small percentage of the proceeds.

The players whose rights Black Snow was so nobly standing up for, in other words, were in fact low-wage mouse-clickers slaving away in a virtual sweatshop. This did, of course, lend a certain irony to Black Snow's crusade--but like I said, it seemed to me an irony that the merits of their case could survive.

And yet, as I continued to think about the case after my talk, I began to have my doubts. The first turn in my thinking occurred as I embarked on a year-long attempt to duplicate Black Snow's financial success (though not their methods), buying and selling goods in Ultima Online and blogging my efforts as I went along. "Play Money: Diary of a Dubious Proposition" (www.juliandibbell.com/playmoney) is the name I gave my blog, and you can read the whole, sad story there if you like. For the present purposes, though,

it's enough to report that the project quickly brought me in contact with players whose methods made the Black Snow sweatshop look quaint. One sent me a photo whose implications made my mind spin, a picture of a fully automated "gold farm": 24 computers crammed into a closet in his house, each one of them running an Ultima Online client, each client piped to a program that repeated the same loot-gathering operations over and over, without so much as a bathroom break. If Black Snow had hit on one of modern capitalism's great efficiency-enhancing maneuvers--off-shoring--my friend the gold farmer was working another--automation--for all it was worth.

What it was worth, in his case, was enough real money to wipe out his student loans, buy his wife a new washer-dryer, and make a nice down payment on a Prius. I didn't begrudge him any of it, but I did have some qualms about another picture he showed me. It was a chart of the price, on eBay, of Ultima Online's unit of currency, the gold coin, and it was headed steadily, precipitously downward. The gold farmer told me that this was the result of overproduction by other farmers, less scrupulous than he, and a quick scan of selling patterns on eBay told me he was probably right. And here was a problem that hit home. After all, I was trying to make money myself now, selling those coins, and the faster the price dropped, the harder it would be for me to do that.

Moreover, this clear and present threat to my livelihood put me in a better position to understand how the activities of the Black Snows and the gold farmers affected the average player. It's common to hear players grumbling that those who buy their way to success in the game spoil the success of those who play their way to the top, but I never had much sympathy with that argument. Live and let live, I figured--if some players had more money to spend than time to play, while others had more time than money, what was the harm in letting each group follow its own best path to the game's upper levels? Now, though, I could see that the consequences of the "export market" (as the economist Castronova has characterized the exchange of virtual goods for dollars) weren't so easily contained. The cash market for gold drove the gold farmers, and the gold farmers drove hyperinflation within the game, until eventually there was no way for anyone, time-rich or time-poor, to keep up with the rising cost of living except by resorting to the same very effective but not very playful methods that made the gold farmers rich.

Thus ran the argument anyway, and while I've since come to question some of its premises, what remains clear is this: The argument had almost nothing to do with intellectual property. It was an argument, rather, about a peculiar sort of economic justice, about the best way to regulate the daily life of a peculiar sort of society, about the governance, in short, of a semi-fictional world. And seen from within that world, the contemporary intellectual-property debate, in all its vastness, was just a sideshow. What mattered here wasn't whether Black Snow had or had not violated Mythic's copyrights. What mattered, rather--and mattered indeed--was whether Black Snow had or had not done harm to the community of which their subscriptions to Dark Age of Camelot made them members.

Now, it may seem incongruous to bring up such lofty notions as governance, community, and economic justice in the context of a commercial video game, but on this point, too, my thinking was moving toward a place much different from the one it started in. The shift here came a few months after I laid eyes on that gold farm, when I decided to pay my first visit to online gaming's equivalent of a Star Trek convention: the semi-annual EverQuest Fan Faire.

The Faire was pretty much what I expected, in most ways. Wizards and dwarves roamed the hallways in hooded robes and bad make-up; small groups of doughy men and pale women huddled around cocktails trading quest stories and character stats. There was one recurring scene I hadn't expected, however: conference room after conference room filled with players hurling questions, advice, and demands at the designers of the game, who seemed to be taking careful notes. It looked for all the world like a series of town meetings.

And as I took it all in, I remembered in a new light a talk I had heard by Dave Rickey, a leading MMORPG designer, just a few months earlier. Rickey was ostensibly talking about how customer support works in a game this complex, but by the end of his talk it was clear his point was that it doesn't. Customer support, in the traditional sense of companies walking users through a product that the company understands much better than the user, has to give way to something more like democratic politics. "You have to remember that, in aggregate, the players always know your game better than you do,"

said Rickey--and given that fact, he argued, the most efficient way to manage customer satisfaction is to let them tell you, to a certain extent, how to run your game.

Back at the EQ Fan Faire, I was seeing the game companies from a new angle. Caught between the demands of a not entirely captive customer base and the inefficiencies of trying to single-handedly manipulate a large, complex society, they were doing what governments of large, complex societies have a strong tendency to do: outsource decision-making to the people. Needless to say, relations between the game companies and their paying “citizens” are still a far cry from the best practices defined in, say, the Federalist Papers. All the same, I realized, they come close enough to blur the line between designing a game and framing a constitution. Common principles of game design (“keeping it fun,” “maintaining game balance”) start to sound suspiciously like certain founding axioms of classic liberal political theory (“pursuit of happiness,” “the greatest good for the greatest number”). Dave Richeys and Raph Koster start to talk a little like John Lockes and Jeremy Bentham.

And lo and behold, the end-user license agreement--that egregious tool of corporate tyranny over the defenseless, voiceless customer (or so I had painted it) – starts to look more like the place where a complicated give and take between designers and players is finally ratified, transformed from a murky power struggle into the legally binding rules of the game. The EULA starts to look less like a contract of adhesion, in other words, than like a social contract.

III.

Don’t get me wrong: EULAs are evil. Or at least EULAs as generally executed tend to be. But that’s because the EULA as generally executed tends to be effectively nonnegotiable. Whereas the EULA for a game like EverQuest – as I could no longer deny after seeing its designers come face to face with the fierce enthusiasms of its players – was effectively renegotiated on a daily basis.

And in recognizing that, I was obliged to acknowledge that I had come around one hundred and eighty degrees in my thinking about *Black Snow v. Mythic*. No longer did intellectual property seem to me the most productive frame to put around the case. No longer did a U.S. district court room seem to me the best place to resolve the case’s

contradictions. No longer, especially, did the end-user license agreement seem to me an obstacle standing between the case's central questions and their proper answers.

Quite the contrary. For the most central question of all, finally, was whether or not activities like eBay and gold farming did unconscionable harm to a community like Dark Age of Camelot's--and it was precisely the EULA that kept that question in the hands of the community's body politic. Weighing the case purely as a matter of intellectual-property law, a judge could certainly have determined the legality of eBay once and for all, but because the actual reasons Mythic and many of its customers wanted the practice stopped had nothing ultimately to do with intellectual property, any such ruling would have addressed those reasons no more adequately than a coin toss. Ruling the EULA to be a valid contract, on the other hand, would have sent the question back where it belonged--into the much more finely tuned evaluative process that is the ceaseless, grinding struggle between players and designers over the shape of the game.

Again, don't get me wrong: EULAs aren't perfect. There are questions they can't answer, such as, for instance, whether Mythic wasn't overstepping when it invoked intellectual-property law to compel eBay's help in enforcing the rules of its game. That's one for the case books, to be sure. And of course no EULA can guarantee that the negotiations that produce it are genuinely fair and balanced, any more than a democratic constitution can guarantee a democratic state. As it is, I hasten to repeat, the feedback loop between MMORPG players and MMORPG designers is at best a crude approximation of democratic government--and for the sake of whatever fun inheres in these games is probably better left that way.

All that said, can there possibly be a legal mechanism better-suited to the peculiar demands of virtual-world governance than the end-user license agreement? Look at it this way: The ontological ambiguities of the virtual world are such that there is probably no realm in all of human culture--aside from the bedroom perhaps--that is so consistently difficult for the law to make sense of. Considering the novelty of this realm, we might reasonably hope for future case law and legislation to do a better job of it, but I suspect it will be a long time before enough of those ambiguities are ironed out to make a difference. And besides, why subject virtual worlds to the uniformity of legal code when so much of their appeal lies precisely in their diversity? Ideally, they are parallel

universes--alternatives not just to reality but to one another. And ultimately, the only way to secure that ideal in the legal context is through that part of the law that's friendliest to variety--the law of contracts.

Contract law gives us the EULA, and the EULA gives us alternatives. Properly enforced, the EULA makes each virtual world its own parallel legal universe, immunized as much as it can be from the inability of existing law to reckon with its strangenesses and possibilities. The EULA gives us the restrictive legal regime that is Dark Age of Camelot, with its proscriptions against eBaying and its standard clauses demanding copyright to everything you say or do within its bounds. But the EULA just as easily gives us the radically open alternate reality of an online world like Second Life, where selling virtual items and virtual real estate is encouraged and all intellectual property rights remain in the hands of the players. For that matter, the EULA can put us in interesting parallel realities even outside the realm of fantasy and games: the famous General Public License, after all, legal cornerstone of Linux and other open-source software, is effectively a EULA--as are the various licenses designed by Creative Commons to carve out a space for other alternatives to copyright.

Yes, possession is nine-tenths of the law, they say, and some say too that this is best interpreted to mean the law is overwhelmingly concerned with questions of property. And even if that isn't true of the law, it was certainly true of me when I first came upon the case of *Black Snow v. Mythic*. Fascinated by the power and scope of the intellectual-property question, I failed to notice the beauty, if it's not too ridiculous to call it that, of the EULA question, which is that it's not about possession at all. In some fundamental way, it's about the same thing virtual worlds are about: creation, invention, the conjuring of abstract universes, the telling of stories. It's about that other tenth.