

VIRTUAL PROPERTY – IP IN MASSIVE MULTIPLAYER ONLINE ROLE PLAYER GAMES

Treatment of IP in End User Licence Agreements

Adam Simpson, Partner, Simpsons Solicitors

This paper was delivered on 17 July 2006 at the Licensing Executives Society Australia New Zealand NSW Seminar *Virtual Property – IP in Online Gaming*. It was one of three papers, each covering a different facet of the law and commerce in online environments.

This brief presentation will look at the contractual relationship between games developers and players in relation to “virtual property”.

Ultimately, the “property” that is created in games whether avatars, buildings, game sequences or weaponry are the graphic embodiment of the programming code.

Even if user-generated, its existence in the game relies wholly upon the developer’s code. The life that is breathed into this code, its appearance, animation and interactivity and thus value is made possible only by the benevolence and commercial incentives of the developer.

A Garden of Eden?

The developer is God in this virtual world. There can be no atheists and no agnostics. It is only by this God’s will that players, live, trade and die. It is subject to this Gods’ rules that the players play. These rules are the terms and conditions imposed by the developers in click-through or shrink-wrap agreements. They are non-negotiable. They are Commandments. There are always more than ten.

Of critical importance then to any analysis of the nature of ownership and rights in virtual property is a consideration of the End User Licence Agreements (EULAs) between players and developers.

The EULA controls the virtual environment.

There are, of course, laws that over-ride any contract – consumer, fraud and trade practices laws for example. There also very real issues that exist in relation to the enforcement of EULAs in the real and virtual worlds. They are however the first line of defence for developers and are largely effective in controlling the relationships between the developer and the player and often between players themselves. As in the real world, the majority of people comply with society’s laws.

For today’s purposes we’ll take a closer look at the way in which EULAs seek to deal with the complex issue of ownership and use of virtual assets in Massively Multiplayer On-line Role Playing Games. Here the borders between fantasy and reality are becoming increasingly blurred or simply don’t exist.

The complexity largely stems from the expanding capabilities of these games and the growing expectations of players for reward and security for their efforts.

It is my view that, somewhat ironically, the more these types of fantasy games reflect reality the more immersive they will feel and therefore potentially the more successful they will be. I don’t think players are really not looking for a great divergence from reality. While these games are fantastical, they are still held together by basic and real human needs such as communities and communication, aspiration, reward and trust.

For this reason I think the more EULAs incorporate the tenet of real world IP laws that allow the creator to be rewarded for their effort with exclusive rights that can be traded and enforced, the more the player will be immersed in the virtual world and the more it will prosper with paying escapists.

That said, a benevolent developer dictator may even find ways to improve the existing laws in an on-line Utopian world...

Two Divergent Camps

From an intellectual property perspective there are two main camps in the way developers deal with IP ownership created within the game: those who let players own IP (such as Linden Labs in *Second Life*) and those who don’t (Sony in *Everquest*).

Everquest – Sony On-Line Entertainment – *We want it all...*

The *Everquest* EULA takes the classic conservative approach and seeks ownership of everything associated with its proprietary game. It provides:

"We and our suppliers shall retain all rights, title and interest, including, without limitation, ownership of all intellectual property rights relating to or residing in the CD-ROM, the Software and the Game, all copies thereof, and all game character data in connection therewith.

You acknowledge and agree that you have not and will not acquire or obtain any intellectual property or other rights, including any right of exploitation, of any kind in or to the CD-ROM, the Software or the Game, including, without limitation, in any artwork, music, character(s), item(s), coin(s) or other material or property, and/or any compilation or copyrightable arrangement of any of the above (collectively, "Rights"), and that all such property, material, items and Rights are exclusively owned by us –

Any content generated by the user within the game, would be covered.

It specifically mentions that the player does not have any rights in the characters – the characters that players have so enjoyed trading.

The only reservation is the auction system run by Sony on its Station Exchange site that provides the means for players to "buy" and "sell" virtual assets to other players. The exclusive ownership by Sony is:

except solely as SOE may permit you to exploit Virtual Goods in connection with Station Exchange."

This is reinforced later in the EULA with:

Except in connection with Station Exchange and subject to all of the provisions of the Station Exchange Service Agreement, you may not buy, sell or auction (or host or facilitate the ability to allow others to buy, sell or auction) any Game account, characters, items, coin or copyrighted material or any other intellectual property owned or controlled by us or our licensors without first obtaining our express written permission.

It is useful to remember that what is being "bought" and "sold" is not an item at all, but is, generally, a right of use: the right to use a particular piece of code within the game, that is, part of the Game itself. In other words, a restricted assignable sub-licence of the Game code.

The sale of in-game objects for real currency (often through eBay) has been of long running concern for Sony in *Everquest*. Notwithstanding the contractual prohibitions of such trade, there was a thriving business in selling characters and virtual assets. The sales are particularly attractive to those who do not have the time to build up extensive experience and assets. In January 2001, Sony sought to enforce its EULAs and sought eBay's cooperation in banning the sale of virtual assets. For a while the auctions were immediately taken down.

This forced sellers into new auction sites that specialised in this virtual economy.

Sony realised its market error. The actions of its users motivated Sony to set up Station Exchange in about June 2005. Basically, market demand drove the change. Players believed that their efforts (and these are substantial, many players are on-line more than 20 hours a week) should not only be transferable but valued in real money.

Taking a closer look at the intellectual property ownership provisions:

- The developer *retains* all rights in the Game and associated material
- The player *agrees* that he or she does not have any rights at the time of entering the contract and will not acquire any rights in the Game and material
- The player agrees all rights are exclusively owned by the developer.

Some brief comments:

Firstly, there is no mention of an assignment of rights from player to developer. Rather, it is agreed that the developer owns all rights. The "grab" of rights is very broad.

This is, in effect, saying that even if rights are created, the player is not the first owner of the rights. This is akin to the position of an employee that creates, say, an artistic work. The employee does not transfer rights that she or he has upon creation, instead the employer owns them at first instance and thus a transfer is un-necessary.

This side-steps a potential problem in dealing with an assignment or exclusive licence of copyright under Australian law.

While the contract asserts that the choice of law is Californian, there may be instances where Australian law is applied.

As many of you will be aware, the Australian *Copyright Act* requires that exclusive licences and assignments of copyright require signatures in order to gain the protection and exclusive rights offered under that Act.

Clicking "I agree" on a click-through agreement will not be considered a signature. Accordingly, a developer that seeks an assignment or exclusive licence by operation of a click-through agreement, runs the risk that it could not enforce the rights against third parties.

The developer would need to invoke equity to perfect the intention of the parties and be obliged to join the player in any proceedings. This is so that the legal and equitable owner make ostensibly the same claim to avoid the defendant facing a double jeopardy of two actions by two owners.

The developer may consider a clause requiring the player to do all things necessary to ensure that ownership is transferred. Such clauses are common in a range of contracts.

Secondly, there is no mention of moral rights in the contract at all. Again the contract specifies Californian law, but California was an early adopter of moral rights. I am not an expert in Californian law but it may be that players acquire moral rights in any copyright work they create. I do understand that one can waive moral rights in that jurisdiction (you can't here) and so it appears a curious omission.

So Sony adopts the view that it owns all rights in the game and relating to it. It grants a limited sub-licence of its code to enable users to trade rights of use to particular objects within the game within its own auction system.

Linden Labs, the creator of *Second Life* has a very different approach. One much more in-line with real-world experience. This is not only a reflection of a different attitude towards rights but also the scope of creativity available within *Second Life*.

Second Life – Linden Labs

The Second Life EULA emphasises the "just a service" notion whereby the developer just provides the mechanism by which people interact –

1.2 Linden Lab is a service provider, which means, among other things, that Linden Lab does not control various aspects of the Service.

You acknowledge that Linden Lab is a service provider that may allow people to interact online regarding topics and content chosen by users of the service, and that users can alter the service environment on a real-time basis. Linden Lab generally does not regulate the content of communications between users or users' interactions with the Service. As a result, Linden Lab has very limited control, if any, over the quality, safety, morality, legality, truthfulness or accuracy of various aspects of the Service.

It specifically warns that other players can alter the service environment and Linden does not generally regulate the content of communications between users or the users' interactions with the service. In relation to IP it states:

3.2 You retain copyright and other intellectual property rights with respect to Content you create in Second Life, to the extent that you have such rights under applicable law. However, you must make certain representations and warranties, and provide certain license rights, forbearances and indemnification, to Linden Lab and to other users of Second Life.

*Users of the Service can create Content on Linden Lab's servers in various forms. Linden Lab acknowledges and agrees that, subject to the terms and conditions of this Agreement, **you will retain any and all applicable copyright and other intellectual property rights with respect to any Content you create using the Service, to the extent you have such rights under applicable law.***

So basically this EULA says you **retain** any rights you may have – it doesn't grant or assign any rights it has. That raises the issue of what rights does a player have in the first place?

For copyright works that exist in the real world and are then transposed into the virtual world – for example, the BBC broadcasting a radio service within Second Life there are no real issues – the BBC retains its rights in the broadcast.

The issue becomes more vexed when intellectual property rights are created at first instance within the game structure. One must turn back to the fundamentals of copyright such as sufficient creative effort, originality and material form and other such issues. These basic principles must be applied, as they would in the real world, to any such creations.

For example, if a building was created using Linden Labs design system and the player used texture “skins” or prefabricated works created by Linden Labs then there could be issues of joint-ownership. Joint ownership, under Australian law, requires that both owners, Linden Labs and the player, must consent to any exploitation of the building design. So unless that consent was given or that “skin” or pre-fab was removed, the player has rights – but cant exploit them.

This conclusion is inconsistent with some of the statements on the Second Life site, for example:

“The business opportunities do not stop at the virtual world. In Second Life, all Residents retain Intellectual Property rights over everything they create in-world—in Second Life, and offline. Turn a series of screenshots into a graphic novel, and sell the rights to a real life comic publisher. Prototype a fashion line, create real world versions of it, and sell them in a local clothing boutique. Shoot a machinima movie short in-world, and sell it as a pilot for a cable network. Not only is all this permitted—it’s encouraged.”

Which is echoed to some degree in the EULA:

*“Linden Lab’s Terms of Service agreement recognizes Residents’ right to **retain** full intellectual property protection for the digital content they create in Second Life, including avatar characters, clothing, scripts, textures, objects and designs. This right is enforceable and applicable both in-world and offline, both for non-profit and commercial ventures. You create it, you own it – and it’s yours to do with as you please.”*

But the issue of joint ownership is not resolved in this provision, it still relates to rights that are *retained*. There is no licence of any material owned by Linden Labs.

While a considerable leap from the conceptual framework adopted by Sony, there are some interesting limitations. For example, what I call the “power to smote”...

The Power to Smote

As does Sony, Linden Labs reserves the right to delete any of your content:

*Notwithstanding the foregoing, you understand and agree that by submitting your Content to any area of the service, you automatically grant (and you represent and warrant that you have the right to grant) to Linden Lab: ... the perpetual and irrevocable **right to delete any or all of your Content** from Linden Lab’s servers and from the Service, whether intentionally or unintentionally, and for any reason or no reason, without any liability of any kind to you or any other party*

Given the enormous amount of time and money that can be invested in creating content, the almighty right to smote a player and his or her virtual assets on a whim is a serious one. From an artist’s perspective, moral rights are raised. It is one that could be wielded for commercial favours. Coke could pay Linden Labs to remove Pepsi’s city. What real value are your IP rights in such circumstances?

Sure the Australian Government can take your land on close to a whim but it is obliged to compensate you.

As I touched on at the start of this presentation, the more EULA’s reflect real world expectations, the more “immersive” the experience can be. The potential lack of security and stability within these virtual worlds will continue to hamper their growth in real world dollar value.

I think that is the direction of the EULAs for these virtual reality games. The more “real” they become, the more real world laws will apply. The market will drive real world laws to be embedded in the EULAs. Real world regulators will take a closer look at the activities in virtual worlds, as happened slowly with the internet – ASIC may object to the trading of virtual stocks worth real dollars. Employment regulators will certainly object to the unconstrained labour markets (well maybe not this Government), where people are paid virtual currency but can exchange for real dollars for performing in world tasks. Banking regulators will scrutinise virtual banks. Police will discover these virtual worlds are being used to launder money. The list goes on.

While there was much excitement at the time, the internet showed us there were, in fact, rather few new issues to tackle from a legal theory perspective. The biggest problem arguably turned out to be keeping track of illegal activity, identifying law breakers, and catching them.

SIMPSONS

SIMPSONS SOLICITORS
Level 2, Pier 8/9 23 Hickson Road Millers Point NSW 2000 Sydney
Phone +61 2 8014 5050 Fax +61 2 8014 5060
www.simpsons.com.au

In its role as God, overseer or benevolent dictator, the developer will play a critical role in administering these real world concerns in a way that is not open to broader internet issues. The EULA will be its prime mechanism. It is the social contract that binds the virtual world and will accommodate real world concerns.

One of those real world concerns is the way in which brands are integrated into the virtual world.

Intellectual
Property.
Entertainment.
Publishing.
Media.
Visual Arts
& Design.
Museums
& Galleries.
Litigation.

Liability limited by a scheme approved under Professional Standards Legislation. Simpsons Solicitors Pty Ltd (ACN 125 211 823) trading as Simpsons Solicitors.