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Online worlds are becoming more immersive, and individuals are being invited to participate more fully in these worlds. Participants are being given more and more individual choices, the ability to interact more fully, and the opportunity to create lasting social interactions. Should intangible objects acquired in these worlds be treated as personal property? Should individuals maintain their personal rights while present in online worlds?

Masato Hayakawa, Cory Ondrejka, Seth Steinberg, and Andrew Zaffron discuss these issues in a panel discussion moderated by Santa Clara University, School of Law Professor Tyler Ochoa. The following is an edited transcript of their discussion.

Ochoa: Now, the usual response when I pose this question to people is, “Well don’t be ridiculous. Of course they don’t have any ownership rights because there’s an end user license agreement [“EULA”] that specifies that the game provider owns anything and everything that goes on in the online world. The end user license agreement provides for that.” While I agree as a practical matter that it may be the case that the end user license agreement takes care of these issues, I find that answer unsatisfactory for at least two reasons. One: The end user license agreement might be non-existent or unenforceable or preempted in a particular instance. It may be that a game provider that does not have access to good legal counsel may have neglected to obtain end user license agreements from certain people who play the games. It may be that a court might find a particular provision unenforceable in some respect. If you had an end user license agreement that said, “you violate some condition of the game, you turn over your first born,” I guarantee you that a court
would not enforce that. And they may find some provision unenforceable as against public policy. Or it might be preempted by federal copyright law in some instances. Two: Whether or not that’s the case, I think it’s logically backwards to say that the end user license agreement takes care of everything because, analytically, what you want to say is, “Well, what’s the default position? If we didn’t have a license at all, who would have ownership rights in this creation?” Then you ask whether or not that is changed by the end user license agreement; and then third, you ask whether or not that end user license agreement is enforceable. So it seems to me, as an analytical matter, you want to start with the default position—What would happen in the absence of an end user license agreement?—and then talk about whether or not the end user license agreement affects that. So, for purposes of the third panel, I’ve asked my panelists to assume an online game and to assume away questions of the enforceability of the end user license agreement and talk about what the default issues of ownership are and how they might be resolved.

So, let me introduce our panelists, who are ready to address this issue. I’ll start on your left, on my right. At the end over here, we have Seth Steinberg, who is the Director of Business Affairs and General Counsel of LucasArts, a subsidiary of Lucasfilm. LucasArts is the leading developer and publisher of interactive entertainment products for video game consoles, computers, and the Internet, and, of course, is the provider of massively multi-player online role-playing games [“MMORPGs”] based on the Star Wars properties. Prior to joining LucasArts, he was Legal Counsel for Business and Legal affairs for 989 Studios and Sports, a division of Sony Computer Entertainment of America [“SCEA”], was, prior to that, an associate at Reinis and Reinis in Los Angeles. His degrees are from the University of Wisconsin–Madison, and his J.D. from John Marshall Law School, and it’s a pleasure to have you.

Steinberg: Thank you.

Ochoa: Next to Seth is Masato Hayakawa, who is a lawyer with the San Francisco office of Morrison and Foerster and is with their Technology Transactions Group, which provides legal assistance to clients in various sectors of the video game industry, negotiating agreements for video game development and licensing of technology and content. His degrees are from the University of California, Berkeley, with a J.D. from Yale Law School, where he was an editor
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both with the *Yale Journal of International Law* and the *Yale Law Journal*. It’s a pleasure to have you.

Hayakawa: Thank you.

Ochoa: On my left, your right, we have Andrew Zaffron, who is the Senior Vice President and General Counsel of Sony Online Entertainment ["SOE"] and is responsible for all legal and business affairs of the company. Prior to that, he was the director of legal and business affairs at Sony Computer Entertainment of America. Again, involving intellectual property licensing, including in their online game division. He has both a Bachelors degree and a J.D. degree from the University of Illinois.

Zaffron: 24 and 0... basketball team.

Ochoa: The basketball team is doing extremely well, and I’m sure he’ll be making a licensing arrangement for them to appear with Sony as soon as possible. And finally, on the far right here—not politically necessarily—but from the point of view of the room, we have Cory Ondrejka, who is the Vice President of Product Development for Linden Research. He is Vice President of Product Development in Linden Labs’ award-winning digital online world; it’s called “Second Life.” And he was instrumental in their decision to allow users to retain intellectual property rights to their creations in Second Life. Prior to that, he was a Project Leader and Lead Programmer for Pacific Coast Power and Light, developer of “Road Rash,” and a Lead Programmer for Acclaim Coin-Operated Entertainment. His degree is from the U.S. Naval Academy. He has a Bachelors of Science degree in both Computer Science and Weapons and System Engineering, so, if you don’t like his answers to the computer science questions, he may bomb us all into oblivion. [laughter]

Okay, now that I’ve introduced the panel, I’d like to get into the hypothetical, and I’ve posed four sets of questions to the panel that I’d like to talk about this afternoon. But the general hypothetical is one with which we are all familiar [with] to varying degrees, and we can vary it as we go along. Suppose we have some type of massively multi-player online role-playing game, a simulation-type ["sims-type"] game. And this game allows a user to customize his or her character in the online world to some degree, and we’ll talk about what degree of customization is necessary for certain consequences to
follow, but as is typical in many of these online role-playing games, there may be a fair degree of customization, a lot of different traits that your character may possess that you can choose various things from, and perhaps the NCSoft case\(^1\) provides us with a nice template for thinking about this. You can play lots of different kinds of superhero characters in the NCSoft game, or it might be a sims-type game in which the characters are somewhat more realistic with more human attributes rather than character attributes. Or, at the far end, some type of Lucasfilm games, where almost all of the characters are based upon or derivative in some way of characters originally created for the Star Wars films. So we have some type of role-playing game. A user enters, and creates for himself or herself some type of avatar, and the word avatar is used in this context to refer to the character that someone is playing in the game. And they invest a lot of hours in playing this character as part of their entertainment in the online game, and the character interacts with other characters inside the game, with other people's avatars, has dialogue with other people inside the game, and has lots of experiences and events that occur. In the course of their life in the online game, they may acquire digital property of some type, and we'll talk about the digital property as a second set of issues.

So the first thing that I ask the panelists to address, is what are the various copyrightable works that exist here? Clearly, there is the software code that manages all of this interaction, and nobody questions that the software code is, of course, a copyrightable work. And, in the context of video games generally, we have seen that the screen displays generated by software code are generally considered copyrightable works of authorship that are protected by the copyright in the software code itself. But, are there other copyrightable works here? Is this whole game subject to a single copyright, or can it be subdivided into a number of different copyrights, and, if so, what types of works do we have here? So, let me open it up to the panel and ask: Is this a single copyright? Do we have multiple copyrights here? Is this some type of collective work? What is it? We'll start with Seth down here.

Steinberg: I believe you have a single copyright in the entire work. I think it does depend quite a bit on the type of game, so, to use your

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two reference points of City of Heroes versus LucasArts and Sony Online’s game Star Wars Galaxies, you have two different entire environments, so it’s a little clearer, I think, in one than the other. But everything is derived from the materials and assets being afforded to the end user by the publisher.

**Ochoa:** So code controls everything?

**Steinberg:** Code and the assets afforded through that code such as the art assets, for example, that are provided through the server, yes.

**Ochoa:** When you say "art assets that are provided by the server," what is it that the server provides in the Lucas game as opposed to some other types of games?

**Steinberg:** Well, without playing all the other ones, certainly if you go on to Galaxies, you can create and grow any character that derives form the Star Wars universe, which dates, as David pointed out this morning, all the way back to 1977. And you’re given assets to take different skin tones, different hair tones, different facial animations, but all that is being provided to you by the publisher or the host—in this case, Sony Online—to use and customize within the persistent universe that the player has been afforded.

**Zaffron:** Sticking with that example, this isn’t an instance where it’s a blank piece of paper, and the publisher provides the player with the box of Crayola crayons and says, “Make your character.” The metes and bounds of all elements of customization are controlled by the designers and the artists that make the game. Again, to move further in the Star Wars Universe example, if there’s a character race that’s a Wookie, well, the skin tones of the Wookie, the metes and bounds of those, the lightest and the darkest, are set up by the designers and artists, obviously with Lucas’s input and approval. After all, they’re kind of the guardians of the property. They’re the ones that know how dark a Wookie can be before it stops being a Wookie in order to control their property. How long a nose can the Wookie have? Our initial customization routine allows changes of body size, face shape, nose length, and all that kind of stuff, but all of that, the metes and bounds of it, is dictated by the artists, designers, and LucasArts and Lucas Licensing as well. I imagine that George Lucas would be really annoyed if we let players start a Wookie with a nose out to that
exit sign, and all of that art work, the textures that go into that, are all
designed by our designers, created by our artists—the tiles, the colors,
and the palettes, and all that kind of stuff. So, while it’s a broad set of
choices that a player has in customizing a character, it’s kind of an
infinite number of choices between here and here in each of those
decisions. So, you know, to suggest that it’s kind of a blank slate
where we just dump a box of crayons on the player and say, “Hey,
make your character,” and the player’s creative juices completely
make that, I think, is kind of a false premise.

Ondrejka: So how many different characters can you make in
Galaxies?

Zaffron: Probably infinite, but, again, within those metes and bounds,
and the metes and bounds are set by us, the models are created by us,
and the textures are created by us. But it’s got to be infinite because
there’s this slider. I’m not a programmer, but I don’t know what
gradation is in the number of different instances that that slider will
move between the two metes and bounds on every element of the face
and body and skin tone and all that kind of stuff. It’s a lot.

Ondrejka: I think the question of breadth is actually a real interesting
one. Obviously, Second Life comes at this from a slightly different
perspective since we actually give our users IP rights in all these
things that they make, but, putting that aside for the moment, thinking
about the breadth, I think it’s important. If you were looking at a box
of Legos that ships to you with forty Legos in it, Lego designed every
one of those pieces to exacting specifications, and they even give you
some designs. You know, build this one, build this one, build that
one. But there are a lot of configurations that you can build out of
those pieces that none of their artists or play-testers necessarily have
ever created, and so—certainly from my perspective as not being a
lawyer clearly, so feel free to ignore this—but we are talking about an
unimaginably large breadth of possibilities. The idea that, by giving
all these options to the player, now Sony and Lucas have IP rights to
all of that is kind of interesting. It’d be like if you gave someone a
word processor that only could hold brief sonnets or haikus. Haiku,
you’re only talking about twenty-some words. It’s not like you could
then claim IP rights to all of those haikus.
Zaffron: The Wookie example is a perfect example for, perhaps, the difference between what you’re talking about and what we’re talking about because, regardless of the number of combinations that Seth can imagine to make a Wookie, at the end, it’s still got to look like a Wookie, or else it’s not in the game, or it’s not within the scope of the choices.

Ochoa: I’d like to have Masato’s view, and then Seth.

Hayakawa: Just to sort of step away from the physical appearance of the avatar for a moment, when thinking about sort of the breadth of copyright maybe a clear example is, let’s say we have this Wookie, and it looks generic. This Wookie walks out into Times Square and begins to recite “Ode on a Grecian Urn.” It’s pretty clear to me that if this person is typing an original poem, it’s coming up on the screen, and it’s being shouted across this entire zone, that this is a separate copyrightable work that the player is creating, assuming that it is original and that it is not “Ode on a Grecian Urn,” that it is being tangibly fixed, and that it is just sort of being spontaneously generated, then, in the absence of EULA, as we’re going to have to assume for this hypothetical, I think this is an example of a separate copyrightable work that is not . . .

Ochoa: The assumption here is that the dialogue spoken by the character, even if the character is a derivative work, is original, and that because it’s in digital form, it’s being fixed as it’s being spoken. Therefore, we have an original work of authorship fixed in a tangible medium and the dialogue becomes a copyrightable work.

Hayakawa: Subject to all the requirements it’s original and not what-have-you . . .

Ochoa: Assuming it’s original . . .

Hayakawa: Then I see no reason why that is not an example of a separate copyrightable work within the context of this digital world.

Ondrejka: Moving back a little bit, you take your Wookie, which, of course, ships to you with a bunch of animations and gestures that have been given to you by those artists, and, through a sequence of key presses of your choice, you create the Happy Birthday Wookie
Dance that’s a thirty-second long dance original presentation of your Wookie, which has now been immediately fixed because it has taken place inside the world. You can reproduce it. It’s an original work of authorship, right?

Steinberg: It’s to sharper minds than myself, but I think there still lies the argument that it’s still deriving out of the world that the initial author is providing, and I’d even take it back to the Lego analogy: just because I buy Legos, and I build a spaceship with them, do I now have any kinds of rights to Lego itself? I would think not. And if I wanted to build twenty-thousand spaceships and start selling them on eBay, I would think that Lego’s toy people might take issue with that.

Zaffron: I think what Cory’s talking about is kind of akin to a compilation copyright. When you think about it, the programmers, artists, and designers have defined and created each of these individual animations, and I think what Cory is talking about, if I’m not mistaken, would be having a copyright in that original, unique, expressive combination of those animations, each of which, taken by themselves, it’s probably clear would be owned by the game publisher or the game owner. Absent a EULA, it’s an interesting question.

Ochoa: To put a legal spin on what Cory was trying to say here, it seems to me there’s a distinction between software code per se and software that is a tool for creating other things. A word processing program is unquestionably copyrightable. Software code for a word processing program is copyrightable, and yet, of course, that does not give you copyrights in all of the text that is written by a user using a word processing program. A paint program, the source code for a paint program is clearly copyrightable. I provide the metes and bounds for a paint program. I can define what shapes you can use in the paint program. I can define the colors that you can use; I define the resolution of the pixels. And yet it’s clear that if I paint a picture using a paint program, that is a copyrightable work of authorship for the person that used the tool. And the question is, to what degree of customization do you have to provide for a character generator to become a tool rather than some type of derivative work, and when we’re talking about Wookies, it’s very easy to say, “Well, any type of Wookie that’s recognizable as a Wookie is a derivative of Lucas’s creation.” But if we’re talking about more realistic human-type
figures where the underlying humanity is not subject to IP protection *per se*, if you provide only four choices, you can be only one of four characters, well, clearly the game provider has defined what each of those four characters are; it’s their creation. But if you can use various aspects, a software tool that allows you to create 128,000 characters, just because it’s finite, does it make each one of those characters copyrightable by the tool provider or not? And is that a good analogy?

Hayakawa: I like Andy’s view of character customization as a compilation copyright. One can think of this as creating new art from perhaps preexisting clipart, where the individual clipart is copyrighted with the original illustrator, but by configuring these in certain unique ways, and if there are an adequate number of them, that these are not generic then I think there might be some sort of copyrightable work in the compilation of, as you said, the elements that are themselves copyrighted by the original creator, presumably the game designer.

Zaffron: Well, I just prefer to analyze it the other way around, which is I prefer to begin with the element of expression that the designers, artists, programmers, publisher, and creator of the characters places in the design choices to begin with rather than focus so much on the sheer number of design choices. I think that just might be a little bit of a trap because it’s just clear to me that fundamentally, whether we’re talking about Star Wars Galaxies and Wookies, EverQuest and dwarves—well I haven’t played Sims, so I don’t really know how that character creation routine works—or something more realistic, fundamentally they’re all the same. Fundamentally, some artist that is an employee of a company that writes the checks and is therefore creating work for hire, sat down and created that texture, and that texture is resident of all of the possible textures that can go into a face [and] are resident on the client that is provided to the end users, who can then kind of stretch them out and make them look different ways. But fundamentally to me, it’s kind of all the same.

Ondrejka: But at some point, you have a generic face maker. At some point, you put so much into the product that you can make all human shapes, for example, or all human faces, because you put that much flexibility in. And it seems a little odd...

Zaffron: Oh, well, at the point in time when you’ve eliminated *all*
creativity from the publisher and the artist . . .

Ondrejka: No, I'm not saying that at all. I'm saying one of the things you look at is how artists build faces in Max and Maya. They use a lot of tools that are built into those products that accelerate the creation of other faces. And Max and Maya certainly aren't trying to hold IP rights over the faces you're making in their tools. Yet, they can provide textures, they can provide bumpmaps, they can get way into technology if you want. I think it is interesting this sort of tool/game distinction that isn't always clear as we might want it to be, or maybe we're not sure where the dividing line needs to be.

Ochoa: Okay, without necessarily resolving that first set of issues, we can move onto the second set of issues, because I think we reached agreement, at least at some level, which is, even if we continue to disagree about whether the appearance of the avatar is controlled by the code, there seemed to at least be some agreement that the behavior of the avatar is controlled by the user, and that, at least to some extent, that behavior might create copyrightable material, particularly in the original dialogue that the avatar has created while engaging in this multi-player online game. So then the question becomes: what if any ownership rights flow as a result of the various characterizations we might give this? And let me suggest different kinds of characterizations we can have. The dialogue might simply be original to the user, in which case it is an original work of authorship that the user owns. It might be characterized to some extent as a derivative work of the software provided by the game provider. It might be characterized as a collective work, a compilation of works that all meet together in this online environment, where contributions are brought by many players, or it might be characterized as a work of joint authorship. And the question is: which of those characterizations best suits the model of a massively multi-player role-playing online game? And, of course, that's going to depend in part on which contributions you think are copyrightable and are not. But, within the universe of the things that have been suggested here, which of these characterizations best suits the model or two models that we've discussed? So let me start with Cory on this end for this one.

Ondrejka: One of the salient characteristics of online worlds is that their design sort of never survives first contact with the users because
they come in and they immediately start changing your product. And that happens in every online world, no matter how much we adhere to a license, no matter how flexible you make the product, users come in and do things you didn’t expect, didn’t anticipate them doing. One of the important characteristics of this is that change continues over time, the place continues to evolve over time. Obviously, I’m not an expert on things like whether it’s a collaborative work, things like that, but given the fact that it never stops evolving, it sure seems like you have a lot of individuals who are adding to it at different points in time, basically for the entire life of this larger base product that they’re interacting in. And the user who comes in and recites poetry sure seems to be an individual engaging in authorship. I could imagine two users acting out a play, right? They’re doing the Wookie Love Story inside Galaxies—don’t even start thinking about it—and to which they compose roles, characters, and dialogue. So there’s something that was joint authorship by those two characters. But I don’t see Lucas being involved, other than the fact that it’s the Wookie Love Story that derives from the meeting, some obvious derived story from the Star Wars universe. It’s bad to use Lucas as an example because it’s such a solid universe, that everything sort of derives out of that. But it sure seems that they’ve written original dialogue and they did it together. They may be doing something collaboratively. I could also imagine users doing something collaboratively with the game creators, where you invite your users in and you say, “We are going to build an adventure over the next two weeks, and after that, other users can go play the adventure you build.” And at that point, the users are collaborating with the creators of the world.

Zaffron: Well, I like using Lucas as the example because then I make no admissions. I’m glad there’s an end-user license agreement, but, that having been said, we do, in our games, in EverQuest and EverQuest II, we do in fact collaborate with our user community to create experiences, but, under a signed license, which, I hope, contains the right language. I mean, under a specific signed license. So we’ll invite players that are called guides to engage in, to use some of our tools as a matter of fact, to design original events, but in order to use those tools and design the events and have this cool experience, in return, they promise us that they don’t own it, we own it, we can do what we want with it. In the absence of that, I think it’s a really interesting question. It’s going to get more interesting as time goes on because the next iteration of worlds, well, already, players can, as
Cory mentioned, players can change the world in small ways. I have little doubt that the next generation of online games, players are going to be able to change the world in much larger ways. There will be games where players, because of what they do, a portion of a forest will burn, and it will stay burnt. I mean, it's now burnt. It's not going to regenerate tomorrow. So, to what extent have players actually contributed to the authorship of the content? It's a really interesting question. And I don’t know.

Ochoa: And we'll get to online arson laws in a minute.

Hayakawa: I think the regime that we are looking at here, again absent end user license agreements are, by and large, a lot of individually copyrightable works created by single authors with a lot of implied licenses. What the metes and bounds of those implied licenses are, it's hard to say, but I think, if I go out into the virtual town square and recite my poem, I'm clearly now—as I type the slash shout command rather than the shout whisper command that's going to be broadcast across the zone—granting an implied license to the game host to broadcast it across the zone. I think that in an online world we are more acutely sensitive to these notions of IP rights and licenses, but it is something we take for granted now in the real world, that as I sit here and I speak, I assume I am granting an implied license for someone to record this discussion, for someone to blog this. But I think that just because we are in a virtual world, where we are much more sensitive to IP rights, we think about much more, but it's not different than, for example, the speech I am giving now.

Steinberg: But the interesting thing, taking it a step further, if you want to get beyond just the pure copyright legal issues, and forgetting the licenses, is that the novelty of the online games is the world. So you're encouraging people to do the types of things that Cory was pointing out and that's what feeds into other people's enjoyment, the time they spend playing it. So, in one sense, you're going to be faced with what they refer to in law school as a result-oriented decision in a sense. In order to continue to have a market for these games and to Andy's question to the noontime speaker to have the publisher spend $40 million or whatnot to create these environments, there needs to be a decision that continues to vest the publisher with the rights to continue to go forward with it. And I think it might lead into your next question; when you start to look at some of the money being
spent outside of these worlds, it speaks to the passion of the players involved.

Ochoa: And I do want to get to that question of the money being spent outside the world, but let me follow up on something Masato says. So I take my avatar into the online public forum of some type, and I shout my original poem of some type. Now, in your analysis, I have granted an implied license to the game creator to distribute that poem to other users of the online game, which clearly happens. My question is: can the online game provider at some point then decide to say, “Okay, it turns out that I’ve got some pretty creative people playing this game. People seem to enjoy it. I’m going to publish a book, ‘The Poems of Online World,’ in which I publish the dialogues and stories that have been created by the people who are contributing to the game.” Or people who are playing the game. Let me avoid the use of “contributing” because that carries some implied weight on it. The people who are playing the game engaged in experiences and events. To what extent can the game provider then turn that into subsidiary artistic expression of some type, if you want to put a nice spin on it, or subsidiary commercial merchandising, if you don’t. And, again, let me start down here this time with Seth because, I think, again, the Star Wars universe may be a different perspective from that of, and I haven’t played Second Life, but I take it it’s more of a sims-type game.

Steinberg: Well, you probably not only have an implied license from many publishers, you have an express license, but beyond that you can still make the argument. Whether it’s a winner, I don’t know; that’s why you have judges. But you can make the argument that, were it not for the world you’re in to begin with, were it not for all of the audio and visual elements you are provided to begin with, would you have gotten to make that statement, to do [that] song, to do those works of poetry that you then want to put in the book.

Zaffron: Well, I have an actual example from the EverQuest world, and that is that a bunch of players on what’s called a “dragon raid” in a place called the North Wing of the Temple of Veeshan. And I won’t bore you all with the details. But the way you’ve got to do this, coming from an EverQuest player, is there’s this one dragon that’s kind of the gate keeper. If you don’t kill that dragon first, then, any other dragon you try to kill summons that dragon, so then you’ve got
to fight two at once. So anybody with any brains leading a dragon raid will kill that dragon, his name is Aaryonar, first. Well, this group of players didn’t. They kind of skipped around, or maybe he respawned while they were in there or something. So they pull this one dragon, and Aaryonar is kind of in the beginning of this area, when Aaryonar starts coming to run, other dragons see that he is running, and they run after. So there was this huge train of ten dragons, all just chewing up this raid, and somebody made a movie out of it and sent it to us. Interesting question as to, in the absence of any kind of written documentation at all, does the person who actually made that little movie have any rights in it at all whether to distribute it themselves or to block us from being able to distribute it in an unfettered fashion. I just think that’s a fascinating example, again in the absence of any documentation. It was a great movie. And they all died.

Hayakawa: An R-rated movie, I take it, for the violence.

Ochoa: Now I’m assuming that the dragons are operated by the machine code rather than manipulated by the individual users as the avatars are, or do people have dragons as avatars?

Zaffron: No, the dragons are all manipulated by AI [artificial intelligence] scripting that tells them, it’s not the most “I”, but it tells them, “If X, then do Y.” It tells Aaryonar, “If you’re not dead, and any of these dragons are aggravated, you go this way and you go get them.” And then the AI for the next dragon says, “If you see Aaryonar go past you, you follow him.” And so on and so forth. If I’d have thought about it, I really should have brought it. It’s very funny.

Ondrejka: Well, Second Life’s whole reason for being is to allow users to add to it. All of the content of Second Life is built by its users inside the world. So they’re not building in offline tools and importing it, though they can also do that. But they’re literally building collaboratively in the space, so, obviously, I’m sort of biased since we’re trying to build an internal marketplace with very high levels of commoditization, with very high pressures of market forces applying. I’m all for them having ownership and being able to go do things and leverage what they’re doing. Obviously our world looks more like a tool in this continuum of, is [it a] pure game or is it a tool,
because it's not even a sims-type game. There are virtually no traditional game elements in Second Life other than if you look at the real world as a game, it looks a lot like that.

Ochoa: Although I noticed ten minutes ago, you did say that you "give" all of your users intellectual property rights in those things, which assumes initial ownership with you, but you rephrased it this time.

Ondrejka: More correctly, our EULA fails to take IP rights away from our users.

Ochoa: And that's the question. Does the EULA "give," or does the EULA "fail to take?" Which [of those] is the default position that we're looking at? In terms of legal doctrine, it seems to me that you can analyze online events as a derivative work of the underlying movie, in the case of Lucas, or of the source code or of the game in other types of games; a joint work to which both the employees of the company as works for hire and the individual users have contributed; or you can analyze it as a collective work. And a collective work is, of course, a compilation of works. Each work is owned by the individual who contributes that work, but the publisher of the collective work, the compilation of works, owns some rights in the collective. And, in fact, the implied license is governed by a statutory license, which is § 201(c),\(^2\) which says, in the absence of some written license agreement, the default position is deemed to be that the publisher of the compilation has rights to publish in that compilation and in revisions of that compilation, but not as individual contributions. So, there's many different ways that we could think about that. And I don't know if you want to comment on those legal models, or leave it at that point before I move on to the next topic.

Ondrejka: Not really.

Ochoa: I forgot to include the usual disclaimer that, of course, these gentlemen are here in their individual capacities and nothing they say can be deemed to be binding on their employers. The third question has to do with ownership of digital objects acquired in the online world, and the reason this comes up is that your instinct is to say, "I

have gathered a hundred pieces of gold in my online world.” It’s just a bunch of digital bits; it has absolutely no value other than in the online world. But strangely enough, it does, because what we see is that people who have acquired large amounts of property in some type in an online world then go onto eBay and try to sell the rights to that property to somebody else. Or somebody who has been playing an avatar in an online world for a period of several months and has tired of playing that character and wants to move on to playing a different character, create a different avatar, might decide to sell their initial avatar to somebody else. And you see these transactions occurring in the offline world, transactions occurring where you have the transfer of digital property from one person to another. Now again, typically, this is forbidden by the EULA, but the question is, to what extent can you really enforce the EULA in these types of instances, and is there any type of acquiescence on the part of the game manufacturer if a transaction occurs in the outside world and we allow the transfer to go forward, whether knowingly or unknowingly, can we say that this is not “property” if people are actually selling it for monetary value?

Zaffron: Well, you know, I gave an interview to some law journal or something on this topic and immediately got accused of giving them a head fake, but, in fact, part of that premise isn’t correct as a game operator. We, in fact, really don’t know and don’t have any verifiable way of knowing when Person A transfers in-game coin to Person B for real coin because we don’t know that the real money changed hands. We obviously see the advertisements for it. I have somebody in my department that, every day, goes to eBay and sends take-down notices on every EverQuest and EverQuest II auction we can find on coin, characters, and items, and we do that every day. Now, that having been said, the fact that we don’t know in one of those transactions if the money actually changed hands means that it’s an enormous customer service burden on us. We get calls from people who say, “Darn it, I forgot my character’s password, and I have my original CD here, and here’s my original CD key, and here’s my credit card number, and I signed up for this account on such and such date,” and we look at our records, and, sure enough, that matches the characters. And people forget their passwords, so we go ahead and tell them so they can change it, and then, lo’ and behold, we get a call five days later from somebody else in Texas who says, “I just bought this character for $500 from somebody and lo’ and behold, now it’s gone.” It’s an enormous customer service nightmare.
Additionally, again, we’re sitting up here assuming the absence of any kind of end-user license agreement. Fact is that online game development is extraordinarily complex, not just until you launch it, but even after you launch it, and I can think of a lot of instances in our online worlds where we made a mistake, where we’ve, in designing something, in designing the Flaming Sword of the Gods +3, it goes into the game, people find it legitimately, and two or three weeks later, we discover it should have been +2. We shouldn’t have let it go in as +3. It’s too powerful. It’s kind of ruining game balance. It’s destroying the challenge of particular areas of the world. People are burning through content too fast, so we’ve got to make the decision to take that Flaming Sword of the Gods +3 and turn it into a Flaming Sword of the Gods +2. In the industry, the verb for that is “to nerf.” And, indeed, we’ve had to swing the “Nerf bat” many, many times over the last six years. Again, assuming the absence of a EULA, if somehow people have property rights in the Flaming Sword of the Gods +3 that they just found, and for game balance reasons, we have to tell them, “Look, I’m sorry, but either (a) we’ve got to take it away—we’ve taken away things, not often, but a couple of times over the last six years—or we’ve got to turn it into a Flaming Sword of the Gods +2.” Somebody’s going to stand up and scream, “Wait, that just cost me forty bucks. Where’s my forty bucks?” Those are real issues and needless to say, I can obviously disclaim any liability for that, but I’ve been told to assume the absence of any EULA, which also means I can’t disclaim a damn thing.

So here we sit trying to figure out—I’m kind of a social utility person—how to build business models so that great games get built. If there’s a business model that screws up the incentive to build great games, I ain’t for it. And really, it doesn’t have anything to do with Sony writing my paycheck. It’s not that big. As I think that through, there’s an extraordinary amount of risk in building and maintaining online worlds for years when anybody and everybody can stand up and scream, “Oh, this game error just cost me $25.” Because I could take something, and this something that didn’t happen or that I didn’t find, or this monster was supposed to be there at three o’clock that always drops the Boots of the Elven Lords and it wasn’t there because the game was in error, so I couldn’t get a set of Boots the Elven Lords [that] would sell for $66, so you owe me $66, and then I can just see the world deciding to get a whole bunch of people together that don’t have that $66 they feel they should have had, and all of a sudden, I’ve got a class action suit. Well, I just want to make games.
Ochoa: I think it's very helpful to have some of the practical perspectives as to why a game developer feels that certain terms should be in a EULA, because as an academic I'm sitting up here thinking "what are the reasons why they don't want property to be transferred outside the world," and we have some very practical reasons here.

Zaffron: It's not just that they ought to be in a EULA. It's that, even in the absence of a EULA, § 106,3 had Congress been smarter, ought to have "exploit" in there too. I mean, not just the exclusive right to prepare derivative works, and not just the exclusive right to sell, copy, but also to exploit—my view.

Steinberg: Let me just add to what Andy was saying, the other part, in order to keep these games going, you have to retain your customers. And, if you're able to progress in a way not designed, and, I don't know how familiar people are in the audience with MMO Games [massively multi-player online games], but there's basically a craftsman model and a conquest model, and I think most of what's being discussed here is craftsman, where you progress by building, becoming stronger, and gaining value throughout a game, as opposed to just doing battles, like City of Heroes or whatnot. But if you are getting to the end by essentially artificial means... you're going to have more people getting towards the end, getting to the place where I've done this, now I'm ready to move onto a different game where, in a normal scheme, it should have taken, if you're playing this game maybe forty hours a week, which is a lot, months and months to get to this point. So, if you basically can't keep the environment interesting, then you have a huge issue, so it's beyond customer service.

Ondrejka: However, so, there are actually a couple of really important points that got mentioned that I just want to reinforce. You can't overemphasize how important this is because virtually any scheme to stop it eventually relies on your ability to detect it, and the reality is that it's very hard to detect, so keep that in mind.... Or if you're buying network bandwidth and the guard decides there's a big red button that's marked "absolutely never push because this is the emergency power off button" and then they push it... bad things like that happen. So, I think liability-wise, there are many other industries

that have dealt with much higher value liability in digital goods and intangible creations, so I think there are ways to protect yourself there.

On the content creation cost side, first you must understand that content cost is a significant part of conventional MMORPG development. In fact there's a great quote from one of the greats in this industry, "The cost of content creation is rising faster than the market is expanding." Which, I don't have an MBA or a law degree, but that sounds bad to me. And there's something really critical there. The commoditization, as you start trading these items, where you just go buy whatever you want, bypasses authorial intent and bypasses designers wishes to cause you to play for 800 hours or whatever. So, there's a question: is that a problem of the design, or is that a problem of the buying and selling of the items. Remember, it always goes back to the fact that you can't detect that those items are being bought and sold.

So a different approach is to say, embrace the market and give your users the tools to actually create content. Which is what we've done. And one of the things that we've seen is that by giving users this market with intense market forces and with economic incentives to spend their time to create content, that you do have some opportunities there. And I'm sure we're going to get into the "user created content is crap" discussion. Which makes sense since ninety-percent of everything is crap. But one of the things you do see in user-created areas is that there is a small percentage of users who do make very good content. And by allowing them to own their creations, to leverage their creations, to buy and sell their creations, you're providing an incentive to what they're trying to do . . . . Yeah, you had your hand up.

Symposium Attendee (Keith Boesky): Yeah, you're talking about one element of the liability issue and I think the other element—I know that you're not a lawyer which is probably the only place I might know something that you don't—but you're actually creating securities, so you have reporting requirements, you have additional liability. If EA launches Detroit Motor City and they get 30,000 users and they need 50,000 to break even, they close it down. If those people own their cars they would have to report that it was going to be closed down, they would have reporting requirements for the number of parts being issued, so I think you have a securities element also. It's an awful lot different than a hosting issue. When you're telling somebody that they can trust the fact that they're building and
owning an object and then you’re taking it away from them or releasing a number of objects in the world that may devalue the object that they have created.

Zaffron: But remember, you can’t have a EULA that says that you can shut the world down at any time you want.

Ondrejka: No, no . . . . And I agree that absent a EULA that exposes mass liability, but again, much like you went into some of the practical issues, if you look at a hosting company, hosting companies go out of business all the time, CoLos [Colocation sites] in San Francisco disappear all time. You get a call from your CoLo that says, “We can’t give you power any more” (because we live in California and power is so damn easy to get here) so I’m not sure that we look any worse than those. They certainly do big liability carve-outs in all of their agreements. So I agree that that’s another one that, in a practical sense, you are going to have to have carve-outs for, but I’m not sure we look any worse. And certainly, when you look at our carve-outs in our EULA, we look a lot like hosting companies and service providers in that sense.

Symposium Attendee: If I build an object, if I have value based on scarcity and you see that value appreciate, and you decide, as a company, that you’re going to release a bunch of similar objects. That would impact my market.

Ondrejka: Right and that’s true, but that’s a separate discussion of what is your approach, as a company, and what your core values as a company is [sic], and what you tell your users.

Zaffron: Well and also how you can possibly maintain the integrity of the game in light of that and the possibility of game designers running afoul given . . .

Ondrejka: Well basically, we don’t add any content to the world, is our way around that one.

Zaffron: What do you do when a “dupe” bug pops up?

Ondrejka: We fix the bug.
Zaffron: Yeah, that’s good.

Ondrejka: Yeah . . . at least we try to fix the bug. We beat the programmers. We resort to the part of the non-EULA that we’re not talking about that says that we may delete any content at any time for any reason. Especially for performance, debugging, et cetera, et cetera. Much like how we end up having carve-outs for, “we have rights to copy your stuff for debugging purposes,” “for QA purposes,” et cetera, et cetera, et cetera.

Zaffron: Right, because believe me, it happens all the time, there are duplicates—we call them “dupe bugs”—but they are bugs that allow people to duplicate items, coins, that kind of stuff, by cheating. We try to find them, we try to track them down, but EverQuest is now 6 years old in March, I have little doubt that there is a dupe bug still, or maybe more than one, in EverQuest that I just don’t know about, and nobody else knows about except the people that are really smart that are exploiting them out there, and in essence counterfeiting, creating something out of nothing that has real value.

Symposium Attendee: But if other people actually have a property interest in the thing that is being duped, wouldn’t Sony be liable for not fixing that dupe bug and causing the depreciation value of my object?

Zaffron: Well, I prefer not to talk about Sony ever being liable for anything.

Steinberg: Actually, since Sony publishes the game, Sony would be liable, in that situation, and in fact there was—I’m doing some research—a case in China, actually, in ‘03, where there were problems with the service and the court essentially had a finding the equivalent of “There was ownership in the property” and they found that the company should’ve done a better job of protecting their servers. I think the servers were hacked and there were damages awarded for the downtime and the loss of character.4 So in that case,

Sony would be liable.

Ochoa: I'm going to ask you about that question later, but I see you have a plant in the audience that your colleague David Anderman wants to ask Cory a question.

Symposium Attendee (David Anderman): Aren't we really talking about market forces at the wrong level? Isn't the better question, "Shouldn't the market forces be applied at the level of deciding do you want to accept a EULA in which you can or cannot own materials within the universe?" I mean, it's no different than voting with your feet. If you don't like the universe in which you've chosen to play, you're free to go choose another game, and choose a game in which you can own the things that you've created. But, you know, it's sort like there's a continuum of that. It's really that next level that we can all sit here and say, "We're all, in that sense, totally in favor of free competition and everything else." But we sound a little bit like EFF to some degree.

Ochoa: Well, I think that's the strongest argument that can be made there. Let me turn it around and give you sort of my strongest argument from the other perspective. There are lots of things that I might own but not want to spend time doing—that might be burdensome to me. If I don't want to clean my house, I can hire someone to clean my house for me. If I don't want to go grocery shopping, I can hire a personal shopper to go shopping for me. And if I don't want to work through the first 23 levels of an online video game, why shouldn't I be able to hire somebody else to work through those 23 levels for me, and let me jump in at level 24? I mean, in essence, it's just a personal services contract. Why shouldn't I be able to do that? Why should we be barred by an end-user license agreement or something else?

And it turns out that this actually has globalization implications. I've actually read about the fact there are programmers in poor countries like Malaysia who spend hours playing these games and acquiring digital property that then they can go sell for real tangible assets that have a lot of value given the currency exchange between the United States and the labor rates in Malaysia. So, this is actually a means of outsourcing wealth to a poor country, and allowing a programmer with some skill to earn some money doing what he or she does best, which is play video games. You know, so if you look
at it from those perspectives, shouldn't the person be entitled to
benefit from their labor and shouldn't the other person be entitled to
be lazy by hiring someone to do the work for them?

Hayakawa: I just wanted to point out that, we started this discussion
talking about IP rights and copyrights, and we've swayed—veered
completely away from that—and I think that indicates our gut
instincts about this issue. Our view of this, with respect to selling or
ownership of digital objects or avatars is not so much the traditional
IP model as [it] is—despite the case here—the Feist "sweat of the
brow" copyright model,5 [where] by investing our labor—in the case
of Feist, in carefully putting together a phone book—we obtain, by
the fruit of our labor, some rights to that. Of course what the
Supreme Court said in Feist, "you don't obtain a copyright just
because of the sweat of the brow. It has to be original." But I think
that the fact that our conversation has gone toward personal services,
and thinking about laborers and third world countries who invest their
labor and get some sort of return indicates that this is the sort of gut
instinct that is motivating this debate. This is not so much about IP as
it is about labor, and getting value for labor. I think at least for those
who support commoditization, I think that is sort of the guiding
instinct.

Ondrejka: For those of you who aren't aware of the value of these
things, a Jedi, which is the really cool character to have in the Star
Wars Galaxy Game, last time I checked on Ebay runs around a
thousand US dollars. So, we're talking about relatively large sums of
money. The other thing that's really important to realize is, Star Wars
Galaxies, in a very intelligent move, has said, "We'll adjust the
games, so that if you get a Jedi, but you don't know how to play it,
you're not going to have a Jedi for very long." Which was, I think, an
inspired decision . . .

Zaffron: I didn't make it.

Ondrejka: The Jedi [model] is great because what it does is you can
still buy and sell this stuff, but you're buying something that actually
might not be all that valuable if you haven't invested the time in the

(disapproving the "sweat of the brow" doctrine as a basis for copyright protection).
product to learn how to use it.

Ochoa: Ok, well I have a fourth set of questions we can move on to, but I see some comments in the audience as well. Let me take Andy's last comment, and then we'll take some questions, and see if we have time to move onto some of these other issues.

Zaffron: Just as an interesting sidebar, the community tends to be somewhat self-censuring as well. When the community discovers a newbie that doesn't know what the heck he or she is doing that has this level 65 character or 70 character now in EverQuest and doesn't know the geography or doesn't know how to get from point A to point B, it's immediate ostracism, and so it's kind of interesting how that works.

Ochoa: I think David has a question.

Symposium Attendee (David Friedman): Yeah. This is really connected to the point made by someone else about which level of market because it seems to me that this whole discussion really is related to the lunchtime talk, that the lunchtime speaker was arguing for intellectual property rights set by statute and non-waivable, and against freedom of contract. And that the implication of a lot of this panel is it's very unclear what the optimal set of property rights are, for complicated reasons, and therefore the right way to create them is to have the producer of the game include in the game a package of "these are the property rights that come with this game." Producers have an incentive to try to design a game combined with property rights customers will like, and over time, the ones who do it badly will lose out and the ones who do it well will gain. In the particular case of your point about the Malaysian, the point I think you're missing is the Malaysian is spending many hours of labor doing something the game creator could've done for free. The game creator could've just created a twentieth level character instead of a zero level. And therefore, there may be net gains, if they can enforce it, to the game creator, either saying, "Alright, whatever the market price is for 20 level characters, we'll undercut it by a dollar and sell them ourselves."

Zaffron: In fact, that's what Electronic Arts does. And Ultima Online made the decision about a year ago—I love bashing EA—to do just
that.

Ondrejka: Although SCEA is also talking about starting to sell . . .

Zaffron: I would never bash SCEA.

Ondrejka: Of course not.

Ochoa: I'll go ahead and start the questions now since there seem to be plenty. If we can go ahead and take the next question here, and then there are two back there. Let's take this woman here first.

Symposium Attendee: If I'm hearing you correctly, then the real thing with the end-user license agreement would be the intent of the publisher of the game as to whether it would be, you know, open or closed. I mean if the intent of the game maker was to be a continuing thing that the public continues on and on, that's one thing, versus what SCEA or others do as far as setting boundaries. So would "intent" be a correct terminology there, or not?

Ochoa: I think she's asking that of Andrew if I'm not mistaken.

Zaffron: The way I look at it is very much like previous questions, which is we try to make an end-user license agreement that people see before they install the game [and] have to agree to it, see every time they start the game up [and] have to agree to it, and every once in while we switch the buttons on them so that they can't just automatically click on the button they've been clicking on for the last year and a half mindlessly. So, you know, it's kind of a wake-up call to them. So we see it as really both parties' intent. Sure, a lot of people, probably as a practical matter, don't read it, but some do, and when we change our end-user license agreement, you better bet it's put up on the boards by players for all other players to see and they comment on it and: "Oh, how could Sony do this?" and "Oh, look at this little thing Sony put in here about we have no rights to privacy in the communications we make just because they go through Sony's servers and therefore Sony can see them." I mean, there's a vigorous comment by our player community on elements of our end-user license agreement, particularly when we make changes. So we look at it as intent of both the parties, frankly, even though, as a matter of reality, it may be a fiction vis-à-vis any particular player that just
wants to get the heck into EverQuest and never reads them.

Ochoa: The next two questions were back here in the middle and I don’t care which order we take them in. We have another one here. Whoever gets the mic first, right? It’s the law of the jungle out here.

Symposium Attendee (Alexander Weddle): We started talking about property rights in characters, for instance, online game play, and then we kind of started looking at the way it relates to real world property. So, we started a discussion about, perhaps stealing, that goes on online or counterfeiting—crimes such as these—so I’d like a discussion about criminal elements that are appearing online, perhaps stealing or the translation of virtual property into real world property and the levels of policing. You’ve talked about, for instance, the game players policing these worlds themselves, but you have, for instance, in the case of avatars ganging up on weaker avatars to steal all their property and then go online and sell them on eBay and how this affects what the legal implications are.

Zaffron: Well, all I can talk about is the way that our games are designed. And the way that our games are designed, in the game environment itself, characters can’t steal from other characters within the context of the game. The real live person behind the keyboard has to get ahold, in some way, shape, or form, of the other player’s account. So, if your character and my character are playing in any one of our games, and I can be as powerful as all heck, I still can’t do anything—I can’t kill you and take all of your stuff. That’s not the way it works. But there are some games—Diablo—in which it did work that way and there were just extraordinary hacks in Diablo and Diablo II, which would allow players to, in essence, create their own super-equipment, run around and kill other players, take their equipment. If there had been a secondary market for that, it would be an interesting question, but . . .

Ochoa: Next question is here.

Symposium Attendee (Eric Hutchins): I kind of like playing in this intersection between metaphysics and law here, and I want to stretch it a little bit more. And if we took the concept of a persistent online universe to its fullest extent here, maybe with Second Life or some future product that has yet to be envisioned, if we create the universe,
endow the users with some of these property rights that we’re talking about, to such an extent, and then a dispute arises in this online world, a property dispute, what have you, between two players, two avatars, however you want to frame it; the deviousness of my mind—how it’s working is—is there an argument to be made, you know, for want of jurisdiction? I mean, if something arises, then why not create a particular forum within this persistent online universe for dispute resolution? Why would a particular person, a particular party to a dispute, ever assent to the jurisdiction of a particular court in the real world?

Zaffron: Jack Balkin [of Yale] argued that at State of Play, that there ought to be, by contract, an online, in-game dispute resolution mechanism. He made a fascinating argument. I don’t pretend to be able to explain it.

Ondrejka: Well, we’ve actually been working with Jack on that very topic and working with eBay. So if you want to understand dispute resolution in an online space, look at eBay, right? Square Trade has mediated something like two million disputes at this point, 80% of which never involve a human other than the disputants, right? So there’s a tremendous amount of evidence that there’s a great deal of efficacy in online dispute resolution and clearly, if you can do that before you wander your way into the courts, you can have an opportunity to make it simpler and easier for players, make your life easier, etc. For all the reasons that eBay did it.

Zaffron: You know, that having been said, though, I’m not sure that I would be supportive of a sale or auction system for online property even verifiable, that had the kind of dispute resolution mechanism and verifiability that eBay has, because frankly, and not to slam eBay too much, but they’re, and not in our world, in auctioning rare coins and diamonds and all that kind of stuff. There are a lot of scammers on eBay and there are a lot of thieves on eBay and they get away with it. To suggest that in our environment, respectfully coming from a Sony company, that we would [be] happy with the level of verifiability that transactions on eBay may have, is not correct. Just given the fact that we’ve got to protect 55 years of Sony-dom, we would require, in order to do anything like that, a much, much higher level of

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verifiability and reliability.

Ondrejka: Sure, but there's a difference between the reliability at the transactional point versus once you have a dispute, even in your incredibly verified system, you're still going to end up with disputes. You left a comment that I didn't like, or whatever. So I was more referring to it at that point that they have a very effective online dispute resolution.

Ochoa: And let me add my facetious comment here. I sort of liked the Diablo solution here. Online trial by combat is your online dispute resolution, right? The better player wins, regardless.

Symposium Attendee: Back to the dragon movie, can an AI engine create copyrightable content in whole or in part, whether even as an agent of a programmer, and if so, I'm thrilled, because I'm going to create an AI engine that runs through scenarios, millions and millions of them—these dragons are doing their Wookie dance, they're doing everything—and it's all my copyrighted stuff, ultimately. Also, is a game occurrence a story or a procedure? And if it's a procedure, is it even copyrightable at all?

Zaffron: The thought I had regarding the movie was that, again any absence of any kind of documentation, the director, the one that was capturing the moving screen shots, all of these frames, was consciously making choices: where to put the camera, where to move the camera, during the whole time when he was making that movie, and I just thought it was kind of interesting as long as we were talking about potentially user copyrightable content, in absence of any agreement to the contrary.

Hayakawa: But in this case, I do not think the copyright would vest with either the dragons doing the killing or the players getting killed. The copyright vests, I think, with the creator of the film. And arguably, you know, the players who are members of the famous uber-guild, have some sort of right of publicity. There are a lot of other issues there. But with respect to the slaughter by the dragons, I think it's the creator of the film that has those rights.

Symposium Attendee: Something like a real world documentary, in other words.
Hayakawa: Yeah, and like a real world documentary, you’d probably want releases from the participants being filmed.

Zaffron: Of course, interestingly, this director took a piece of commercially available music that everybody out here would recognize but I’m too old to recognize and put it as background music for this so-called original work. Just goes to show you.

Ochoa: The microphone’s coming to you, Dennis.

Symposium Attendee (Dennis Corgill): Two questions, but first a caveat: Pong is about as sophisticated as I got on some, well, maybe a little bit more, in terms of games. But the first question is: we’ve been talking about end-user agreements where you’re preventing them from selling property outside of the game. Are there any games which provide intellectual property rights or some sort of property right within the game? For example, if I create a certain type of avatar, nobody else can create that same avatar. But my second question also goes to the idea about, it seems as though the thrust of many of the comments have been that allowing people to sell things on eBay is contrary to the business model. I assume that if I became very adept at one of these games that it would not be illegal for me to publish a book: *How to Get to the Twenty-Fourth Level*. And I could go and I could sell that book and there would be no problem. It seems to me if I have the right to do that, then why don’t I have the right just to go out and sell the twenty-fourth level? And how would my legal right to sell the book disrupt or not disrupt the business plan? Because if there’s a lawful way to disrupt the business plan, it seems to me that the problem is with the business plan and not with an after-market of selling avatars on eBay or whatever.

Steinberg: I would just say on the second point, your book, you would have to be very careful, though, in the way you wrote it. There’s actually a very thriving publication industry for hints and tips within games. And the processes of giving those arguably are protected, as well as your ability to sell it using various trademarks or whatnot.

Ochoa: The processes of giving tips are protected how?

Steinberg: I’m sorry, the explanations from within the game itself and
building on the IP within the game.

**Zaffron:** For instance, if this book contained quest descriptions and ways to solve a nine-stage quest, well there’s got to be, I mean, basically it’s telling a story.

**Steinberg:** It’s a cheat code.

**Zaffron:** Or a story.

**Ochoa:** Section 102(b): “In no extent does copyright extend to any idea, procedure, process, system, method of operation, principle, or discovery”… so I’d be a little worried about over-claiming there.

**Zaffron:** Oh, but we’re repeating our story.

**Ochoa:** Repeating the story, in some way.

**Steinberg:** Or it’s hard to do without copying UI [user interface] elements, without referring to other…

**Ochoa:** UI elements? Sorry, user interface elements. Okay. And the first point, remind us of the first question? Oh, any in-game intellectual property rights do you provide to any of your users?

**Zaffron:** No. Well, we don’t put it that way, but in fact, a good subportion of our games anyway, is building an in-game economy. When you find something, we have absolutely no problem and in fact encourage you to sell your Boots of the Elven Lords for as many plat as you can get—as many platinum pieces as you can get within the game. We just don’t want you selling your Boots to the Elven Lords to somebody else that’s going to claim that they sent you the money, when they really didn’t, or vice versa.

**Hayakawa:** And I would argue that most online games grant something resembling a right of publicity to all of their characters. If I go out and I make a character named “Masato Hayakawa,” no space in between Masato and Hayakawa, I am going to assume that virtually

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every single game cannot create a character with that same name.

Zaffron: Well, within that subset of the world, yes. Within that service . . .

Hayakawa: Yes, yes. With the caveat being that there are separate servers or there are shards, or whatever you want to call them. But you know, in part this is a technical limitation, that there's a file name associated with my character name. But it is, in a sense, a right of publicity. People gain certain fame . . .

Unidentified Panelist: You're making the Hulk argument.8

Hayakawa: It's not quite the Hulk, but if, for example, in Paragon City, I build some superhero that becomes quite famous within that, within that limited virtual world, I think most game publishers would tacitly recognize that by not allowing another player to make a character with that same name.

Ondrejka: Also, in IP systems within worlds, we still haven't managed to quite finish doing it yet, but we're trying to bring Creative Commons into Second Life because it would be a very useful tool for creators within Second Life, especially because a lot of things you create in Second Life—designs could move back out in the real world. When you're creating things from scratch, the virtual world is just a membrane to the real world. You could be doing design in the virtual that you're then going to exploit in the real world. And just because of transitions between the two, since we're granting IP rights, we have to figure out ways to make sure that carries over and Creative Commons is a very good piece of that. The caveat has been that bending Creative Commons to work on digital items has proven to be a little bit exciting, much like working with GPL attached to digital items.

Ochoa: Okay, well I don't want to cut off all of the questioning here, but I did want to spend just a few minutes on sort of my fourth set of questions here. Just to get some ideas out there and some things to

I think about as you go, and if we wrap that up early, then I’ll take the last couple of questions we have here. And the question is—and again I think this goes back to Masato’s point about sweat of the brow, certainly not a basis for copyright protection although often the basis for other types of intellectual property—suppose I’ve been playing this avatar in my online world for perhaps many more hours than is good for my psychiatric health. Every night I’m on for two or three hours and I’ve been playing for a year. I’ve invested a lot of time in creating this character, so what happens when the game provider decides to pull the plug on my character? Now of course, your end-user license agreement is going to give you the right to pull the plug on my character, but isn’t the person who’s been playing the game every night for the last year going to feel like some type of tort has been committed? And what rights should they have, assuming the world continues to exist at all, and you haven’t pulled the plug on the entire world, which of course is going to happen if you go into bankruptcy or something? But, what rights should I have to continued access to this world? And, you know, that may depend on what rules I may have violated, right? But, in theory, you know, you can pull the plug on any character whether they’ve violated any rules or not. And should we give the user any rights to continued access within, with or without whatever restrictions you want to impose? You know, has a tort been committed if I pull the plug?

Hayakawa: I think a better example, and one that I think sort of strips away some of our preconceived notions and some of the biases of this panel is, not to ask “What if the company pulls the plug on your character?” but “What if some other player comes, or some hacker comes and deletes your character?” Clearly, the owner of the server, the game company, has a cause of action against this hacker that’s deleted the character. But does the player whose account was deleted have a freestanding cause of action against this hacker? I would think of the question that way because when you think of the game provider versus the player, you have a certain dynamic there that I would argue, in the absence of a EULA, you’ve entered into an implied agreement of a certain implied term and I believe the contract law for contracts without a definite term is the courts will construct a reasonable term. And if EverQuest has been out for six years, which is, I think, a longevity record for a massive multi-player online role-playing game, or close to it, I think a court would say it’s perfectly reasonable for a game player to expect that in this industry, where there’s tremendous turnover, some of these games are eventually
going to shut down.

Ochoa: Okay, I like the twist. If a third party hacker deletes my avatar, who has rights? Does the company have rights? Does the game player have rights? Do they both have rights?

Hayakawa: Company definitely has rights.

Ochoa: Computer Fraud and Abuse Act, you know, somebody's hacked into my system and deleted some digital, some collection of data stored on my server.

Hayakawa: Data that's worth, you know, $40 to $50 a month.

Zaffron: That's for real. Question isn't whether the person whose account's been hacked has a claim against the hacker, because regardless whether that person has any property interest in the underlying character or not, that person still has some sort of legitimate—you know, I'm kind of not an expert on a lot of this stuff—interest in seeing that their home computer is not hacked, and would probably have some sort of trespass, some sort of cause of action. But, what's the element of damages?

Hayakawa: I think, I would say it'd probably be trespass to chattels—would probably be the tort that I would pull out of a hat. The chattel being my data, in the form of my character which is stored, which just happens to be stored . . .

Ochoa: And of course when you say “my data,” you're implying some sort of property right.

Zaffron: It's not your data, and it's not even stored there. It's not stored locally. It's stored on our servers.

Hayakawa: Alright, but if I were to frame this tort it would not do well for my standing to say, “I am suing you because you deleted Sony's data.” I would begin by righteously pounding on the table and saying, “You deleted my data, that just happened to be held on Sony's

server.” If Sony has an Electronic Communications Privacy Act claim against you,\(^\text{10}\) that’s a separate cause of action than mine. My damages are, “What will it cost to recreate that character, to cover that character?” Of course, that creates an inter . . .

Zaffron: I have a tough time finding that tort, but . . .

Hayakawa: If I were to make that claim. But of course, then the damages raise an interesting question. For me, it’s hundreds of hours and years and years. For Sony, it’s someone going and looking at a backup tape. Or maybe not even that. You never know.

Zaffron: Well, as a practical matter, let’s face it. We never get there. Because as a practical matter, what happens is when we get that complaint, we give your character back, and so nobody ever guesses.

Hayakawa: But maybe there are no damages.

Ochoa: And how long do the backup tapes sit around? I mean, how long . . .

Zaffron: Well, it’s not an issue, it’s actually a long time. We’ve got archives going back years and we have daily backups. We have immediately at my disposal and anybody that can use our tools, we have access to the last twenty character backups for any character, which are done generally when some event occurs, so and you know it’s minutes apart. So the long and short of it is that we have immediate access to immediate backups so the rollback isn’t that bad and within a day we can get backups for a little bit further back if we need to.

Ondrejka: Of course, if CALEA [Communications Assistance for Law Enforcement Act]\(^\text{11}\) applies to IP enabled services, that might change.

Steinberg: Again, I would just say, without dodging the legal aspects


of it, it does become practical because, again, the games are very community focused. Your first intent is the customer service side, the enjoyment of the player. So to Andy’s point, you would try to get the person back to what needs to be. You would do what you can to refund them. I think the bigger question is, where you first went, where if you just cut the game off, and then what do you do? I don’t know the answer to that.

Ochoa: Yeah, well you know, again, if you cut the entire game off I can’t see a judge saying to Lucas, well you’ve got to keep the game running. That’s just not practical. That’s not going to happen. I think it’s the more interesting . . .

Zaffron: Well, how about if we twist it this way, which is: we all understand that a reasonable player would expect that someday, the service will be turned off. But reasonable players may not know this early in the development of the online industry that as the curve starts winding down, what companies start doing is consolidating servers. So, Furor, who is a very famous EverQuest character on one of the servers, let’s suppose that his server, which is called Veeshan, doesn’t have enough people on it left, so we consolidate it into another server. And it so happens that on that server we consolidate it with, there’s another “Furor.” So he loses his name. He’s “Furor X” until he decides what new name he wants. Did he have a property interest or any kind of interest absent a EULA in that name because he spent five years building a reputation, running a very famous EverQuest website for years that was called Fires of Heaven, which was the leading EverQuest guild—this is the guild leader of the leading EverQuest guild—did he have an interest in that name? I’m glad I got a EULA.

Hayakawa: To even complicate even more, let’s say he sold virtual goods branded under the name “Furor.” Does he have an unregistered trademark? He designates himself as a source of goods if he crafts stuff that he sells under his name.

Zaffron: Well, if a shard gets absorbed into multiple other shards, he might lose his guild, also. Alright, so, all the value that runs along with that.

Ochoa: I’ve been told that I’ve only got four minutes left, so I want to grab the extra things here and I’m going to ask Eric to take the next
question here. This is Professor Eric Goldman from Marquette.

Symposium Attendee (Professor Goldman): I think this last question’s the most interesting to me because it’s something I’ve been really wrestling with. I want to assume that we have a EULA that says, “We can kick you off for whatever reason.” And yet, we still have people who engage in substantial efforts to build up things that are quasi-property and I’m really wrestling with, to what extent the panelists think that there can be any kind of protection for those assumptions in the face of a EULA that says, “The foundation of this is that we can kick you off or take away your rights at any time.”

Ondrejka: Well, we actually got asked this at State of Play by one of our users because we’re saying, “Go build this whole world.” We have users, you know, collaborating with twenty, thirty users to build whole games inside Second Life, and they’re doing that within a EULA that says that we can delete all their stuff whenever we want to, in theory.

Part of the problem is that much of what they’re creating has no meaning outside of Second Life. They build a game experience inside Second Life. You can’t just turn it into a webpage somewhere. And so one of the things that we’ve been wrestling with and trying to engage our users with is, what is ownership of this kind of property when it only has meaning within our one virtual world? And what does that mean in terms of disciplining users or dealing with users who do violate the rules or even worse, commit criminal activities like hacking and damaging some other account?

Hayakawa: Stepping away from the law, this does raise an interesting point—we always hear from political scientists and sociologists that economic activities do not develop absent guaranteed property rights and the rule of law. In these communities where we don’t have guaranteed property rights, property can just be switched off. Or it can just be deleted. And yet we see tremendous economic activity.

Zaffron: Because presumably, their cost of goods is low enough, and their margin is high enough so that that makes up for, economic theory—I mean, what do I know about economics—but it makes up for it. But, I guess I don’t struggle so much with your question. I think that, at the end of the day—and you asked me to assume a EULA which says, “We can kick you off for any reason,”—that that
EULA would, by and large, be enforceable. I don’t think it would be enforceable if, for instance, we kicked off a member of a protected class because that person was a member of a protected class, or some other reasons that are clearly violative of public policy as has been established by the courts in the last fifty years.

Steinberg: And if you did that, you’d have to deal with the market forces as well because the community would be outraged and all anarchy would break loose.

Zaffron: They’ve been outraged at me before. We kicked off a user that wrote a pornographic story and you know, the community was outraged because we did that.

Ochoa: Okay, I’ve got one more minute, which I think means one more question and I don’t know who the last one will be, but . . .

Zaffron: How about my ex-boss?

Ochoa: Ex-boss here. Okay, last question from Riley.

Symposium Attendee (Riley Russell): It’s probably not fair, but I have a comment and a question. And one is: We’ve been talking about individuals as sort of the property rights that they may be developing, but isn’t there a super set in this that’s really the rules of the game? And that the people playing the game have an interest that might be as important as the individual needs in these worlds. And we’ve talked all about games, but we’ve never really talked about the rules of the game. We talked about law and individuals. I think that’s something that has to be thought about in this. And then the next question was, at first I was going to ask Andy: if I’m a young player who’s invested forty million hours in the game, what about someone under 18? What do you do there, and can they be bound by the EULA?

Zaffron: Well, we ask that parents accept the EULA on behalf of their minor children. We do what we can in the game business. As to the first question, that was part of the head fake that I was accused of, because what I said to that reporter was, that with real world economic gain driving, as a driver of in-game activity, leads more to anti-social behavior and to disruptive game play in violation of the
rules than it would in the absence of those economic forces driving. I’ve seen it, Cory.

Ondrejka: No, I would say that as a general statement, I don’t agree with that. Saying that within the standard MMORPG rule set, I would agree with that. Right, so I think your higher-level question, the rules of the world do need to in fact be related to the rules of your EULA. They’re completely interrelated. The decisions you make about economic forces, about the EULA, the rights of the players, you can’t do that do that in a vacuum separate from what the game play is.

Ochoa: OK, and on that note, we’ll have to leave it there. We thank our panelists. We’ll take a ten minute break.