

Choice of Substantive Law: Real World Sale, Barter, or Lease of Virtual Property

By:

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In 2002, Economist Edward Castronova estimated that several million individuals held accounts in multiplayer online games. A Massive Multiplayer online game is the virtual experience of the game Nintendo amplified by modern cinematic action, sound and visual content, coupled with on-line chatting among as few fifty or as many as thousands of real players from various nations. Each of these individuals logs on to a company provided server that creates the visual context for the game. Unlike Nintendo, many of the games never end. New chapters, new episodes or conquests are released by the game provider with new challenges. A player begins by creating an online account, assenting to the terms of a user agreement and downloading the game from the game provider's website. The player selects or creates a physical self or avatar, "an electronic image that represents and is manipulated by a computer user."² The player then spends an average of ten hours a week "running about in the game world, chatting with others, undertaking various tasks, purchasing, producing, and consuming goods"³ to develop the game story. Guildwars, Entropia,⁴ Everquest, and World of Warcraft⁵ are several of the more popular multiplayer games. In Guildwars, each player creates a character from eight distinct professions. This game has a story and players complete a quest, kill an evil intruder or squelch the advances of a foe to advance the story.⁶ During the game, skills and weapons may be purchased with game money as part of the interaction within the game. Weapons of warfare such as a shield, a bludgeon, swords, and other computer images to enhance the player's performance and success in the game may be earned or purchased. Magical charms, powers, and shawls with endowments of power can be found, purchased, or

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²Merriam-Webster, 11th Collegiate Dictionary, electronic dictionary (2003).

³Edward Castronova, *On Virtual Economies 2* (July 2002), CESifo Working Paper Series No. 752. Available at SSRN: <http://ssrn.com/abstract=338500> (last visited February 28, 2008).

⁴The User Agreement states the law of Sweden governs without the applicability of Sweden's conflict of laws.

⁵The laws of Delaware without regard to its principles of conflict of laws govern the user agreement.

⁶For a description of the various game themes see, generally, David P. Shelton, Comment, *Claiming Ownership, But Getting Owned: Contractual Limitations on Asserting Property Interests in Virtual Goods*, 54 UCLA L Rev. 751, 756 (2007).

stripped from a conquered foe as part of the game. If not acquired through a successful conquest, member content or game content can be purchased or exchanged as part of the game in the virtual world with game money or, increasingly, these virtual assets, computer images, are available for purchase in the real world – for real dollars – on game provider websites⁷ or those operated by independent sellers.⁸

On July 30, 2005, in a posting entitled Virtual Economies, Real Cash, the author reported that through GamingOpenMarket.com, over \$2,190,000 United States dollars had been traded in that system in Lindens, the currency of the game Second Life.⁹ An estimated \$3 million in real world exchanges occurred in 2003,¹⁰ in 2005 game providers and economists estimated that \$100 million was spent on virtual goods.¹¹ As a result of pressure from some game providers both eBay and Yahoo! announced the discontinuation of the sale or exchange of game content on their sites in 2005. Yet, isolated posting can be found on eBay.

What law governs these real world transactions of virtual assets? What rights are conveyed? Of the two prevailing views of the property interest of the player or member content, each results in an interest that can be “sold” or “leased.” Some game developers view the virtual property created by its players or members as being inseparable from the underlying computer code or data that produces the image that appears as an object on the video screen. Because of the inseparability of the object or image, the game developer “owns” the property created or submitted in the game service area.¹² Consequently, the member has, at least, the right to use the content it created and the right to transfer the privilege to use the content. In contrast to this first view, players and some game developers view virtual property in terms of functionality “each item has a purpose and function within the video game and can be traded for another item”¹³ within the virtual world. Because the assets are the byproduct of player time and money

⁷<http://stationexchange.station.sony.com/faq.vm#WhatIsStationExchange>. Sony announced the introduction of an “official” trading website for real world acquisition of virtual assets. Sony will charge the selling player a “nominal listing fee” of \$1 for goods and coins and \$10 per character and a service fee of 10% of the transaction price.

⁸Real world sites for acquisition or sale of virtual property or accounts include: www.ige.com, www.uotreasures.com.

⁹<http://www.davesite.com/themag/073005virtualecon.shtml>.

¹⁰Dibbell, The Unreal Estate Boom, *Wired*, Issue 11.01 (January 2003), available at http://www.wired.com/wired/archive/11.01/gaming_pr.html.

¹¹Richard Raysman and Peter Brown, *Novel Legal Issues in Virtual Property*, 8/9/2005 N.Y.L.J. 3, col. 1.

¹²Indeed, the User Agreement for Quiddwars distinguishes game content, the visual content provided by the game provider’s server such as the graphics, sound effects, music, animation-style video, content, layout, design, files, data, and characters from member content – images submitted or created by the player. Guildwars, User Agreement ¶ 6 (a) (last updated January 2008). The provider reserves all rights under copyright law to the game content and the member grants a “non-exclusive, universal, perpetual, irrevocable, royalty-free, sublicenseable right to exercise all rights of any kind or nature associated with” member content when it is submitted or created in a “service area.” Guildwars, User Agreement ¶ 6 (c) (last updated January 2008).

¹³Richard Raysman and Peter Brown, *Novel Legal Issues in Virtual Property*, 8/9/2005 N.Y.L.J. 3, col. 1.

within both the virtual and real world, players are free to sell or exchange these assets on real world trading blocks. Regardless of the view of the property interest held by the player, a U.S. forum court may deem the application of its Uniform Commercial Code appropriate¹⁴ and a European forum court pursuant to the EC Convention on the Law Applicable to Contractual Obligations¹⁵ may apply the UCC in a transaction if a player in the U.S. is selling its creation of a computer generated image.

1. Analogical Development or Extension of the UCC

First, the drafters of the UCC intended the expanded applicability of the UCC to commercial transactions that were neither transactions for services nor transactions in real estate. Second, the term “goods” refers to personalty, personal property which of necessity includes software and computer images. Both Revised Article 1, now codified by 29 states, and unrevised Article 1, recognize as the primary policies in construing the UCC the modernization of the law governing commercial transactions and the continued expansion of commercial practices through custom, usage, and the agreement of the parties. The UCC was not designed as an exhaustive statement of all commercial law with the concomitant task of addressing every potential occurrence and every foreseeable transaction or issue and requiring the plugging of every foreseeable gap with rules.¹⁶ Courts were expected to: 1) develop the UCC through analogical development of the text – the application of the delineated purposes and policies – as unforeseen and new circumstances and practices were confronted;¹⁷ and 2) “recognize the policies embodied in an act as applicable in reason to subject-matter . . . not expressly included in the language of the act” or intentionally excluded if reason and policy require[d].”¹⁸ *Barco Auto Leasing Corp. v. PSI Cosmetics*,¹⁹ and *Advent Systems Ltd. v. Unisys Corp.*,²⁰ both presented new types of transactions, *Barco* the long term lease of goods for the useful life of the goods in 1984 before the codification of Article 2A governing the lease of goods and *Advent Systems* the licensing of software in 1991. In both instances,

¹⁴ Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. *Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.* (emphasis added)
U.C.C. § 1-105 (2000), codified in some fashion as Revised U.C.C. § 1-301 by the 29 states that have codified Revised Article 1.

¹⁵Article 4, ¶ 2 (a presumption that the contract is most closely connected with the country where the party who has the characteristic performance of the contract maintains his/her habitual place of residence).

¹⁶Robert S. Summers, *General Equitable Principles Under Section 1-103 of the Uniform Commercial Code*, 72 NW. UNIV. L. REV. 906, 907 (1978). See also, William D. Hawkland, *Uniform Commercial “Code” Methodology*, 1962 U. ILL. L.F. 291 (discussing the Prussian Code of 28,000 sections to address every foreseeable problem).

¹⁷Mitchell Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 LAW & CONTEMPORARY PROBLEMS 330, 333 & 340 (1951). Accord, U.C.C. § 1-102, comment 1 (2000).

¹⁸U.C.C. § 1-102, cmt 1 (2000).

¹⁹478 N.Y.S.2d 505 (1984) (lease of personal property).

²⁰925 F.2d 670 (1991) (licensing of software).

existing articles provided an analogous context for resolving the issues when the transaction was a lease and not a sale and when the subject of the transaction was not a traditional good.

The scope provisions of Articles 2 (Sales) and 2A (Leases) reinforce this expanded view of the applicability of the UCC. “Unless the context otherwise requires, this Article applies to *transactions in goods*”²¹ Similarly, Article 2A states a principle of broad applicability. “This Article applies to any *transaction*, regardless of form, that creates a lease.”²² Section 2A-103(j) defines lease to mean a transfer of the right to *possession and use* of goods for a term in return for consideration Unless the context clearly indicates otherwise, the term includes a sublease. In both instances, we observe the expansive scope of both articles to include transactions, not merely sales or leases, reflecting the envisioned flexibility of the UCC, the “machinery” or mechanism for the expansion of commercial practices.

However, at first blush, the stated limitation of transactions in *goods* appears problematic. The term “goods” means all things which are movable at the time of identification to the contract other than the money in which the price is to be paid, investment securities and things in action.²³ The focus is upon movability to distinguish transactions for services or real property from transactions for personalty. If the subject of a transaction is personalty, personal property, the goods definition is satisfied. First, a threaded distinction exists in Article 2 between personalty and real property. We see this distinction in sections 2-107²⁴ and 2-304.²⁵ Second, case authority reveals an expansive definition of goods to include software,²⁶ stock in a cooperative housing corporation,²⁷ and electricity.²⁸ The drafters did not intend for Article 2 to become obsolete or antiquated but rather its scope was to expand as commercial transactions expanded and evolved. The subsequent expansion should then be memorialized in a revised promulgation by the relevant quasi-legislative bodies. Although the 2003 amendments to Articles 2 and 2A expressly exclude information from the definition of goods, no jurisdiction has codified the amendments. Finally, the recent draft of Principles of the Law of Software Contracts by the ALI excludes the exchange of digital art from

²¹Unamended U.C.C. § 2-102 (2002).

²²Unamended U.C.C. § 2A-102 (2002).

²³U.C.C. § 2-105 (2002).

²⁴U.C.C. § 2-107 (2002) (a transaction for minerals and the like is a transaction in goods if the seller is to sever or extract the goods).

²⁵U.C.C. § 2-304 (2002) (applicability of Article 2 to transactions involving an exchange or barter of goods for something other than money including real estate or services).

²⁶Twenty-two jurisdictions include software within the definition of goods. Of these twenty-two, three exclude custom designed software distinguishing service from personalty. Likewise, courts have held that transactions for software, other than custom designed software, are within the scope of the Vienna Convention on Contracts for the International Sale of Goods.

²⁷In New York this sale was the sale of personalty governed by Article 2. *Silverman v. Alcoa Plaza Associates*, 37 A.D.2d 166, 323 N.Y.S.2d 39 (1971). But see *ALH Properties Ten, Inc. v. 306-100th Street Owners Corp.*, 191 A.D.2d 1, 600 N.Y.S.2d 443 (1993) (Article 8 more appropriate for its facts).

²⁸See, e.g., *Helvey v. Wabash County REMC*, 151 Ind.App. 176, 278 N.E.2d 608 (1972) (electricity held a good).

its scope. Consequently, Articles 2 and 2A should be extended to govern the real world sale, barter, exchange, or lease of virtual assets acquired or created as part of Massive Multiplayer Online Role-playing games.

