

**ONLINE MULTIPLAYER GAMES:
A VIRTUAL SPACE FOR
INTELLECTUAL PROPERTY DEBATES?**

and

**TERMS OF SERVICE, TERMS OF PLAY IN
CHILDREN'S ONLINE GAMING**

by

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Abstract

The first essay explores how online, multiplayer games are used as a space for the negotiation of intellectual property rights. Focus is placed on the ways in which existing laws and understandings about intellectual property are transforming to accommodate the unique characteristics of online games. Labour issues and the underlying use-value-exchange-value relationship are explored within the framework of a political economic perspective. The second essay provides a content analysis of Terms of Service contracts contained within some of the most frequented children's online games. Emphasis is placed on the exchange of information and culture that occurs between children and corporate entities, in order to identify the nature of these interactions, and the legal and economic implications of children's participation in this exchange. The findings are discussed within the broader context of research ethics, intellectual property, and children's potential rights as producers of digital content.

Dedication

To my family—Tom Grimes, Margaret Elliott, Melissa Grimes, Colin Grimes, Emilie Grimes, Annabelle Grimes, Joanne Bouchard and Andreas Reichert—each of whom contributed in their own unique way to getting me here and continue to fuel my work through their unconditional love and support.

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List of Acronyms

CAD	Canadian Dollar
COPPA	Children's Online Privacy Protection Act
DCMA	Digital Millennium Copyright Act
EA	Entertainment Arts, Inc.
ESA	Entertainment Software Association
EULA	End-User Licence Agreement
FTC	Federal Trade Commission (US)
GNP	Gross National Product
ICT	Information Communication Technology
IP	Intellectual Property
IPR	Intellectual Property Right
MMOG	Massively Multiplayer Online Game
MMORPG	Massively Multiplayer Online Role-Playing Game
OECD	Organization for Economic Co-operation and Development
PIPEDA	Personal Information Protection and Electronic Documents Act
SOE	Sony Online Entertainment
TOS	Terms of Service
TOU	Terms of Use
TRIPs	Trade-Related aspects of Intellectual Property rights
USD	US Dollar
USTR	United States Trade Representative
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

Essay One: Online Multiplayer Games: A Virtual Space for Intellectual Property Debates?

Introduction

With the continued proliferation of information communication technologies (ICTs) and the increasing primacy of information in social systems as diverse as economics, health and even culture, the question of how the newly digitized society will address and incorporate human rights has become a matter of global urgency. Within the realm of ICTs, communication rights (including rights to access), participatory rights, and the right to contribute and share cultural symbols and texts emerge as particularly prominent areas of concern. The emergent "Internet culture" (Castells, 2001) has presented us with an opportunity to express and share a plural and extensive array of cultural products and artefacts. As long as the digital cultural landscape continues to escape the commodifying reach of the transnational corporate giants, the emergent world information society will retain its potential to include the voices of innumerable cultures, independent filmmakers, amateur animators, local musicians, artists, and grassroots organizations. In stark contrast to previous media and technological innovations, the Internet and other new ICTs provide users with access to both the means of cultural production (through software and programs that are easy to use and relatively affordable or even free) and potential mass distribution (primarily through the World Wide Web). This enables new media

users to participate—albeit in varying degrees—in the construction and evolution of the online culture, both through the creation of content (such as websites or web-TV shows) and through their contributions to multi-user online environments (such as games or forums).

The fact remains, however, that the most popular websites, online environments and games are often commercially owned and operated (“Online Games,” 2004; Lastowka & Hunter, 2004), responding primarily (if not solely) to corporate and shareholder interests. Since the advent of the Internet, a number of factors and developments have contributed to its encroachment by the growing online presence of transnational cultural industries and accompanying consumer discourses. As the rest of the globe slowly gains access to the technologies, conventions and interactions of the digitized society, corporate entities strive to establish themselves as the primary gatekeepers of cyberspace. Corporate fervour to dominate the Internet is motivated by the very nature of digitization, which, as Hamelink (1995) suggests:

[R]einforces a social process in which the production and distribution of information evolves into the most important economic activity in a society, in which information technology begins to function as the key infrastructure for all industrial production and service provision, and in which information itself becomes a commodity tradable on a global scale. (p. 73)

At the centre of this process lie the contentious issue of intellectual property (IP) and the expansionary forces of copyright laws—both in terms of their application and enforcement. In his comprehensive analysis of the growing influence of copyright on cultural production and distribution, Bettig (1996)

argues, copyright and patent laws provide the legal grounding and support for the appropriation and commodification of an ever-expanding breadth of intellectual and artistic products. Through these processes, culture and cultural texts are increasingly conceptualized as “intellectual commodit[ies]” (Weiner, 1995, p. 15). This stance is supported by Coombe (1998), who describes how contemporary intellectual property laws pose a “threat to contemporary signifying practice, freezing forms, deeming denotation, and containing connotation,” through their legitimization of the “cultural authority” (p. 26) of intellectual property owners. In this way, Coombe states, “holders of intellectual property rights are socially and juridically endowed with monopolies over public meaning” (p. 26). This is particularly true in the US, for example, where the tendency for copyright laws to be monopolistic is further amplified by the oligopolistic nature of the American cultural industries and US dominance of the global software industry. Within global commercial culture, the US government also plays an important role in the enactment and enforcement of copyright laws both nationally and abroad—through the new standards stipulated by the World Trade Organization’s (WTO) Agreements on Trade-Related aspects of Intellectual Property rights (TRIPs)¹, as well as through US foreign policy practices that, Shadlen, Schrank and Kurtz (2005) argue, “require countries to increase significantly the range of products and processes that qualify for protection as ‘intellectual property’” (p. 46).

¹ As Shadlen et al. (2005) describe, the US has been “the principal advocate” for the inclusion of intellectual property rights (IPRs) in the World Trade Organization (WTO) and its trade agreements, as well as “the leading protagonist of the push toward stronger global protection of IPRs” (p.48).

The ideological foundations of existing intellectual property regimes—which encompass a variety of laws relating to, Coombe (1998) explains, “copyright, trademark, publicity rights, design patents, and associated merchandising rights” (p. 6)—are the topic of significant debate. It is often argued that contemporary copyright systems are not operating according to the underlying principles or ideals of intellectual property, namely to serve as a way of rewarding creators and inventors, and of encouraging them to share their works with the rest of society (Boyle, 2002). A number of crucial problems with the way copyright law is interpreted and enforced have been identified, many of which stem from the fact that its basic premises were formulated in the early stages of the Industrial Revolution. At that time, creative production was a far simpler process, generally involving a single author and a single publishing house. In the early twenty-first century, however, many creative works involve the contribution and participation of a number of creators, sub-contractors, and off-shore production studios working in a post-Fordist system that has alienated many creators from authorship of the final product. As a result, “Ownership of copyrights increasingly rests with the capitalists who have the machinery and capital to manufacture and distribute them” (Bettig, 1996, pp. 7-8), as opposed to the artists, authors and other labourers directly involved in the cultural production process.

As the international cultural environment becomes increasingly entangled within expanding copyright systems, emergent forms of ICTs and their digital content are increasingly conceived of and defined within the confines of a

commercial framework. In conjunction with the broad commercialization of new media formats, debate and controversy has arisen over the encroachment of corporate interests on the online activities of Internet users. The fundamental conflict of interest that exists between the culture industries and Internet users was first brought to public awareness in the late 1990s. An example of this is the music industry's highly publicized pursuit of legal actions to obstruct online file-sharing activities through popular programs such as Napster and KaZaa!, which lead to widespread public debate and a number of important corporate and legal developments. More recently, media (Dibbell, 2003; Thompson, 2004) and academic (Taylor, 2002; Lastowka & Hunter, 2004) attention has shifted to the realm of online digital games, an enormously popular Internet activity (Jones, 2003; "Americans Playing More Games," 2004) at the centre of numerous legal, economic and ethical debates that have the potential to significantly impact upon the future of the global information society. The struggle over meaning and ownership within the realm of intellectual property law is a crucial site of study for understanding the role of the user in determining how future laws will be formulated and interpreted. As Coombe (1998) argues, "People's anticipations of law (however reasonable, ill informed, mythical, or even paranoid) may actually shape law and the property rights it protects" (p. 9). It is thus important that academic inquiry not be limited to formal legal institutions and theories, but should also examine how law is applied and experienced, as well as resisted and redefined, within the quotidian practices of everyday life (Coombe, 1998).

This paper thus seeks to examine how online digital game players and creators are contributing to a shift in both contemporary notions about the nature and limits of intellectual property rights (IPRs), as well as the growing relationship between virtual leisure activities and real-world economics. A brief discussion of the history of intellectual property within the digital context will precede a preliminary overview of the ongoing debate as it is portrayed in both academic literature and the popular press, providing the context for this analysis. Focus will then shift to an examination of the ways in which existing laws and widely-accepted understandings about intellectual property are transforming to accommodate and incorporate the changing characteristics of online gaming practices and technologies, as well as the impact this might have upon social conceptualizations of play and commodification (or labour), and the relationship between Marx's concepts of use value and exchange value. The argumentation and theoretical perspective applied to this analysis draws from the political economy of communication framework formulated by Mosco (1996), and thus seeks to examine the issues surrounding online multiplayer games from a political economic approach.

Intellectual Property in the Digital World

Laws and legal systems present compelling instances of the development, institutionalization and ongoing struggle over meaning that occurs within contemporary society. As Coombe (1998) suggests, it is often via legal forums that hegemony is both "constructed and contested," through "the adoption of legal strategies [that] may give meanings the force of material enforcement" (p.

25). Accordingly, the concept of intellectual property—what it means, what it should include, and how it should be articulated in legal documents and trade agreements—has remained an important point of contestation and debate since its first appearance in pre-Industrial England. Even in its preliminary stages of development, intellectual property law in Britain favoured capitalists—creating laws aimed at protecting the economic rights of companies and ensuring profits for publishers and printers (Bettig, 1996). The roles and rights of the authors and creators were not a concern, as publishers initially focused predominantly on securing the rights for classic works and medieval texts. The development of the printing press and early intellectual property laws also forced a “legal definition of what belonged in the public domain. A literary ‘common’ became subject to ‘enclosure movements’” (Eisenstein, 1983, p. 84). It was not until publishers and printers had nearly completed securing the rights for the public domain works that authors finally gained some status and the demand for new and original works increased significantly (Eisenstein, 1983).

Within the US context, the first federal copyright law was established in the Act of May 31, 1790. Following the precedent set by previous state laws and the British Act, copyright protection was only provided for a set term, and extended ownership to either the author, his or her heirs, or to assigns to whom copyright had been formally transferred. Copyright owners were granted the exclusive right to print, reprint, copy, publish and sell their works. Once the statutory term had expired, published copyrighted works passed into the public domain. By the early nineteenth century Locke’s notion of natural rights (the

basis of earlier British copyright laws) began losing credibility within the US courts. This issue was addressed in the landmark Supreme Court case of *Wheaton v. Peters* (1834), which “set the terms for copyright protection for the next 150 years” (Bettig, 1996, p. 28). The Supreme Court concluded that copyright was not a natural right, but instead a statutory right, created by Congress, and could thus only be “secured” through the enactment of a formalized process (including registration, notice and deposit). The *Wheaton v. Peters* case, Bettig describes, “framed copyright litigation as a matter of protecting the copyright owners’ exclusive rights to exploit and profit from effort and risk put into the work versus protecting public access to literary creativity” (p. 28). The rights of the copyright owners were never absolute or completely exclusive, however. In addition to the limits placed on the duration of copyright, a compulsory licence required that the public be guaranteed access to copyrighted works appearing in the mass media². Over the past fifty years, however, these early limitations on corporate and individual copyright have been drastically depleted. During the second half of the twentieth century alone, US Congress extended the statutory term of copyright a total of eleven times (Engler, 2003). By 1998, major players such as Disney (whose Mickey Mouse copyright was about to expire) openly lobbied Congress for another increase in the duration of copyright, and succeeded in extending corporate copyright by two decades (to 95

² The “fair use” (within the US) or “fair dealings” (in Canada) doctrine is another example of the legal and moral limits to a copyright owner’s control of a work. Although “fair use” was not institutionalized in the US until the 1976 Copyright Act, it has been both a sanctioned practice as well as an accepted and well-established judicial “rule of reason” throughout most of the history of copyright. Fair use/fair dealings doctrines recognize the public’s right to use copyrighted materials for personal or academic purposes. In the contemporary IPR environment, however, third parties’ fair use/fair dealings rights are increasingly superseded by the copyrights of IP owners (Shadlen et al., 2005).

years), “while individual copyright was increased to 70 years after the creator’s death” (p. 32). Under the current regime, Lessig (2002) argues, “no work will pass into the public domain through copyright expiration until 2019—assuming Congress does not extend the existing terms again” (p. 30). By the time most of today’s copyrighted software and computer applications pass into the public domain, it is unlikely that any computer or machine in common use at that point will be able to run them (Lessig, 2001).

Historically, ‘ideas’ in themselves were considered beyond the scope of copyright and intellectual property law—at the turn of the twentieth century, it was widely understood that ideas and facts were decisively part of the public domain. In recent years, however, these “Long-standing limits on the reach of intellectual property—the anti-erosion walls around the public domain—are being eaten away” (Boyle, 2002, pp. 15-6). Copyright³ and patent⁴ laws, the two principle forms of IPRs (Shadlen et al., 2005), are repeatedly expanded to include ‘ideas’ and ‘concepts,’ which less than thirty years ago would have been considered outside the realm of intellectual property ownership, including recent

³ Copyrights provide the creators (or formally designated assigns) of original forms of expression—such as written materials and artwork—with a number of exclusive rights of authorship, including the rights to copy and distribute, or perform and publicly display the work (O’Rourke, 2003; Shalden et al., 2005). Each different form of work is granted a specific “bundle of rights,” O’Rourke (2003) describes, and “some are even subject to compulsory licensing” (p. 13). Fair use/fair dealings and “copyright misuse” are the primary doctrines put in place to counterbalance copyright.

⁴ Patents protect the underlying ideas, processes, mechanics, composition or new improvements upon industrial products and processes (O’Rourke, 2003; Shadlen et al., 2005). A patent grants exclusive rights to the inventor (or formally designated assigns), which “prevent any other from making, using, or selling the invention or its equivalent” (O’Rourke, 2003, p. 14). Patent rights are considered much stronger than copyright, as they do not allow for “independent creation” (an acceptable defence to copyright infringement (O’Rourke, 2003)), but are also generally shorter (in the US, for example, a patent lasts 20 years, compared to over 95 years for corporate copyright). Antitrust laws are often applied to counterbalance patent rights that are extended or enforced unfairly.

developments in Europe that allow the application of copyright to raw compilations of facts and data (through database rights⁵, for example).

The introduction of digital technologies, ICTs and software has presented a unique set of challenges to traditional understandings of intellectual property. Much controversy has stemmed from the fact that digitization has drastically altered the nature of information, which can now be reproduced infinitely and distributed to “countless people simultaneously without mutual interference or destruction of the shared resource works” (Boyle, 2002, p. 17). The digital commons and intellectual properties of the twenty-first century are vastly different from the plots of land and printed texts legal articulations of property and copyright were originally intended to protect. Vaidhyanathan (2001) argues, since copyright was fundamentally designed to regulate unauthorized “copying” of a work (and not the audience’s right to read or share works) new technologies have presented copyright policy makers with a difficult dilemma. Digitization has, in essence, caused a collapse or merger between previously distinct activities, such as accessing, using and copying (Vaidhyanathan, 2001). Thus far, the response has been to expand IPRs to encompass this broader set of activities, as opposed to widening the parameters of the public domain or broadening definitions of fair use or fair dealings allowances. This trend is evident in the US *Digital Millennium Copyright Act* (DMCA) (1998), for example, which not only amends existing copyright law in order to strengthen the legal standing of IPR

⁵ See Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (also known as the “Database Directive”) (“Copyright and Rights in Databases Regulations,” 1997 as cited in Colston, 2002).

holders, but also nullifies legislative authority over the determination of copyright, letting “copyright holders be[come] copyright cops” (p. 159). Vaidhyathan identifies four key ways in which the DMCA undermines user rights and privileges those of IPR owners—through the shift of control over the terms of copyright (including access to and use of a work) to the copyright owners; through the replacement public discussion of copyright as a public good by a near exclusive consideration of corporate or private interests; through the repositioning of national interests under the jurisdiction of global, nongovernmental bodies (including the World Intellectual Property Organization (WIPO) and the WTO); and through the subordination of culture to the technological imperative.

Furthermore, many ICTs and much digital content (of which online games are but one example) are highly interactive, calling for a level of participation and contribution from users and audiences that is much more active and involved than previously thought possible. Boyle (2004) highlights that one of the key challenges that ICTs present to the WIPO is that intellectual property laws will now have a much more direct impact upon individual citizens than ever before. Whereas IPRs were once primarily the “preserve of major industrial concerns,” Boyle (2004) argues, the WIPO is now called upon to implement a “set of laws that regulate the citizen-publishers of cyberspace as well as protecting traditional publishers from competitors in the same industry” (p. 4). While these two groups may be subject to the same laws, however, they do not always have access to the same legal knowledge and resources, nor do they benefit from the same

level of representation within domestic and international councils (Boyle, 2004). Nonetheless, individuals are increasingly confronted with IPRs and laws relating to personal privacy, freedom of expression, as well as access to information and culture. It is therefore not surprising that users of new technologies are concurrently becoming entangled in legal disputes and ethical conflicts, in terms of the extent and nature of their participation in commercially owned and operated programs, games, online communities and websites.

One of the most significant ways in which individuals and participating nation states are affected by globalizing IPR standards is through the WTO's TRIPs agreements. By defining IPRs as trade-related, Shadlen et al. (2005) explain, TRIPs not only consistently require participating countries to provide "more protection to a wider range of goods classified as 'intellectual property'" (p. 48), but also enact harmful trade penalties against those countries that fail to meet their new obligations. Unlike previous international treaties, compliance to TRIPs is monitored and enforced by the WTO, a highly influential international organization armed with a "binding dispute resolution process" (p. 56). These expansive IPR requirements are further amplified by the bilateral pressures found in US foreign policy⁶, a country which currently holds some of the world's most stringent IPR standards (with IP protection requirements that are even more demanding and comprehensive than those found in TRIPs). As the primary

⁶ The notion of intellectual property as "trade-related" was further codified in the 1994 Uruguay Round Agreement Act (Shadlen et al., 2005), which established that countries found violating copyright could be penalized through retaliatory trade sanctions. The Act further amends US trade statutes to stipulate that even TRIPs-compliant nations can be targeted under Special 301 if IPR protection does not meet US standards. Canada is currently included in the USTR's annual Special 301 Report, which lists countries that fail to provide the adequate level of IP protection, for its hesitation in extending and implementing copyright to Internet content.

supporter of the inclusion of IPRs in TRIPs, as well as the home of the bulk of the world's software industry (Shadlen et al, 2005), it is not surprising that the US increasingly positions IPR protection at the centre of its foreign trade policy. Significantly, both TRIPs and US foreign trade agreements define software as a form of literary expression that is protected under copyright. Combined, the new global regulations on IPRs—introduced and sustained by TRIPs agreements on the international level and by US foreign trade policy on the bilateral level—thus work to institutionalize and secure the protection of software under copyright law, as well as establish greater IPRs (both in terms of scope and in terms of the duration of exclusivity) for copyright owners.

Global Software and the Digital Games Industry

Despite the united front provided by the WTO and the United States Trade Representative (USTR) in regards to the appropriateness of copyrighting software, the positioning of software under existing copyright laws remains somewhat problematic. For instance, O'Rourke (2003) argues, distinguishing between "ideas" and "expressions," particularly in terms of the non-literal aspects⁷ of computer programs, in order to identify and define the copyrightable aspects of the program is an extremely difficult proposition. She writes,

Analogizing source code to a literary work seemed to make sense [...]. But the uneasy fit between software – a utilitarian work characterized by network effects – and a statute designed for more conventional creative works like novels and artwork became apparent over time. Copyright [runs] the risk of being too

⁷In this context, the term 'non-literal aspects' refers to that which is beyond the actual source and object code of a computer program. This includes elements such as the structure of the program, the sequence of operations, the user interface and the database structure.

indiscriminate and, perhaps surprisingly, too powerful, resulting in monopoly profits when such a return was never required to encourage investment in the first place. (p. 16)

The incongruity between software and IP law is largely explained by the fact that existing IPR statutes were written prior to software's emergence as a mass commodity form. While contemporary IPR systems do allow for a certain measure of customization or "tailoring of rights by subject matter" (O'Rourke, 2003, p.13), computer software remains a particularly challenging case. The legal ambiguity surrounding software is evidenced by its oscillation between copyright and patent protection schemes, particularly in recent years. Whereas software has traditionally received protection under copyright laws, US developers are increasingly obtaining patent protection as well. This shift is especially disturbing as US patent rights are considerably stronger than copyrights and are often counterbalanced by trade-driven antitrust laws⁸, as opposed to the user-centeredness of fair use or fair dealings doctrines. Furthermore, as O'Rourke (2003) describes, the US courts increasingly support "the view that exercise of an intellectual property right can never give rise to antitrust liability⁹" (p. 2).

The US presents an especially pertinent and compelling case study for developing an understanding of contemporary transnational IPR regimes and their impact on the global digital games industry. It is estimated that

⁸ Antitrust or competition laws seek to regulate trade practices and restrict those that are deemed unfair or otherwise undermine market competition.

⁹ Even in cases that suggest the contrary, as in the 2001 Microsoft antitrust ruling (*USA v. Microsoft Corp.*, 2001), the primary focus in antitrust cases remains on how IPR claims translate into anticompetitive practices and license restrictions.

approximately 75% of the world's packaged software market, an industry within which digital games production is assuming an increasingly prominent role, is produced by US-based companies (Shadlen et al., 2005). The worldwide digital games industry is currently estimated at approximately \$28 billion (Lowenstein, 2005), and in 1998-1999 leading game producer Electronic Arts, Inc. (based out of California) ranked eighth among the top twenty software companies in the world (Shalden et al., 2005). The impact of the US's dominance over this burgeoning market is significant, both in terms of the corporate structure of the global digital games sector, as well as in terms of the resulting cultural content. The US ranks first among the world's top digital game-producing countries (followed by Japan, Britain, Germany, France and Canada (Colbourne, 2004)), while North America as a whole produces nearly 40% of global game content ("DFC Intelligence," 2004). In Canada, Dyer-Witthford and Sharman (2005) describe, more than half of the nation's \$2 billion (CAD) digital games industry is generated by US-based Electronic Arts (EA). In terms of content, while gaming is highly popular among Canadians—41% of Canadian households own a home gaming console ("ACNielsen Study," 2003) and nearly 67% have a home computer ("Selected dwelling characteristics," 2005)—domestically-produced games account for only 5% of the Canadian market (Dyer-Witthford & Sharman, 2005).

The US digital games industry is additionally noteworthy in terms of its instrumental role in setting somewhat contradictory legal precedence for digital IPRs. The use of copyright and patent rights to attempt to squelch competition

and establish monopolies is common practice among US console makers, for instance, starting with Magnavox's successful suit against competitors for infringement of its Odyssey home console screen display patent¹⁰ in 1973. Later cases, on the other hand, such as *Atari Games Corp. v. Nintendo of America, Inc.* (1992) and *Sega Enters. Ltd. v. Accolade, Inc.* (1992), as well as *Sony Computer Entertainment, Inc. v. Connectix Corp.* (2000), yielded much different results. The courts in these cases ruled that reverse engineering of consoles and game cartridges by competitors in order to produce and market games that were vertically compatible with existing home console systems was a fair and legal practice, as it resulted in "public benefit consistent with the goals of copyright law" (O'Rourke, 2003, p. 18). While these cases represent instances of inter-corporate litigation, motivated primarily by profit interests and market competition, they also clearly illustrate the legal context within which digital game producers operate. Once users or game players enter into the foray, however, and come into direct contact with the games industry's stringent IPR strategies, a more complex and ethically charged set of property-related conflicts and tensions arise.

A Viable Market for Magic Wands?

Nowhere have the tensions between user and corporate intellectual property interests more clearly manifested than within the realm of online gaming. Unlike the ongoing conflicts surrounding music file-sharing software

¹⁰ Patent #3,728,480 (covering the collisions of a pixel with an object on a raster screen display (Charne, 2005)) was granted to Ralph H. Baer, inventor of the Odyssey home game console, in 1973 and later sold to Magnavox ("The Video Game Revolution," 2004).

(including Napster and KaZaa!), cases involving online multiplayer games (most often involving 'Massively Multiplayer Online Role-Playing Games' (MMORPGs) such as *EverQuest*, *SimsOnline*, and *Lineage*) illustrate how the interactive and collaborative nature of many Internet applications problematizes traditional notions of authorship. Online multiplayer games consist of ongoing cultural productions, the result of the combined efforts and participation of both corporate employees (designers, programmers, customer support agents, etc.) and the games' players. The collaborative and often symbiotic aspects of these shared production processes are presenting new challenges to legal concepts like intellectual property and ownership. The emerging debates have the potential to both significantly alter the structure of the Internet and redefine future articulations and treatments of intellectual property issues worldwide. Thus, while file-sharing cases may effectively demonstrate conflicts between corporate interests and the notion of a cultural commons, online multiplayer games present a unique venue for a critical investigation of how online environments and communities are redefining social conceptualizations of cultural work, digital copyright and intellectual property.

Lastowka and Hunter (2004) identify *Blacksnow Interactive v. Mythic Interactive* as the "first dispute over virtual property to make it to the real-world court system" (p. 50). The owners of Blacksnow Interactive had set up a "point-and-click sweatshop" in Tijuana, Mexico, where employees were paid a substandard hourly wage (under \$3.74 USD/hour) to play the online multiplayer game *Dark Age of Camelot*, in order to build up characters and acquire rare (in-

game) items to then sell to other players over the Internet (Dibbell, 2003). When the game's developers, Mythic Interactive, found out about the outfit, they demanded that operations cease on the grounds that Blacksnow was infringing upon Mythic's intellectual property. Blacksnow responded with a counter-suit, claiming that Mythic was engaging in "unfair business practices," and had their lawyer publicly state, "What it comes down to is, does a [...] player have rights to his time, or does Mythic own that player's time?" ("Blacksnow Sues Mythic," 2002). Though the *Blacksnow Interactive v. Mythic Interactive* suit was eventually dropped, early legal actions of this kind nevertheless mark an important shift in both legal and public perceptions of the nature of virtual copyright and the problems spawned by the commercialization of online interactions and play.

The conflict over virtual assets and IP in the context of online games has not been limited to corporate disputes. In 2000, Taylor (2002) describes, Sony Entertainment secured the cooperation of popular online auction sites, including eBay and Yahoo!, to prevent *EverQuest* players from selling game characters and other in-game items for real-world profit. She explains, "Up until that time a sort of 'cottage industry' had sprung up in which users were turning their online labor [*sic*] into offline cash" (p. 231). The online auction market for *EverQuest* goods, such as virtual armour, weapons, magic wands, and even entire characters, had at that point developed into a \$5 million USD industry. Though Sony succeeded more or less in putting an end to *EverQuest* commerce on eBay and Yahoo! auction sites, the prohibition has been largely ineffective, as auctions and sales continue to flourish on less compliant, less traceable websites

(Lastowka & Hunter, 2004). Today, the secondary, unsanctioned market for virtual in-game assets is estimated to have reached between \$200 and \$400 million USD (Dibbell, 2003; Leupold, 2005).

The reasons behind the heavy-handedness of the corporation's reaction to these activities are twofold, the most obvious being the real economic repercussions that unsanctioned trade can have on corporate profits. As Taylor (2002) argues, the main problem companies have with allowing players to buy and sell their accounts and items is that "it short-circuits the economic model that is the lifeblood of many commercial virtual environments—subscriptions" (p. 231). In order to effectively participate and 'succeed' in these games, players must gain substantial 'experience' through participation in quests and battles, each of which require a considerable amount of time and effort to complete. This process is bypassed significantly when items and 'pre-levelled' characters (previously-played avatars with high levels of experience) can simply be bought in an auction, as the time usually required to attain the more desirable features of gameplay—as well as the accompanying subscription fees a player would pay while working towards those features—is removed from the equation. Since some items and 'experience' levels can take months to acquire, the accumulative loss accrued can be substantial (Taylor, 2002). If players are able to bypass the amount of play-time typically required to earn an especially rare sword, for example, the incentive to dedicate extraneous subscription time toward the attainment of such a sword may be lost. If this practice becomes sufficiently widespread, the subscription-based economic model of many online games

could be threatened—an outcome that some game developers are attempting to avoid by authorizing a more limited, company-run alternative to the player-auctions. Players of the popular game *Ultima Online* (produced by EA), for instance, can now purchase a pre-levelled avatar through the company's Advanced Character Service. In this case, however, players are encouraged to use this service to purchase an “additional character on an existing account [or if the player is] already familiar with the development process” (“Support,” 2004).

The later part of *Ultima Online's* recommendation highlights another important aspect of real-world or offline trade, namely the impact that ‘pre-levelling’ or ‘by-passing’ can have on the content and context of the game. In the case of *EverQuest*, in order for the implementation of a ban on offline auctioning to become effective, the game developers were required to commence regulating certain in-game practices that, when left to the discretion of the players, were otherwise used to conduct unsanctioned trade. The game owner's interest in preserving the game's structure also relates to issues of authorship, such as respecting the artistic expressions of the scriptwriters and programmers who developed the game software, or ensuring that control of the corporate image is maximized. The fact that offline sales of items bypasses the rules of the game also has a potentially negative effect on other players, who may consider these practices unfair or disruptive, and see their enjoyment of the game diminished as a result.

The vested interests of the players and the corporate owners of games have provided sufficient justification for some states to intervene in cases of

'unjust' gameplay practices. In South Korea, for instance, the police "actively prosecute people who hack into games, and they give more weight to cases in which valuable game items are destroyed or transferred" (Castronova, 2003, p. 4). State involvement is rationalized by the fact that in-game assets take time to acquire or build, can be observably bought and sold on real-world markets, and that players are manifestly distressed by the 'unfair' loss or theft of their game items (Castronova, 2003). In a country where an online game, *Lineage*, was recently reported to be more popular than television (King, 2002), the growing influence of online gaming on social, economic and political life is unmistakable.

It is argued, however, that many of these disputes and developments can be traced to the fact that most online multiplayer games revolve around a common central theme—that of property-based economics. Lastowka and Hunter (2004) have identified a number of commonalities within online game structures that relate directly to commercial discourse, including exclusive ownership, the transfer of goods, and a currency system to support (or even necessitate) trade. Even those games set in the most fantastical of settings, such as the medieval, Tolkienesque worlds of *EverQuest* or among the anthropomorphized creatures of Neopia (the world of *Neopets.com*), gameplay incorporates a virtual economy that faithfully reproduces the Western capitalist system (Lastowka & Hunter, 2004). Furthermore, the very design and layout of many online games often emphasize or privilege commercial and economic features above other, extra-economic activities. In *Neopets.com*, for example, the primary activity of caring for a cyberpet (a virtual, online version of the

Tamagotchi) necessitates a near-daily purchase of 'food' and other goods in order to maintain the cyberpet's health and well-being. Without continuous participation in the commerce and trade systems of *Neopets.com*, players see their cyberpets wither away, starving from malnourishment and neglect.

The fact that online worlds conform to Western capitalism and consumer ideology is not all that remarkable when one considers their place and function within the predominantly American culture industries. As Lastowka and Hunter (2004) describe, the most popular online games are often those produced, owned and operated by private, US-based corporations. What is surprising, however, is the sheer volume of trade and commerce that takes place within virtual worlds, through the actions and interactions of the players themselves. The economies of some online games are so massive and refined that economists such as Castronova (2002) are able to analyze them using the same methods applied to the analysis of real national economies. Castronova calculates that the average hourly income of a character in *EverQuest* is \$3.42 USD, while the gross national product (GNP) of Norrath is estimated at around \$135 million (Dibbell, 2003). Even in cases where virtual worlds start off with no property-based market system, it can be argued that the players themselves actively reproduce and impose capitalist economies onto the game environment—through both their in-game and offline trade practices. The question thus becomes whether these transactions are legitimate—are virtual assets truly equivalent to real world commodities?

Lastowka and Hunter (2004) suggest that by both descriptive and normative accounts, virtual property is the legal equivalent of real world property. They argue that because the “development of Western property law and property systems over the last 200 years has been characterized by a shift from tangible to the intangible” (p. 40), any objection to the legitimacy of virtual property based on its intangibility is unfounded. Furthermore, they conclude that virtual property is justified by three of the major accounts of property that have informed legal decision-making in the Western world since the Industrial era—Bentham’s utilitarian theory, Locke’s labour-desert theory and Hegel’s personality theories. Their analysis shows that, in principle, all three theories support with qualification the claim that virtual entities and assets count as legitimate and real property. As Castronova (2003) points out, however, the results of this analysis do not confirm that virtual items must be treated as equivalent to real-world items—they simply show that “there are no prima facie grounds for dismissing the putative property rights of people who believe they own magic wands” (p. 4).

Yet, the intellectual property debates taking place within the context of online gaming are only partially resolved by the conclusion that, theoretically, virtual assets can be understood as legitimate property. The more complex issue is that of ownership—the players’ and industry’s conflicting claims over who actually ‘owns’ these assets and who should benefit from their real-world exchange value. Is the owner and operator of an online game also the owner of the characters and objects that the players spend months (perhaps even years) creating within the space of the game environment? Even among US legal

experts, the world's leaders in stringent, corporate-driven copyright and IP laws, opinions are split when it comes to determining which party can rightfully claim ownership of avatars (game characters, or visual representations of the player while engaged in gameplay). On the one hand, players argue that their in-game characters and other virtual assets become their property through the amount of time, effort and creativity they are required to put into them. On the other hand, the owners and authors of the games claim that because they own the software, as well as maintain and operate the sites and game designs, any activities that occur within the confines of the game fall under their legitimate copyright. Their claims are further supported by the existence of End-User Licence Agreements (EULAs), which explicitly warn players that by agreeing to the terms of the site, they are in essence forfeiting their rights and any future claims of ownership or authorship over their submissions to that site. Both sides of this conflict will now be examined, as the arguments presented by each represent important challenges to contemporary legal and social conceptualizations of intellectual property.

Player Interests vs. Industry Interests

While the subject of these conflicts, namely games and gameplay, may appear to be a somewhat playful and perhaps even trivial topic for such a heated dispute, Taylor (2002) maintains that with the advent of multiplayer capabilities, online games have become much more than 'just a game'. She argues that online games are also spaces in which individuals invest a significant amount of time congregating, occupying the virtual space, creating avatars, producing

cultures and communities, sharing in leisure activities, and reproducing economies. In terms of the characters and items players acquire and create through the process of gameplay, Taylor (2002) writes that players are at the very least the collaborative authors¹¹ (and hence partial owners) of any cultural artefacts that result from their efforts:

It takes a player to create a character and it takes the time of the player to develop the character. Through their labor [sic] they imbue it with qualities, status, accomplishments. Indeed, while the owners of a game provide the raw materials through which users can participate in a space, it is in large part only through the labor [sic] of the players that dynamic identities and characters are created, that culture and community come to grow. (p. 232)

The focus of this line of argumentation is on the meaning of culture and community, which require collective participation and formulation in order to produce shared and cohesive social meanings. If the average *EverQuest* or *Ultima Online* player is dedicating twenty hours a week to the construction of a character and participation in the game community (Castronova, 2002), are they not entitled to some level of recognition for their roles as game 'citizens' and productive members of the game society? Players contribute to various features of the gameplay, through the creation of characters or avatars, but also through the customization of items, such as costumes, houses, and weaponry. Part of

¹¹ It is important to note that many of these arguments seem to rely on the assumption that the IPRs under dispute fall under copyright law, wherein "A copyright is automatically created when an original expression is fixed in a tangible medium" (Cavazos & Morin, 1996, p. 51), and therefore any type of composition (from posting to a newsgroup, to sending an email, to role-playing in an online game) becomes "subject to a copyright that belongs to the author" (p. 57). However, it remains unclear if player activities and communications would in fact qualify for copyright protection, as copyright is generally only applicable to the *expression* of ideas and is not available for ideas themselves. As Shadlen et al. (2005) argue "[P]rivate rights over ideas are *not* automatically conferred upon possession" (p. 49, my emphasis). Furthermore, the majority of IPRs must be actively applied for and secured in order to ensure recognition and protection. The outcome of this particular aspect of the debate will have important repercussions for the players' claim of automatic ownership over their submissions and contributions to the site.

what makes a game attractive to other players (and potential subscribers) is its ability to offer a well-developed social dynamic, a feature that would not exist without the continued efforts and participation of regular players. Games such as *EverQuest* use their large user-base (or population) as a key selling point in advertisements and press releases. Online games that fail to attract a minimum number of players, on the other hand, often fail miserably, as the design and gameplay are to a certain degree dependent upon player interactions and contributions to make the game worthwhile.

A further, more explicit, way players contribute to the construction of online game environments is through participatory design and market research. Kline, Dyer-Witheford and de Peuter (2003) describe how the makers of the first-person shooter game *Doom* are able to directly exploit players' ideas and programming skills by releasing parts of the game's source code on the Internet for players to modify and refine. In so doing, the company "turn[s] every player into a potential programmer who could create his or her own levels of the game...opening an ever-expanding vista of worlds created by other players" (p. 204). The practice of modifying game code (also called 'mods' or 'modding'), Postigo (2003) explains, essentially operates as a "gift economy" among hobbyist game programmers and hackers (known as 'modders'). In appropriating the works of modders, however, game companies convert these gifts into commodities, resulting in "the circumvention of the initial investment risk for the commercial developers as the development work is transferred to the fan base where costs are negligible" (p. 597). From a labour theory approach, Postigo

(2003) argues, modders add “a considerable amount of value to commercial games,” contributing “six to twenty-four months of additional time, developing additions to the original code that can range from thousands to millions of lines of code, and earn no salary to their work” (p. 602). While the exceptional case of ‘modders’ lies somewhat beyond the scope of the current discussion of ordinary, everyday player practices, the special role of ‘mods’ within game development highlights how the game industry does recognize certain forms of unpaid labour put forth by players.

Players’ activities and interactions, both within and outside of the game world, have also provided inspiration for new product development and informed marketing strategies. The online game/community *There.com*, for example, used the organic commerce that cropped up from the *EverQuest* eBay auctions as a model for their own heavily commercialized game design (Lastowka & Hunter, 2004). Children’s game website *Neopets.com*, on the other hand, compiles and sells detailed youth market studies based on data collected from surveys, gameplay, and the interactions that players contribute while participating in the site. Though these types of practices are by no means limited to the world of online gaming, they remain highly relevant to the intellectual property debate, as the determination of authorship is crucial to any claim of ownership of intellectual or cultural products (including data appropriated and sold as market research).

Digital games have also attracted a significant online fan community, wherein fans (presumably players) of particular games create websites, form discussion groups and exchange game-related information and add-ons (Nutt &

Railton, 2003). As with traditional media fan subcultures, the industry has both tapped this fan base for ideas and fostered further community development by hosting fan-generated websites and maintaining discussion forums. These fans add value to the games, Postigo (2003) explains, by contributing “large amounts of the content for these sites making them valuable resources for gamers, which serve as, amongst other things, a ready-made ‘tech-support’ group for other gamers” (p. 595). In the case of *The Sims*, Nutt and Railton (2003) describe how the online fan community is encouraged by EA (the game’s production company), to produce “detailed and complex artworks and fictional narratives” (p. 578) about their avatars and gameplay experiences. Rehak (2003) notes that the massive online fan base dedicated to video game heroine Lara Croft (from the *Tomb Raider* game series) has played a significant role in the character’s elevation from pixelated avatar to full-fledged virtual celebrity. On the other hand, Rehak (2003) also suggests that while a great deal of the online content dedicated to Lara Croft is “generated by fans, for fans,” the majority is surprisingly “always in line with the interests of Eidos and Core Design” (p. 489) (the games’ design and production companies).

A similar set of producer/creator relationships is also found in recent studies of online science fiction fan communities, such as Consalvo’s (2003) examination of fan websites dedicated to the *Buffy the Vampire Slayer* and *Star Trek* television series. Traditionally, studies of fan subcultures and communities have tended to emphasize the “interpretative tension between popular culture’s producers and consumers, who vie for authority over textual meanings” (Rehak,

2003, p. 482). Fans of science fiction and fantasy television, for example, continuously negotiate and re-appropriate copyrighted media texts, characters and images in their production of 'fan fiction,' zines and artwork, oftentimes coming into direct conflict with television networks and producers (Radway, 1984; Bacon-Smith, 1992) in a practice that Jenkins (1992) terms "textual poaching." This form of fandom, Jenkins (1988) describes, serves as "a vehicle for marginalized subcultural groups to pry open space for their own cultural concerns within dominant representations" (p. 85).

Within the context of the Internet, Consalvo (2003) suggests, fan communities have discovered a "preeminent publishing opportunity" (p. 74) to reach a potentially international audience, as well as greater access to media texts and materials for creative appropriation. In response, television networks and producers have threatened many fan-sites with lawsuits, often resulting in the removal of unauthorized materials and the closure of a number of offending sites. In the case of *Buffy the Vampire Slayer*, the WB Network attempted to incorporate fan activities by offering fans a space for their sites on the network server, and granting them access to a limited selection of officially sanctioned images and content (Consalvo, 2003). Consalvo (2003) argues, however, that while fans' online creations challenge the centrality of corporate ownership, the "corporate-produced media product" (p. 76) remains the focal point or nexus of most fan activities. Thus, while fan communities may be engaged in a type of conflict or negotiation with media producers, the producers have the distinct

advantage based on their greater level of control over the contents and availability of the media texts.

The discussion of authorship and intellectual property within online games is compounded by the 'peculiar characteristics' of virtual assets and game environments (Lastowka & Hunter, 2004). After all, no matter how vividly players identify with their avatars or treasure their special, customized swords, the swords, chairs, princesses and dungeons of *EverQuest* are first and foremost the manifestations of strings and strings of computer code. As Stephens (2003) explains, virtual assets are entries in a database, which resides on a server, which transmits data to the player's computer monitor, which then displays one of a finite number of possible images already programmed into the software. Although opportunities for user-customization are becoming increasingly intricate and more frequent, many of the current so-called 'player creations' are simply an amalgamation of choices made from a limited selection of possible characteristics. The decisions about what options are included, how many, and where these selections and other set features of the gameplay appear are in fact made and implemented by the game designers and developers.

The Entertainment Software Association (ESA), a digital game trade association, reports that the digital games industry directly employs 90,000 workers, many in highly-skilled positions (cited in Kline et al., 2003). In Canada, the games industry employs approximately 5,000 such highly-skilled and highly-educated workers (Dyer-Withford & Sharman, 2005). Game development is "a synthesis of narrative, aesthetic, and technological skills to conceive, plot, and

program virtual worlds, deploying the combined expertise of digital coders, graphics designers, software testers, scriptwriters, animators, sound technicians, and musicians” (Kline et al., 2003, p. 199). Production, which is often done in studios by teams of twenty to a hundred people (depending on the nature and scope of the project), can take up to two or three years to complete and cost between \$2 and \$10 million (USD), with many projects cancelled or thrown out before completion¹² (Kline et al., 2003; Dyer-Witthford & Sharman, 2005). Although players may claim that their actions and interactions are what make a game enjoyable, it is apparent that the game parameters and the structure of the content are both imagined and realized through the work, knowledge and artistry of its original creators. The collaborative nature of the authorship of games is also hard to dispute, though player contributions may in fact be quite minimal when compared to the combined, highly-skilled labour of the design and development teams.

At the centre of the industry’s claim to intellectual property ownership is the controversial issue of EULAs (also called Terms of Service (TOS) and Terms of Use (TOU) contracts). EULAs are virtual contracts that players must agree to before entering a game environment, by clicking in confirmation that they have read and accepted the terms and conditions outlined in the EULA. By clicking, the user agrees to waive a number of significant rights, such as the “rights to own the fruits of labor [*sic*], rights to assemble, rights to free speech” (Castronova,

¹² Among those games that do see completion, Dyer-Witthford and Sharman (2005) report, only a small percentage are successful: “Publishers face the “90:10” dilemma: 10% of the games make 90% of the money” (p. 190).

2003, p. 8). For example, the *EverQuest*/Sony Online Entertainment (SOE) TOS (1999-2003) agreement includes the following stipulations:

The Station, including, without limitation [...] contains copyrighted material, trademarks and other proprietary information including, without limitation, text, software, photographs, video, graphics, music and sound, and the entire contents of The Station and each area contained therein are copyrighted as a collective work [...] You acknowledge that SOE and/or third-party content providers remain the owners of all materials posted on The Station, and that you do not acquire any of those ownership rights by downloading copyrighted materials.

Miller (2003) supports the legitimacy of these claims to complete ownership, and suggests that the eventual allocation of property rights will depend largely on EULAs, as per the terms demarcated within. Furthermore, the fact remains that online game spaces are not only private, and explicitly profit-driven, but that users willingly accept these terms and conditions when they voluntarily agree to the EULA (Taylor, 2002).

Other scholars and economists, however, argue that it remains unclear whether the EULAs, in their current form, will prove strong enough to survive the growing challenge posed by players and other opposing parties (Castronova, 2003; Lastowka & Hunter, 2004). Castronova argues that game owners cannot prevent fair and equal treatment of individuals and virtual property just because they have a EULA that says so. He writes, "Synthetic worlds are being treated as special cases, but no law has defined when and how this special treatment should apply" (p. 9). Lastowka and Hunter also conclude that as more people come to inhabit virtual worlds, users will seek to protect the fundamental rights that EULAs currently contract away. Furthermore, it is likely that a large number

of suits will be filed as users attempt to circumvent or attack EULA restrictions in pursuit of profit and other economic incentives (Lastowka & Hunter, 2004), as seen in the unsanctioned player auctions described above.

Another possible challenge to overly restrictive EULAs might draw upon an affirmative defence provided by the doctrine of copyright misuse. Copyright misuse occurs, O'Rourke (2003) describes, when a copyright holder "impermissibly expand[s] the scope of his or her statutory rights, usually through the use of restrictive contractual provisions" (p. 20). A copyright misuse defence can be raised even if the claimant is not subjected to or harmed by the practice(s) claimed to constitute the misuse. The number of cases claiming copyright misuse has increased in the US in recent years, despite the fact that the contours and scope of the doctrine remain somewhat ambiguous and ill-defined, often overlapping and confused with antitrust law¹³ (O'Rourke, 2003). Nonetheless, this line of defence seems especially well suited to gaming-related cases. For, as O'Rourke (2003) explains, the courts which are able to make a clear distinction between copyright misuse and antitrust are often the very same courts that worked to prevent copyright from stifling innovation and retro-engineering practices in the video games cases of the early 1990s and 2000s. Whereas those early cases "addressed how to prevent a copyright from becoming the functional equivalent of a patent" (p. 21), recent copyright misuse cases "generally deal with restrictive clauses that attempt by private agreement to create a patent that the licensor has not applied for under the public law" (p.

¹³ O'Rourke (2003) describes that in prior cases the courts have suggested, "that copyright misuse can only occur if the copyright also violates the antitrust laws" (p. 21).

21). While the copyright misuse defence has not yet been utilized in the dispute between players and game creators, and in fact may prove inapplicable given the legal particularities of such cases, it does demonstrate how existing legal doctrines, put in place to counterbalance IPRs, may as yet be called upon to reassert user rights and restrict corporate claims of ownership.

On the other hand, game owners and producers might also anticipate an eventual shift in the players' acceptance of EULA terms, and modify their approach. For example, during a 2003 conference on legal issues in online gaming ("State of Play," held by the New York Law School), game company Linden Lab announced it was changing the TOS for its MMORPG *Second Life*, in order to grant players full intellectual property ownership of any in-game content they create—"including characters, clothing, scripts, textures, and objects" (Calvert, 2003, p. 1). More recently, (perhaps taking cue from EA's *Ultima Online* Advanced Character Service) Sony announced the upcoming unveiling of own corporate-run online auction house called "Station Exchange," which will go live in late June 2005. Through this new service, players of *EverQuest II* will be able to trade and sell items and characters to other players—for a small fee, payable to SOE. The company is promoting Station Exchange as a more secure, authorized alternative to existing, unsanctioned auction sites. SOE will limit the service to only two servers in order to preserve a sense of "fair play" within the greater game environment, which might otherwise be threatened by the type of bypassing that the exchange and purchase of in-game items and characters enables. Despite the move to sanction player trade practices, however, SOE

clearly stipulates that all IPRs over in-game content will remain their sole property. In the Frequently Asked Questions page of the new Station Exchange website, SOE states:

[Y]ou have no ownership rights in characters, items and coin -- what you have is the right to use them in accordance with the license agreement, the rules of conduct of the game, and SOE's terms of service. When SOE launches Station Exchange, SOE will permit you to "sell" and "buy" that right to use characters, items and coin. In "lawyeresese," you will be buying and/or selling a limited license right, not an ownership right. ("Terms of Service," 1999-2003)

As the debate over EULAs and intellectual property in online multiplayer gaming gains prominence within public discourse, it is possible that other companies will either follow the examples set by EA, Linden Lab and SOE, or otherwise devise adaptive strategies to accommodate subversive player demands and practices.

Play vs. Labour

While players' IP claims necessarily imply a concurrent claim of (at least partial) authorship, the exact extent and nature of the 'work' they contribute remains ambiguous and largely undocumented. Although participation in online multiplayer games is voluntary and presumably motivated by the pursuit of leisure and fun, the intellectual property debates seem to have resulted in a confusion or loss of distinction between the concepts of labour and play. For instance, Taylor (2002) argues for the development of broader social conceptualizations of cultural production and ownership, as well as the recognition of collective authorship to include the contributions of the players. This perspective is supported in part by Terranova (2000), who contends that the

“acknowledgement of the collective aspect of labor [*sic*] implies a rejection of the equivalence between labor [*sic*] and employment [...] Labor [*sic*] is not equivalent to waged labor [*sic*]” (p. 14). This confusion of play with work is a reversal of McRobbie’s (2002) notion of the “cultural turn,” wherein both society and the economy are seen as assuming an increasingly cultural dimension. Here, it is culture that is seen assuming additional social, and especially economic characteristics.

By equating play activities with work (and all the rights and claims that accompany the role of worker), the real labour of the programmers who create the software and the factory workers who assemble the hardware becomes lost in translation. As Willis (2001) suggests, “the abstraction of labor...is not something we as consumers can directly grasp, rather it enters our daily life experience as the inability to apprehend fully or even imagine non-fetishized use values” (p. 338). Within the context of online gaming, the resulting confusion may be at least partially caused by the digital game industry’s own attempts to blur the boundaries between work and play within media and public relations campaigns. Within media discourse, Kline et al. (2003) describe, “making games is itself shown as play—work as fun...so that not only consuming games but also producing them is represented as a continuum of endless fun [which] is a part of the interactive game industry’s hip self-image” (p. 197).

In reality, the labour that goes into digital game production spans across many years and several continents. In addition to the intense work ethic of predominantly male game development companies and the immense creativity

essential to high quality software development, digital games are also the product of the painstaking efforts of a primarily female labour force that constructs gaming consoles and cartridges within the enterprise zones of the developing world. Underpaid and working in arduous conditions, the young women who assemble semiconductors and other components of game hardware are often “subjected to ferocious work discipline under conditions that destroy health within a matter of years” (Kline et al., 2003, p. 205). While players often associate their contributions and participation in online multiplayer games with the labour performed by game designers and programmers, little mention is made of the more explicitly laborious, manual work that goes into manufacturing game hardware. Though the crux of the players’ argument lies in demonstrating how gameplay can be experienced and understood as a form of cultural work, this oversight is relevant in that it demonstrates a fairly limited and highly particular interpretation of labour and labour processes. The position that voluntary, leisure-driven activities should be seen as a type of labour—while crucial elements of game and ICT production remain ignored and unrecognized—jeopardizes our ability to fully comprehend the multifaceted, and often abstracted, labour processes involved in the global digital games industry.

It is not only our understanding of labour that is at risk here, however, but also our notion of play. A number of the leading theorists in this area (Taylor, 2002; Castronova, 2003; Lastowka & Hunter, 2004) argue that the possibility of an economic valuation of play will ultimately depend on whether online multiplayer games are granted the legal status of either a ‘game’ or ‘not game’. In

a widely cited definition of the term 'game,' Huizinga (1938/1950) suggests that the key criteria that an activity must meet in order to be considered as a game is that it have no moral consequence. As Castronova (2003) explains, "Whatever is happening, if it really matters in an ethical or moral sense, it cannot be a game. Rather, games are [places] where we only act as if something matters" (p. 2). Taylor suggests that within the context of games such as *EverQuest* and *The Sims Online*, where the game has certainly come to matter a great deal for members involved in intellectual property disputes, the environments are more accurately described as "dynamic communities" than simple games. For Taylor (2002), the unique characteristics of multiplayer online games have transformed gameplay itself into just "one of many activities users engage in and play is in turn made up of a complicated mix of social and instrumental actions" (p. 228). There are various examples of 'offline' games that are viewed in a similar manner and accepted as important social and political events, including the Olympic Games and a number of large-scale spectator sports. Castronova (2003) describes that games produce real moral and tangible consequences as the result of a "self-confirming social consensus: if all society says that the World Series matters, then it does" (p. 3). It is through society's shared agreement that certain games (like the Olympics or the Stanley Cup) are important and meaningful that the consequences of these games come to be understood as serious and relevant.

If it is decided that online games are not merely 'games,' however, then these online spaces are not only important sites of social and cultural activity, but

must also answer to real world laws and state intervention. On the other hand, if online games are legally defined as 'games,' while they may remain important sites of social and cultural activity, they will operate outside the confines of the law and real world economics (Castronova, 2003). Castronova warns that the more real-world meaning permeates online play spaces, the more likely it is that their status as games will erode and that they will be opened to the laws, expectations and norms of capitalist society. He calls instead for the preservation of play spaces as a fundamental human right. The right to play, to a cultural life and leisure activities, he argues, is implicitly addressed within two separate articles of the Universal Declaration of Human Rights, article 27 ("Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits") and article 24 ("Everyone has the right to rest and leisure"). By allowing economic imperatives to encroach upon the newly formed play spaces of online multiplayer games, we risk our greater, and arguably more important, rights to enjoyment, leisure, and escape from the broad commercialization of the outside world.

Although the right to play may be recognized as fundamental by scholars such as Castronova, its articulation remains absent from the various trade agreements and laws that currently regulate global commerce and ICTs. Although EULAs may be interpreted as "contracts that restrict the ability of individuals to erode the play-ness of the space" (Castronova, 2003, p. 10), in order for a declaration of "play space" to be effective and just it must first be formulated and regulated by a democratic government body. In addition, for a

play space to retain its special status as a 'game,' it would have to "maintain strict separation of its economy from the economy of the outside world" (p. 12). Although Castronova's 'call to action' may be both idealistic and naïve given the current political and economic climate that pervades the Western world, it is nonetheless useful in considering how play might be defined and preserved, as well as envisioning a viable (though perhaps unlikely) alternative to the current commercial model.

Use Value vs. Exchange Value

The online gaming debates can also be understood in terms of Marx's theory of the use-value-exchange-value relationship. Jhally (1987) describes, "The relation between use value and exchange value is central to Marx's concept of the fetishism of commodities" (p. 27). Mosco (1996) defines the process of commodification as follows: use value is determined by a product's ability to meet individual and social needs, whereas exchange value is determined by what a product can bring in the marketplace. Commodification occurs when use value is transformed into exchange value. In Marx's discussion of this relationship, he describes use value as ultimately subordinate to exchange value—that the true disjuncture of "commodity flows" is how the exchange values of commodities seem to "have value inherent in them when in fact value is produced by humans" (Jhally, 1987, p. 29). For Marx, commodities are the "embodiment of human labor [sic] in the abstract" (Willis, 2001, p. 338) and therefore the only way to undermine the fetishism of commodities is to understand the process of exchange value and reclaim human labour. In discussing intellectual property

issues in online gaming within a Marxian context, it becomes clear that players and industry are both contributing to the same commodifying process, and that the resulting confusion between play and labour is better understood as a confusion of use value and exchange value.

Although this line of argumentation may seem to support the players' claims to collaborative authorship and limited ownership, Willis (2001) emphasizes the dialectical role of use value which—though it often goes unnoticed and unidentified—is recovered in 'daily-life social practices' and the individual ways we appropriate, use and understand commodities and goods. In the context of online games, use value might be seen as the value players derive from experiencing the many facets of the game environment, from the enjoyment and effort put into acquiring a new item, or even from finding ways to cheat or break the rules of the game. However, the arguments supporting the players' claim of ownership over their in-game contributions position use value as a justification for (as opposed to resistance to) further commodification. For instance, in her study of *EverQuest* players, Taylor (2002) describes how one respondent perceives her game avatar as a personal "creation" and "product" (p. 236)—imbued with the meanings and personality traits that she has bestowed upon it. By interpreting gameplay and in-game interaction (use value) as a form of cultural labour, and by claiming ownership over the fetishized cultural artefact (exchange value), the players commodify their own gaming experience. While the players have become aware of the exchange value of their participation,

however, it seems that use value has remained unaccounted for within the intellectual property debates of online gaming.

Of course, the players' use value is also commodified by the game owners, who use the players' pleasure, personal investment, and social gratification to compel them to continue to purchase monthly subscription fees and software upgrades. The possibility for players to participate in the creation of a gaming experience and storyline is also a key selling point of online multiplayer games. This trait is reflective of a greater trend that pervades the cultural economy, particularly in relation to digital media formats such as the Internet. As Terranova (2000) argues, "the Internet is about the extraction of value out of continuous, updateable work, and it is extremely labor [*sic*] intensive. It is not enough to produce a good Web site, you need to update it continuously" (p. 16). Thus, it would seem that the very aspects that would allow players to reclaim the use value of online games, such as high levels of interactivity and the opportunity to play and communicate with other players, are often the same features that make online games a profitable market commodity.

In many ways, this discussion is reminiscent of Smythe's (1981) treatise on the television audience as commodity proposed over twenty years ago. Smythe describes the audience's relationship and interactions with the media in terms of a continuum, which departs from the audience's entertainment and eventually becomes an advertiser's commodity. He (1981) writes,

In economic terms, the audience commodity is a non-durable producers' good which is bought and used in the marketing of the advertiser's product. The work which audience members perform

for the advertiser to whom they have been sold is learning to buy goods and to spend their income accordingly. [...] In short, they work to create the demand for advertised goods which is the purpose of the monopoly-capitalist advertisers. (p. 222)

The relationship between players and the game industry can perhaps be described in similar terms. The players' participation in online gaming is commodified and marketed as both a paid-for leisure experience (through gameplay) and as a key selling point of the games themselves (as a community of other players to play with). Through these processes, the 'audience' and 'audience commodity' are created. Within the narrative and aesthetic frameworks of the game designs, as well as the commercial frameworks constructed by the presence of EULAs, the players' gameplay (or unpaid labour) is thus channelled through a commodifying economic lens. Through their shared interpretation of the gameplay experience and the products of gameplay as potential intellectual property, both the players and the game owners engaged in the current debate legitimate and contribute to the commodification of the players' participation.

Conclusion

In seeking to explore online gaming as a potential space for the evolution of concepts of intellectual property and cultural ownership, I have attempted to include the arguments and assumptions of two main perspectives that seem to predominate in the present conflict and surrounding debates. The recent developments examined herein, in conjunction with the growing visibility of this topic throughout academic and legal discourses, are evidence of its significance to changing social and legal conceptualizations of IP and virtual assets.

However, although players may eventually contribute in meaningful ways to new formulations of intellectual property, they remain highly disadvantaged in their fight for ownership rights. The corporate game owners have access to a plethora of resources that individual players do not, including the financial means to delay legal proceedings and settle disputes out of court, or simply ban the player from the game altogether. As Taylor (2002) suggests, “The battle over user autonomy would not be nearly as worrisome if users were operating on a level playing field with the corporate owners they are wrangling with” (p. 233). Although the outcome of this conflict remains to be determined, it is important to remember the superior vantage point from which the corporations are operating and their subsequent role in a decision-making process that could ultimately affect all current and future users of ICTs. Inherent within questions of ownership are the equally significant and interrelated issues of authorship and cultural participation. In the current IPR climate, authorship is of particular consequence, as it bestows upon the author a formal form of recognition, a special status, a degree of legitimization, as well as the possibility of financial and cultural gain. On the other hand, Coombe (2003) argues, “Those who are seen to provide mere resources, data, or information to a ‘common heritage’ or ‘public domain’ are at a great disadvantage” (p. 5). Not only do their contributions go, for the most part, unrecognized, but there exists very little protection for this widespread form of cultural participation within international IPR frameworks.

Our failure to adequately recognize or provide a valid space for cultural participation of this nature points to the most significant threat to players’ rights

and enjoyment of online gaming activities, namely the lack of a truly oppositional perspective within the current IPR debates. While the players and game owners compete for the right to claim ownership over game content, an alternative to the continued expansion of intellectual property laws across cultural forms and forums has yet to be adequately articulated. While Castronova's (2003) "right to play" argument offers an interesting starting point for thinking about this issue from a human rights perspective, the proposition that games could exist beyond the scope of law or commerce is problematic at best. Meanwhile, player resistance to the corporate appropriation of online game culture has thus far consisted of little other than the internalization and legitimization of the very processes of commodification. It thus seems that there is only limited space within capitalist discourse to seriously consider extra-economic, non-commodified use value as an important and valid aspect of daily social life. Taking a political economic perspective, which argues that use value is made subordinate to exchange value within capitalist systems, it is likely that as long as no other recourse is available to them, players will continue to participate in their own commodification. While online games may present an interesting and compelling forum for discussions on the future of intellectual property and virtual assets, as well as how ownership and authorship are to be determined, the debate has thus far been severely limited by the commercial context from which it stems. As the current debate operates primarily within the confines of this framework of commodification, both the players and the online gaming industry

can be seen as promoting the extension of IP to emerging forms of virtual leisure, as well as confirming the preeminence of exchange value in online play.

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**Terms Of Service, Terms Of Play In
Children's Online Gaming**

by

Sara M. Grimes

EXTENDED ESSAY

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Essay Two: Terms of Service, Terms of Play in Children's Online Gaming

Introduction

As children and youth continue to expand their access and presence on the Internet, they increasingly adopt participatory roles in the creation of online content—contributing in meaningful ways to online environments, games and communities. The fact remains, however, that the most popular among these sites are often commercially owned and operated, and respond primarily to corporate interests. This has resulted in what Montgomery (2000) terms a “children’s digital media culture,” which creates new levels of intimacy between marketers and children by dissolving the traditional barriers between “content and commerce.” Nowhere is this relationship more clearly illustrated than within popular branded children’s websites and online games, such as *Neopets.com* and *EverythingGirl.com*. These online game communities provide young users with virtual tools and playspaces, enabling them to interact, adopt virtual pets, play sponsored ‘advergames,’ and serve as a stable data-mining resource for marketers and toy companies. This phenomenon, and the corporate mechanisms that drive it, is reflective of a larger trend in online gaming conventions—one that increasingly incorporates marketing research strategies into game design and content.

Concurrently, digital multiplayer games are becoming the site of mounting legal conflict and academic inquiry. Whereas public discourse and political debate during the late twentieth century centred on music sharing and other forms of digital piracy, attention has now shifted to issues of intellectual property and the nature of participatory design and authorship. Through these debates, online digital game players and creators are contributing to a transformation in contemporary notions about the nature and limits of copyright, as well as the legality and fairness of the Terms of Service (TOS) contracts (also called End-User Licence Agreements (EULAs) and Terms of Use (TOU) contracts) that aim to control and define the activities and experiences of users. The scope and nature of these virtual contracts becomes all the more questionable in cases where the user group consists predominantly of minors—children who remain largely ignorant of the labour relations and legal implications of the activities they are engaged in, the true value of the intellectual property they are voluntarily revoking, and the loss of privacy and cultural meaning these interactions may result in. Furthermore, policies aimed at protecting children's interests online, such as the Children's Online Privacy Protection Act (COPPA)¹⁴ in the US, do not currently address the more indirect forms of privacy invasion and intellectual property appropriation that occurs within commercial game spaces.

¹⁴ The Children's Online Privacy Protection Act (COPPA), passed by the US Federal Trade Commission (FTC) in 1998, established a set of new laws aimed at regulating children's online privacy by requiring that children's websites (both those directly aimed at children and those knowingly gathering information from users under the age of 13) give parents notice about their data-collection activities; obtain verifiable parental consent; and provide parents with access to any information collected from their children, as well as the opportunity to discontinue any further uses of the data collected.

This study explores the hypothesis that children's participation in online gaming is being hindered by commercial interests, through the incorporation of advertising and marketing initiatives into digital cultural content, the appropriation of children's contributions and creativity, and the commercialization of children's online play practices. Emphasis is placed on the exchange of information and culture that occurs between children and corporate entities—namely, how children's in-game submissions and interactions are first appropriated by corporations via the intellectual property claims set forth in TOS contracts, and then re-packaged as market research data and ultimately used to inform new product development and marketing initiatives. This exchange raises a number of ethical and legal issues relating to children's communication and information rights—including the right to privacy and potential intellectual property rights (IPRs)—as well as the ethical implications of researching children online, which I will attempt to address and further contextualize in the analysis.

The research methodology consists of a multiple-case, embedded case study design that incorporates both a mapping of the common characteristics of EULAs or TOS contracts found within seventeen popular children's online game sites (representing nine unique contracts), as well as an overview of the activities and contents featured within the sites themselves. These findings are supplemented by a further in-depth, single-case study of *Neopets.com*, a particularly compelling example drawn from the TOS analysis, which combines a qualitative analysis of the site's contents with a political economic overview of Neopets, Inc.'s corporate history, business and marketing practices. Dominant

patterns and conventions found within children's online digital games are identified, and an initial assessment of the nature and intensity of children's participation in the construction and determination of commercially driven online digital games is provided. Findings are discussed within the theoretical framework of a political economy of communication approach and placed within a consideration of how children's online games are seen to operate within the context of the greater trends and business practices found within children's cultural industries.

The Rise of “Cyber”-childhood

Over the last two decades, children's media usage has increased substantially. In the average North American home, children have access to a variety of media options—from TVs and DVD players, to personal computers and videogame consoles. In the US, Rideout, Vandewater and Wartella (2003) report, nearly all children live in a home with at least one TV set (half have three or more), while more than one-third (36%) of children have a TV in their bedroom. In terms of access to information communication technologies (ICTs), Rideout et al. (2003) explain:

Nearly three out of four [children] (73%) have a computer at home, and about half (49%) have a video game player...nearly twice as many children [under the age of 6 years] live in a home with Internet access (63%) as with a newspaper subscription (34%). (p. 4)

Internet usage studies conducted over the past five years continue to show that families with children remain among the fastest growing demographics

of Internet users (Edwards, 1999; Montgomery, 2000; "Household Internet Use Survey," 2004). In Canada, single-family households with children under the age of 18 have the highest rate of home Internet use, comprising nearly 4.9 million households or 73% of this demographic in 2003 ("Household Internet Use Survey," 2004). Recent studies by Nielsen/Netratings ("Kids Account," 2003; "13 Million Kids," 2003) report that children account for one out of every five Internet users in the US (totalling more than 27 million), while 13.1 million children across Europe are now online. Children are also using media at an increasingly younger age. Rideout et al. (2003) describe, "Nearly half (48%) of all children six and under have used a computer, and more than one in four (30%) have played video games" (p. 4).

Children's early adoption of media technologies, especially ICTs, has led to the widespread acceptance of the notion of the "cyberchild," a primarily celebratory discourse that conceptualizes children as savvy, sophisticated prodigies of the digital, information society. This perspective is found throughout the media and public discourse, as well as in numerous studies demonstrating the Internet's potential to empower children and youth; through their active creation of online content, and their meaningful social and cultural contributions to online environments, games and communities (Holloway & Valentine, 2003; Turrow & Kavanaugh, 2003). Computers and other ICTs are thus framed, as Seiter (2004) suggests, as the "ultimate fulfilment of adult desires to see play turned into a purposeful end, to use play for progress and child development—all this without children noticing the beneficial effects" (p. 93). Studies consistently

report that parents see computers as predominantly educational—including a recent survey in which 72% of parents reported that computer use “mostly helps” in their children’s learning (Rideout et al., 2003).

Yet research also indicates that the most popular children’s sites are often commercially owned and operated, responding primarily to industry interests and an advertising-based economic model (Montgomery, 2000; Seiter, 2004; Shade, Porter and Santiago, 2004). This has resulted in a children’s digital media culture, as Montgomery (2000) describes, shaped by “powerful commercial forces” (p. 636) in an attempt to create new levels of intimacy between marketers and children by dissolving the traditional barriers between content and advertising. Seiter (2004) notes that as Internet use became more and more prevalent among Western children their, “interests, habits, and abilities in the online environment became the subject of intense interest by marketers” (p. 93). The resulting relationship that has formed between marketing, media, ICTs and children’s culture has made childhood “inseparable from media use and media surveillance” (Cook, 2001, p. 82). This is due to the increasingly central role market research has taken in both the creation and manipulation of children’s digital content. As Montgomery (2000) describes, the “intense focus on research within the new media industries has produced a wealth of information, much of it proprietary, which is guiding the development of digital content and services for children” (p. 638). Since the rise of consumer socialization research in the 1980s and 1990s, market research strategies have increasingly incorporated ethnographic research methods, “by which the whole of the cultural commons is

mined for valuable potential cultural meanings” (Rifkin, 2000, p. 171). This has led to the ongoing collection of children’s personal information—as marketers track children’s online activities, and poll their attitudes and opinions through online surveys. The Internet also allows market researchers to construct richly detailed consumer profiles from the aggregate data gathered from thousands of subjects belonging to a demographic group that is otherwise extremely difficult to gain access to.

These practices are part of a growing trend in consumer research that Russakoff (1999) has labelled “cool hunting,” in which marketers, “get kids talking about their taste-worlds” (Quart, 2003, p. 42). From the delegation of anthropologists whom advertising firm Saatchi and Saatchi reportedly sent into children’s homes to study their interactions with digital technologies (Russakoff, 1999), to the “trend setting” teens that marketing firm Look-look employed to spy and report on their peers (Goodman & Dretzin, 2001)—today’s youth marketing industry seems to foster an increasingly invasive approach. The practice of cool hunting manifests itself in various online formats, including sponsored or “branded chats” hosted by popular, youth-oriented chatrooms (“Marketers Find an Audience,” 2001), as well as the invisible data-mining technologies online games use to gather information about their users. While children’s personally identifiable information is protected in the US and on many US-based websites through COPPA, little protection exists for children and websites located outside

of the US¹⁵. Furthermore, no protection currently exists for information that is collected and stored in aggregate form¹⁶, though detailed studies of whole demographics and interest groups are often what marketers and advertisers value most (Smith & Clurman, 1997; Sutherland & Thompson, 2001; Lindström 2003). The Personal Information Protection and Electronic Documents Act (PIPEDA) (Bill C-6), Canada's newest privacy legislation and one of the few Canadian policies to address the Internet and other ICTs, "does not even contemplate that the digital collection, use, and exchange of personal information is something that perhaps should be fundamentally limited" (Barney, 2000, p. 229), and simply requires that companies state their purpose and obtain some form of consent before collecting data from consumers.

Meanwhile, data-mining strategies have become fairly common practice among most major corporations¹⁷, who use sophisticated user-tracking services, data collection and storage technologies, and complex database algorithms to create detailed consumer profiles and map behavioural trends. The process is particularly unique, Barney (2000) argues, as it enables the extraction of unintended or unexpected "patterns and relationships, that the user may have

¹⁵ Notable exceptions are The European Union Directive on Privacy and Electronic Communications (2002) and Canada's Personal Information Protection and Electronic Documents Act (PIPEDA) (2004), which both include certain prohibitions against using personal data for purposes other than that for which they were originally collected. However, neither of these documents provides guidelines or rules specific to gathering information from children. The only mention of minors in PIPEDA is found in Clause 4.3 Principle 3, which states, "Seeking consent may be impossible or inappropriate when the individual is a minor, seriously ill, or mentally incapacitated."

¹⁶ This situation may soon change in the US, however, if the Children's Listbroker Privacy Act, a new legislation first introduced in July 2004 and part of the Parents' Bill of Rights (a set of nine legislative proposals aimed at granting parents more control over commercial influence on children), is passed.

¹⁷ By 1998, Barney (2000) describes, approximately "80 percent of the world's largest 2,000 companies were engaging in data-warehousing and -mining strategies" (p. 227).

never considered looking for” (p. 226). Data-mining algorithms search through raw data, identifying trends, drawing associations, locating sequences and clusters, and constructing generalizations and categories (Barney, 2000). When networked to other databases and data warehouses, a truly staggering amount of consumer information can be gathered and processed in increasingly useful ways. As Lyon (2001) describes, “Database marketing is now heavily involved in...[a]‘world wide web of surveillance’” (p. 101) or “cybersurveillance” (p. 145).

The threat to privacy is but one of the more obvious consequences of data-mining and other forms of commercial surveillance. Of equal significance is an interrelated process at work within these practices, namely the commodification of the users themselves. From the political economic perspective, Mosco (2004) writes, commodification can be seen as an intrinsic component of the digitization process, which enables new, highly standardized opportunities for measuring, recording, and packaging Internet content and online activities. Through the digitization (and subsequent rationalization) of every user transaction that occurs within the targeted site(s), data-mining technologies are used “to refine the process of delivering audiences of...computer users, to advertisers. Companies can package and repackage customers in forms that specifically reflect both their actual purchases and their demographic characteristics” (p. 158). In this way, Internet users are reduced to mere audience commodities (Smythe, 1981), as the use value of users’ online experiences and relationships are made subordinate to the exchange value of packaged user trend reports and data-mined demographic profiles. The users

thus become alienated from the digital products of their online interactions and activities, which are aggregated and reconstituted in commodity form as the intellectual property of marketers and website operators.

The lack of academic attention given to these processes, as well as what impact they might have on children's newfound roles as online cultural producers, is particularly significant when one considers the types of online activities children reportedly prefer to engage in. As Livingstone (2003) argues, "while to adults the internet primarily means the world wide web, for children it means email, chat, games—and here they are already content producers" (pp. 13-14). Children also contribute in more formal ways to the creation of online content, by building personal websites ("2 Million American Children," 2003), for instance, or maintaining "weblogs" (Grimes, 2003). Furthermore, numerous media education programs stress the importance of content creation to children's acquisition of media literacy skills (Buckingham, 2003). However, whereas issues such as children's online privacy and copyright infringement through unsanctioned file-sharing are exhaustively researched and highlighted in the mainstream press, the legal and ethical aspects of children's direct participation in cultural production—including children's potential IPRs and other authorship rights over the ideas, creative content, and cultural artefacts they produce and distribute online—are often overlooked.

Where these issues have surfaced, however, is within the ongoing conflicts between adult online game players and game-owners/creators¹⁸. The disputes between these two camps over intellectual property, ownership and authorship issues have received widespread public and academic attention; and are argued to be contributing to a shift in contemporary notions about the nature and limits of copyright (Lastowka & Hunter, 2004), as well as the growing relationship between virtual leisure activities and real-world economics (Castronova, 2003). Intellectual property laws are particularly significant within the digital context for, as Coombe (1998) suggests, “Legal regimes of intellectual property shape (although they do not determine) the ways in which cultural signs are re/appropriated by those who assert difference in the spaces of similarity, imitating and mimicking signs of authority to express relations of alterity” (p. 27). In this way, holders of IPRs are increasingly endowed with social and legal authority over culture and cultural meaning (Coombe, 1998).

Despite the combined efforts of US foreign policy and global trade organizations to expand and extend intellectual property rights to an increasing number of cultural forms and venues, numerous game-related copyright conflicts¹⁹ have surfaced in the past few years. In many of these cases, tensions arise as players and the game industry both seek to exert control over the characters and in-game items created as a result of the hours, weeks and months of gameplay players dedicate to massively multiplayer online games

¹⁸ This debate and the surrounding issues are discussed in more detail in the first extended essay, entitled “Online Multiplayer Games: A Virtual Space for Intellectual Property Debates?”

¹⁹ In 2000, for instance, Sony Entertainment secured the cooperation of popular online auction sites, including eBay and Yahoo!, to prevent *EverQuest* players from selling game characters and other in-game items for real-world profit.

(MMOGs) and game communities. From the players' perspective, the time, efforts and creativity dedicated to the construction of these game assets, as well as the ongoing maintenance of a consistent and entertaining game "community," is justification for a claim to partial authorship and co-ownership over characters and other player-generated creations. On the other hand, the industry argues that ownership and authorship of the game code design (not to mention original narrative, visual and audio elements of the game, and the rules of play) legitimately extends to the players' actions within the game environment. At the centre of the industry's claim to intellectual property ownership is the controversial institutionalization of TOS or EULA contracts. TOS agreements consist of virtual contracts that players must agree to upon entering a game, by clicking in confirmation that they have read and accepted the terms and conditions outlined by the game owners/operators. By clicking "Yes" or "I Agree," the user consents to waive a number of significant rights, such as the "rights to own the fruits of labor [*sic*], rights to assemble, rights to free speech" (Castronova, 2003, p. 8).

Player resistance to the intellectual property clauses of a number of TOS contracts found within online games has spurred widespread debate and speculation among legal experts and digital game scholars, a number of whom argue that it remains unclear whether TOS agreements, in their current form, will prove strong enough to survive the growing challenge posed by players and other opposing parties (Castronova, 2003; Lastowka & Hunter, 2004). Castronova argues that game owners cannot prevent fair and equal treatment of

individuals and virtual property just because they have a TOS that says so. He writes, "Synthetic worlds are being treated as special cases, but no law has defined when and how this special treatment should apply" (p. 9). Lastowka and Hunter (2003) also conclude that it is likely that in the near future, courts will reject TOS contracts on the basis that they are "overly restrictive upon the economic interests of the participants" (p. 71). The fact remains, however, that only a small proportion of adult players and Internet users pay attention to the contents of TOS contracts and privacy policies, let alone fully understand their legal implications. For example, Turow (2003) describes, the majority of adult Internet users in the US "misunderstand the very purpose of privacy policies," believing incorrectly that the mere presence of a privacy policy indicates that a website "will not share their personal information with other websites or companies" (p. 3).

While little research has been conducted on children's understanding of website policies and contracts, emergent studies do suggest a similar set of trends among child Internet users. In a 16-week study of children's Internet use within a public library setting, Sandvig (2000) found only nine requests for privacy policies of any kind among the 203,647 page requests submitted by children during that time period. More recently, Shade, Porter and Sanchez Santiago (2004) report that young children have difficulty understanding questions about privacy, know very little about common Internet business practices such as sending "Cookies" to track users, and oftentimes did not fully comprehend why personal information should not be divulged online. Turow (2000) reports that

children are more likely than adults to give out sensitive information, particularly in exchange for a free gift or reward, and that 46% of parents are unaware that websites gather information on users without their knowing it. These findings support a growing body of academic research demonstrating the limitations of children's understanding of Internet (especially corporate) processes (Seiter, 2004; Shade et al., 2004), as well as children's overall lack of critical literacy when it comes to new media (Kline, 2001; Livingstone, 2003). They also suggest that private industry standards for obtaining and securing informed consent from child users to the terms, concepts and processes at work within children's websites and Internet applications are inadequate at best. From the lack of attention children give to website privacy policies to their limited understanding of key legal and economic concepts, these studies illustrate the need for further inquiry into children's actual (as opposed to assumed) cyber-literacy, as well as the need to identify the exact nature and implications of the exchanges and processes with which children are engaged online.

As market research into children's online interactions and habits continues to flourish and proliferate, the growing relationship between marketers and child Internet-users also warrants further academic scrutiny and public debate. The growing popularity of advergaming provides a compelling case in point. Forrester Research predicts that the advergaming industry will reach \$1 billion USD in 2005 (Wiltenburg, 2003). Not only do advergaming games provide a new, highly immersive way to access (and oftentimes retain) lucrative audience segments, but they also cost much less than traditional forms of media advertising. For

example, Pereira (2004) describes, while a 30-second television ad can cost up to \$29.90 (USD) per thousand viewers (particularly during prime time), in addition to initial production costs, “there are no costs to “air” advergaming. Spreading development costs across the typical number of players, advergaming can cost less than \$2 per thousand users.” While child advocacy and digital democracy groups²⁰ in the US have raised some protest against the now common practice of using advergaming to promote fast food and junk food to children, otherwise very little attention is paid in North America to the more covert market research functions of these sites. Accordingly, Canadian policy has been slow to address the issue of children’s relationship to online advertising and marketing, despite the fact that transnational institutions such as the Organization for Economic Co-operation and Development (OECD) first identified a number of potential problems and risks to children’s rights and well-being in this very area as early as 1999 (“Online Advertising and Marketing,” 1999).

The Terms and Conditions of Children’s Online Games

Whereas the issues of children’s online privacy and new media literacy are the focus of growing scholarly interest, little mention is made in the literature to date of children’s relationship and potential claims to intellectual property online. The current study thus looks to the intellectual property conflicts between adult online game players and game owners/creators as a potential starting point

²⁰ Including The Centre for Digital Democracy, a US-based new media watchdog, and the Campaign for a Commercial-Free Childhood—a self-described coalition of health care professionals, teachers, academics and parents based out of the Judge Baker Children Centre in Massachusetts.

for an investigation of the presence of a similar set of conflicts of interest within the realm of children's online gaming. Not only do online games—through their incorporation of interactivity, entertainment, community, and cultural participation—represent a unique site for the study of online digital culture, but they also constitute an important dimension of children's online experience. Last year, 87% of children aged 7 to 12 years reported "playing online games" as their favourite online activity (Greenspan, 2003), and all five of the "top five" online destinations most visited by children aged 2 to 11 featured online games of some sort (either MMOG environments, such as Disney's *Toontown Online*, or an assortment of interactive mini-games, as found on *PollyPocket.com*). Since one of the key areas in which the conflict between adult players and game owners/operators has manifested itself has been the contestation (in the case of the players) and defence (in the case of the industry) of TOS contracts, the current study will focus its investigation on TOS contracts within children's online gamesites. This approach represents a point of departure from the existing research, as well as a preliminary exploration of the issues surrounding children and intellectual property online.

The methodology consisted of a multiple-case case study design incorporating nine unique cases. Yin (1984) describes the case study approach as an "empirical investigation of a contemporary phenomenon within a real-life context," in which the "boundaries between context and phenomenon are not immediately evident," and multiple sources of evidence are examined (p. 13). This approach appears consistent with the nature of children's online gamesites,

wherein the commercial content of the site and the autonomous activities that occur within it interact as both hegemonic and oppositional forces. Furthermore, because these virtual “playspaces” represent a new, emergent form of children’s culture, the boundaries between context and phenomena remain elusive and difficult to determine. A comparative, multiple-case design was selected in order to allow a preliminary mapping of the norms or conventions that are being established within TOS contracts present within children’s online games. A particularly salient case was then selected for a secondary, in-depth or “embedded” single-case study that combined a qualitative analysis of the site’s contents and activities with a political economic overview of the site’s history and business practices. This additional analysis provided the contextual framework within which the dominant patterns and trends identified in the comparative case study of TOS contracts could then be situated and understood.

Cases were selected based on popularity rankings measuring the top online destinations most frequented by “children” (aged 2-12 years) and the more general category of “youth” (users under 18 years), as reported by Internet audience research firms Nielsen/Netratings and Hitwise (“Nearly 20 Percent,” 2002; Greenspan, 2003). While this approach initially yielded seventeen cases, the fact that a number of the sites listed were actually subsets of a larger, umbrella brand or web environment (and therefore shared the same TOS contract and privacy policy), meant that only nine distinct TOS documents were identified and retrieved for analysis. A preliminary coding protocol was constructed (see Appendix A), drawing upon Turow’s (2001) inventory of the

contents of privacy policies found on children's websites. Russo's (2001) checklist of "15 significant points" to look for when analyzing TOS or EULA contracts (see Appendix B) was also used in order to identify and categorize key clauses contained within the agreements. In addition, the coding protocol included a general overview of the contents of each site, allowing for comparison between the findings from the TOS content analysis with the types of activities provided by the sites, as well as the types of information users either could or were required to provide in order to participate. This final aspect was further supplemented by the in-depth, single-case study of *Neopets.com*, a particularly unique and compelling gamesite in terms of both its contents and applied revenue model. Appendix C provides a full listing and details of the seventeen cases selected for analysis.

Overview of Site Contents and Activities

In terms of the sites' contents and thematic motifs, the cases selected for analysis were grouped into four broad categories or genres (as illustrated in Table 1), which I termed Arcade, Portal, Themed Game Environment, and Massively Multiplayer Online Game (MMOG). The first category, Arcade, consisted of sites that simply provided a selection of discrete mini-games, or online Flash games, loosely grouped by category and/or by popularity. Users simply selected which game(s) to play, with little to no interaction with other players on the site, and a very limited engagement with the site owners. While membership was required in order to participate fully in the sites' contents, the player had almost no control over the contents and could contribute very little to

the construction of the game environment. Sites in the Portal category, on the other hand, allowed the player a limited amount of control over the site contents, through customization tools that enabled the user to alter the appearance of the homepage or that displayed the user’s personal information and statistics. Portal sites included features that emphasized the site’s community of players, such as forums, chat rooms, and listings of the top scoring players, as well as limited opportunities to contribute to the site’s contents, by submitting game reviews or responding to online polls and surveys. As with Arcade sites, Portals featured a listing of discrete mini-games, grouped by theme or popularity, and often directed the player to one or more new or “featured” games. While the Portal sites were consistently branded throughout (for instance the *EverythingGirl.com* portal featured an animated “guide” named Pippa who introduced games and activities, appeared in pop-up windows to direct players to various areas of the site, and granted players “Pippa Points” for playing featured games), as with the Arcade sites, the overarching site remained somewhat distinct from the games and did not reflect any of the narrative elements found within the gameplay and related storylines.

Table 2-1: Case studies categorized by genre

Arcade:	Yahoo!Games, Yahoo! Fantasy Sports – Baseball, Yahoo! Fantasy Sports, Yahoo! Fantasy Sports – Football, MSN Game Zone
Portal:	EverythingGirl, Pogo, EA Online, Disney Online, gURL.com
Themed Game Environment:	Neopets.com, DisneyChannel, Diva Starz, Polly Pocket, Barbie, Kraft Entertainment (Candystand, Nabiscoworld, Postopia)
MMOG:	Toontown Online

Conversely, sites in the remaining two categories provided a much more integrated and immersive form of gameplay experience. In Themed Game Environments, which combined a mixture of interactive mini-games with more traditional (somewhat static) webpages (containing news and information, plot developments, instructions, forums and other features), narrative and visual elements were consistent and interconnected throughout. In these cases, all areas of the site were integrated into a united, coherent meta-narrative. For example, in *Barbie.com*, the user was addressed directly by virtual Barbie, who invited the user to “Enter an Enchanted World” by clicking on a Barbie Fairytopia mini-game, and “Let’s get super creative” by engaging in one of the projects included in Barbie’s Creative Backpack. In this way, the user was positioned in a specific role, as the player of a particular game, throughout his or her experience of the site. *Neopets.com* users entered into the site as the owners of a virtual or cyberpet, a subject position that remained consistent across the various activities, forums, mini-games, multiplayer games and other areas contained within the site. Opportunities for cultural and community participation were also a more prominent feature of sites in the last two categories, which often included forums, requests for creative submissions and feedback, surveys and polls, or multiplayer components.

Only one of the cases conformed to the final category of MMOG, which is generally understood as a large three-dimensional game that allows for multiple players (up to thousands at a time) to play together and communicate with one another simultaneously. MMOGs feature consistent, ongoing storylines and plot

developments, which reflect the status and level of the players in relation to their progress through the game and the strengths and experience of their characters or “avatars” (online visual representation of the role or persona the player has adopted in order to play the game). While the *Toontown* case did not conform entirely to the norms and conventions previously established by adult and teen-oriented MMOGs (instead espousing a number of “child safety” protocols that limited communication between most players to a pre-determined selection of “Speedchat” options), it nonetheless contained a sufficient number of these criteria to be categorized as such. The *Toontown* site thus featured a completely immersive game environment, in which the player—visually represented by their customized avatar—could explore, interact and play with various aspects of the game in a perpetually evolving, animated online village populated by hundreds or thousands of other players.

In addition to a primary focus on interactive games (either multiplayer, downloadable, or simple one-player Flash games), a number of the sites reviewed also featured “advergames”—games containing themes, activities or images that directly related to a specific product(s) or brand(s). The brands and products featured in online advergames varied from sugar cereals, to movies, to toys and clothing lines. In some cases, particularly within branded sites like Barbie/Mattel’s *EverythingGirl.com* and Kraft Foods’ *Candystand.com*, nearly all of the games and activities related directly or indirectly to products and related merchandise. Almost all of the sites collected some form of personally identifiable information from the player—email addresses, date of birth and gender being the

most common, though some also asked for the user's name and at least some components of their home address (such as state/province, country, or zip code/postal code). The vast majority (eight out of nine) also included some form of social software or community-building tools, such as multiplayer components, game-related forums or chat rooms, and in some cases an email or e-card service. While little more than half of the sites allowed participants to contribute creative submissions (such as game reviews, poetry contest submissions, or fan art), very few allocated space within the site for players to create webpages, user polls, or other features of the website design. Two-thirds of the sites solicited players to complete polls or surveys, or to customize some aspect of the site or gameplay. These same sites often featured surveys, polls or customizable features directly relating to (and soliciting customer opinion about) particular products or brands.

In all nine of the cases reviewed, membership or registration to the site was required in order to access the entirety of the sites' contents. Five of these sites allowed non-members access to a limited portion of the game or a small selection of mini-games. The remainder required that players sign-up or register for membership before any gameplay or participation could commence. While membership to six of the sites was free—only two sites featured games or areas that required a paid subscription, while one became fee-based after an initial 10-day free trial period—in all cases, players were required to divulge personal information in order to join.

Placement and Visibility of TOS

All the sites displayed a hyperlink to a privacy policy on the homepage, and eight of the sites also displayed a hyperlink to the TOS. In almost all cases, both hyperlinks were placed at the bottom of the page. Most often, hyperlinks to the TOS and privacy policy were available on all other pages of the site (excluding pop-up windows), and were likely also placed at the bottom of the page. In only two cases, the privacy policy hyperlink was placed at the top of the page. In six cases, no special markers (measured as “colour,” “font size,” “font type or effects,” and “other distinguishing feature”) were used to enhance the visibility of the TOS hyperlink, though hyperlinks to privacy policies most often included at least one marker aimed at enhancing visibility. As a rule, if the player was asked to read the privacy policy he/she was also asked to read the TOS — conversely, the player was more likely not to be asked either than to be asked to read just one. The same goes for the presence of mechanisms designed to encourage players to read the TOS (such as re-directing the player’s browser to the TOS upon registration, or forcing the player to scroll through the TOS in order to accept). If such a mechanism was in place, it was likely to include both the privacy policy and the TOS.

Content Analysis of TOS Contracts

The length of TOS contracts varied significantly from one case to the next; both in terms of the total printed pages it produced, as well as in terms of the time required to read through the contents in their entirety. In printed pages, TOS contracts produced anywhere from 3-5 pages to 9-12 pages, with a slight

majority (four) in the later category. There was even more dispersion in terms of the time required to read through the contents of the TOS documents, and thus no significant patterns or tendencies could be identified. The TOS contracts took anywhere from 4-5 minutes to a surprising 17-18 minutes for an adult graduate student to read, depending on length, complexity of language, font size, etc. The longest TOS contract was found on the *EA Games Online* website, while the shortest was one provided by Kraft Entertainment's sites. Five of the TOS contracts were characterized by a moderate language style (in terms of complexity of sentence structure, vocabulary used, and formality of writing style), while the rest were predominated by an "advanced" style of language. Most of the TOS agreements also contained a significant amount of legal terminology and convoluted sentence structure, with nearly half comprised almost entirely by a "legalese" style of writing. On the other hand, a number of sites did attempt to clarify their use of legal terminology by providing examples, definitions or other forms of clarification for less common legal terms and concepts. Whereas the majority of the case study sites either directly targeted or allowed participation by children under the age of 13 (only three, *MSN Game Zone*, *gURL.com* and *Neopets.com*, restricted access to some areas to users over 13 years), none of the TOS contracts contained much, if any, "child-friendly" or easy to understand language. Furthermore, only two gamesites provided a child-friendly version of the TOS, wherein effort was made to explain elements of the TOS to younger players, using child-friendly concepts and vocabulary. For example, the child-friendly version of the *Postopia.com* TOS agreement stipulates, "Just by visiting

Postopia, you are saying you will always follow the rules here” (“Kids Read Here,” 2001-2004).

In eight of the TOS contracts, the specific parties entering into the agreement were not explicitly identified (the only exception being *MSN GameZone*)—instead, most merely stated that the user, often vaguely referred to as “you,” was agreeing to terms and conditions put forth by the company (defined as including any number of subsidiaries and sometimes affiliates). Furthermore, two cases referred to the user and/or the user’s parent somewhat interchangeably, and failed to clearly outline where the responsibilities of each the child and the parent might begin and end, or how the actions of one might be distinct from the actions and responsibilities of the other. Little more than half of the contracts specified the negotiability (or lack thereof) of the terms contained within the agreement.

While all of the TOS contracts reviewed warned users that the terms and conditions could change at any time, less than half made a clear designation of responsibility for notification of these changes. In these cases, responsibility was either assumed by the site operator (as in the case of the Disney games and sites) or bestowed upon the user, who was given the express responsibility of periodically reading the TOS and monitoring any changes thereof. The rest of the gamesites simply suggested that the user should review the TOS periodically, without specifying that it was their legal responsibility to do so. On the other hand, more than half explicitly alerted the user that external websites, games and tools linked through the site could contain a different set of terms and conditions,

and advised the user to become familiar with the various TOS contracts they might enter into upon navigating the site's hyperlinks.

Eight of the TOS contracts (with the exception of *Yahoo! Games*) contained the stipulation that any or all user submissions to the site became the unlimited and irrevocable property of the site owners/operators. In most cases, both the types of user submissions included in this claim and the nature and breadth of the copyright assumed by the gamesite were broadly defined. In no case was the user explicitly identified as the owner of his/her submissions. For instance, the contract for *EA Games Online* described:

Once you post or send any Content to EA Online, you expressly grant EA the complete and irrevocable right to quote, re-post, use, reproduce, modify, distribute, transmit, broadcast, and otherwise communicate, and publicly display and perform the Content in any form, anywhere [...]. ("EA Online Terms," 2004)

In some cases, this section of the TOS was extremely sweeping and vague, as in the case of the Disney sites' agreement, which stated:

If, through participation in certain activities, you send any material (e.g., postings to chat, boards, or contests) or, despite our request, you send us unsolicited creative suggestions...the Submissions shall be deemed, and shall remain, our property. [...] we shall exclusively own all now-known or hereafter existing rights to the Submissions of every kind and nature throughout the universe and shall be entitled to unrestricted use of the Submissions for any purpose whatsoever, commercial or otherwise [...]. ("Terms of Use," 2003)

Other TOS agreements included exhaustive lists of items that would be treated as proprietary content, as well as the various ways in which the gamesite might use this content. The *gURL.com* site (a subsidiary of popular online women's

community *iVillage.com*), for instance, listed nine types of user activities or contributions that the site considered to be “submissions” (including poetry, artwork, creative works, message board/forum submissions, and responses to games and quizzes), as well as twenty different ways the site might subsequently use these submissions. Furthermore, users were required agree to grant *gURL.com* (and *iVillage*) “a royalty-free, perpetual, irrevocable, non-exclusive right (including any moral rights)” (“Terms of Service,” 2004) to own and use their submissions. Limitations to the gamesites’ ownership claims were rarely addressed, and in only one case did the gamesite (*Yahoo! Games*) claim less than sweeping proprietary rights over player-submitted contents.

In addition to the sites’ claims of intellectual property ownership over players’ submissions and online communications, TOS contracts invariably included highly detailed and specified limitations on the users’ usage and appropriation of company software and site contents. These clauses provided the gamesites with the very IPRs and copyright protections that the TOS contracts were concurrently denying the players. Items disclaiming the site’s reliability and liability were also ubiquitous, as were statements outlining the gamesite’s right to terminate users without notice, at the operator’s discretion. All the agreements reviewed included a stipulation concerning the jurisdiction or legal venue for any legal claims made by or against the site, and a majority of the agreements also required that players consent to the exclusivity of this venue.

A number of gamesites also included a description of the site’s “rules of conduct” within their TOS documents. These were used to describe the types of

activities or actions that could result in the termination of a player's account, as well as the player's responsibilities in terms of representation (for instance, that any personal information provided must always be accurate), interactions with other players, etc. In addition, the rules of conduct section of the TOS contracts of both *Neopets.com* and *EA Games Online* contained statements pertaining to off-site trade and for-profit player auctions. For instance, *EA Games Online* warned players that it "does not recognize or condone any outside service that may be used for the exchange of points, assets or attributes that you may accumulate as a result of participating in the Service of playing your EA game" ("EA Online Terms," 2004), including eBay and Yahoo! Auctions. *Neopets.com* stated that it reserved the right to permanently freeze the accounts of players engaged in this type of activity.

Comparison of TOS Contracts by Target Audience

Among the six TOS contracts associated with gamesites perceived or self-described as targeting a primarily child audience segment, only two (*Neopets.com* and *Postopia.com*) provided a child-friendly version of the TOS. Four of these TOS contracts contained only a small proportion of child-friendly language within the text of the TOS, and tended instead to include a predominantly "moderate" language style, in terms of complexity of sentence structure, vocabulary used, and formality of the writing. In terms of length, four of the TOS contracts on sites directed specifically toward children were under eight printed pages, and tended to take over 10 minutes to read from start to end. However, cases within the kids' sites category also included the two shortest

reads among the sample, indicating a significant amount of variation in terms of the length and complexity of the TOS contracts. Nonetheless, despite minor deviations between sites aimed at children and those aimed at a general audience (including adults and children) in terms of language use and length, all nine of the contracts reviewed contained all fifteen of Russo's (2001) "15 significant points" commonly found in TOS/EULA contracts associated with Internet applications (as listed in Appendix B). This demonstrates that children and their unique legal status as minors are granted very little (if any) special consideration in terms of how TOS contracts are formulated and applied. The failure of these sites to address children's special legal status within contract law is particularly problematic, as oftentimes minors' contracts (especially those for goods or services not deemed as a necessity) are considered void or at the very least unenforceable by Canadian and US courts.

Only two cases included a separate, child-friendly version of the TOS contract: Kraft Entertainment's kid-oriented *Postopia.com* and virtual pet site *Neopets.com*. In both cases, the agreement began by advising young players to read through the terms and conditions with a parent. The reader was then provided with an easy-to-read, easy-to-understand summary of "the rules you need to know to use our Web site" ("Kids Read Here," 2001-2004). For example, children were warned, "When you play around on Postopia, you promise not to send or write anything that [...] is against the law and is really mean or could hurt someone else's feelings" ("Kids Read Here," 2001-2004). Yet, while every TOS contract analyzed included all fifteen of Russo's (2001) key points, as well as a

number of additional clauses, the two child-friendly versions were significantly shortened and simplified in comparison to the regular, more adult-oriented versions. *Postopia.com*'s child version consisted of only four items, namely that the children agree to the terms as they appeared (non-negotiability of terms); agree to respect the "Postopia rules" (rules of conduct and privacy policy); agree to respect and abide by the site's copyrights; and agree to grant intellectual property ownership of their submissions to the site owners/operators. The child-friendly version of the *Neopets.com* TOS displayed a similar pattern. Users were advised that by using the site they were automatically agreeing to the terms and conditions (non-negotiability of terms), and then warned about the site's copyrights:

The accounts, activities, Items, faeries, games and pets are for you to play while on the site. Except as permitted by the functionality of this site, you can't sell them (for money or Neopoints), give them to anyone, trade them for anything (including Neopoints), or pretend you made them. ("Terms/Conditions," 1999-2005)

The *Neopets.com* TOS also provided an overview of the rules of conduct, warning that non-compliant accounts could be terminated permanently, and told users that by posting or sending any content or comments to the site, "you (and your parents) are agreeing that [...] we can use it in any way we want, anywhere, until the end of time" ("Terms/Conditions," 1999-2005).

The majority of sites in some way limited membership or access to certain portions of the gamesite based on the reported age of the player. Membership was fully restricted by age in only two cases: *MSN GameZone*, which required that players be at least 18 years old to participate, and *gURL.com*, which

restricted access to its site to players 13 years and older. However, not all sites asked or verified the player's age. Among those that did, in almost every case the reported age or date of birth could be immediately adjusted to the required age by clicking on the browser's "Back" button and changing the year of birth. The one exception to this was the *gURL.com* site, which automatically sent a Cookie to the computer of users whose reported age was under 13 years, indicating that the user was barred from participating. Upon each subsequent visit to the *gURL.com* site, unless the Cookie was removed, the user was automatically re-directed to a page reminding them of their illegibility to participate, and asking them to return once they turned 13. While five of the remaining sites stated that parental permission was required for children 12 years and under, only three of the sites took any steps to ensure or confirm parental consent was granted. Furthermore, only three cases asked or required that parents read the TOS before registering (or confirming registration for) their child.

Of further significance was the discovery that among the cases reviewed, the majority of online games targeted specifically at children contained a high proportion of advergames or other branded components. Sites like *Postopia.com*, *Candystand.com*, and *EverythingGirl.com* contained little other than games featuring interactive advertisements and/or product preference surveys. *Neopets.com* incorporated a blend of game genres and activities with a number of embedded product placements (for McDonald's restaurants, Disney movies and General Mills cereals, for instance) that the company has termed "immersive

advertising” (“NeoPets Press Kit,” 1999-2005). These sites often mixed advergames and other forms of advertising with market research initiatives, soliciting players to fill out surveys, participate in polls, or perform online product comparisons in exchange for game-related rewards (such as “Neopoints” in *Neopets.com*, or “Pippa Points” in *EverythingGirl.com*). In some cases, advancement in the game required the real world purchase of certain products. For example, in *Postopia.com* most of the site’s mini-games required “Postokens” to play—coins “purchased” with codes only available inside specially marked boxes of Post kids’ cereals. Within the context of the increasingly invasive approach taken by child marketers, it is apparent that these types of features consist not only of an interactive form of advertising but can also be seen as a new form of online market research—collecting data from child users as they play and interact with the games’ embedded advertisements.

Playing Children’s Online Games

In order to further contextualize the patterns identified in the TOS content analysis, an in-depth or embedded single-case study of *Neopets.com* was also conducted. This particular gamesite was selected as it successfully met a number of Yin’s (1984) criteria for selecting an effective case study. The site itself consists of a recent and ongoing development in children’s digital culture (allowing for direct participant observation of online activities as they unfold), occurring within a real-world and real-time setting, and resulting in an array of activities and social communications over which the researcher and research process will have little to no effect. Furthermore, the Neopets site embodies two

of Yin's three rationales for selecting a single-case study design. Firstly, in comparison to the total sample of cases included in the TOS analysis, *Neopets.com* represents a particularly extreme example of a thriving children's online game community operating within the confines and economic imperatives of a highly commercial business model. The site is not only highly popular among children of both genders and various age groups, but also provides children with an exceptionally vast array of creative opportunities and communicative tools. On the other hand, the business model under which the site operates is highly unique in terms of the level to which it allows children's information and activities to become commodified. Seiter (2004) describes, "Instead of selling a media product itself, NeoPets is selling information about the children and young adults who are its fans" (p. 98). While it is highly probable that many (if not all) of the other sites included in the primary analysis use similar data-mining strategies for internal market research and customer service purposes, *Neopets.com* is the only site that overtly packages and resells aggregate player information and behavioural trend reports to external clients, sponsors and trade publications. In this way, the Neopets gamesite also consists of a revelatory case (another of Yin's rationales for selecting a single-case study design), as it provides a unique opportunity to track and study a market research process that, when operating on the internal corporate level, is inaccessible to the outside observer. Therefore, as Yin suggests, this type of single-case study is "worth conducting because the descriptive information alone will be revelatory" (p. 43). The applied methodology combines a political economic analysis of the site's corporate history, business

operations and market research practices, with a more detailed qualitative content analysis of the texts and activities contained within the site itself. As children's online gamesites represent a form of negotiated cultural space—appearing in diverse formats and venues and encompassing a plurality of meanings and uses—multiple sources of evidence are required for a complete understanding of the true scope and breadth of this phenomenon (Yin, 1984). Thus, this portion of the analysis attempts to contextualize the results of the TOS analysis within a single-case study that incorporates corporate publications, press and trade publication coverage, game content, site design, player forums and webpages, as well as a number of other texts and activities.

Case Study: Neopets.com

First launched in 1999 by two British students as a way to “keep university students entertained, and possibly make some cash from banner advertising” (Headen, 2002), *Neopets.com*²¹ has become something of a worldwide phenomenon among children and teens online. Recently purchased by Viacom, Inc. for an astounding \$160 million USD (Shaw, 2005), Neopets was initially transformed into an Internet business venture in 2000 by market research guru Doug Douhring and operated as a private company, Neopets, Inc., until the summer of 2005. During that period, *Neopets.com* registered over 70 million accounts²², attracted more than two billion page views a month, and repeatedly ranked as one of the top 10 “stickiest sites” by Nielsen/NetRatings (“NeoPets

²¹ <http://www.neopets.com>

²² It is important to note, however, that this number is not necessarily reflective of individual users, as a significant percentage of users create multiple accounts.

Press Kit,” 1999-2005). As of May 2005, the site estimates its user base at approximately 30 million unique members—nearly double the number reported in the spring of 2003—and continues to draw in 28,000 new accounts every day (Chuang, 2005).

NeoPets.com is a Themed Game Environment that builds upon the notion of the “virtual pet,” a concept first made popular in the 1990s by a Japanese handheld electronic toy called the Tamagotchi. Each Neopet is given its own unique name and characteristics, and members or “owners” are required to check in on their pet (i.e. log on) on a regular basis in order to feed and take care of them, as well as contribute to their growth and progress (expressed in terms of a levelling system) by playing mini-games and exploring the various thematic areas or lands of “Neopia.” As they play and interact with their pets, players earn Neopoints, the in-game currency required to purchase food and the other virtual products Neopets need to ‘live’ and ‘be happy.’

While membership is free (and mandatory in order to play), *Neopets.com* incorporates a number of ad-based revenue models into the fabric of the site, primarily through a form of product placement that the company has termed (and trademarked) “immersive advertising.” Here, products and brands are integrated directly into either the narrative content of the site or as sponsored mini-games. For example, during the period of study, users could visit a McDonald’s kiosk in the Neopian marketplace to purchase a Happy Meal for their pet and play games with a McDonald’s theme. Advertising partners include major companies from a variety of child-targeted industries, including food and cereal (such as

McDonald's, General Mills and Kraft), toys and games (such as Mattel, Sony and Atari), media conglomerates (including Disney, Paramount, and Warner Bros.) and goods and apparel (including Proctor and Gamble, and Limited Too). As a result of its unprecedented success in incorporating advertisements into the user experience, Eisenmann and Kind (2003) report, "Neopets has been profitable since its fourth month of operations" (p. 1). A related and equally significant source of revenue is the extensive market research the site conducts on its users. Neopets, Inc. not only provides ongoing consumer response studies for advertisers, but also produces large-scale "Youth Pulse Studies." The Neopets user base is not only composed predominantly of children and teens (39% are 12 and under, and 40% are between 13-17 years), but also attracts a fairly even distribution of male (40%) and female (60%) users ("NeoPets Press Kit," 1999-2005), providing market researchers with a stable pool of respondents from a particularly attractive, diversified and otherwise highly inaccessible demographic group. For an undisclosed fee, advertisers and merchandisers can purchase detailed user studies that contain a wealth of information on children's media habits and preferences, thoughts on advertisements and products, hobbies and likes, as well as ideas and concerns about everything from terrorism to new movie releases ("Youth Study 2004," 2004). The company's market research division, recently renamed Neopets Global Market Research, is described as follows in the site's corporate literature:

Neopets' unparalleled access to young people, coupled with the Company's highly sophisticated, proprietary market research system, enables Neopets to conduct detailed consumer studies for companies that target young people, including the hard to reach 12

and younger age group. Neopets has the largest COPPA compliant...online market research panel in the world, containing more than 50,000 12 and younger panelists [sic] complete with written parental permission. ("NeoPets Press Kit," 1999-2005)

As part of their COPPA compliance, Neopets requires children under the age of 13 years to provide parental consent in order to participate in the more interactive or multiplayer components of the site, including forums, multiplayer games and email. Permission to participate in opinion surveys and divulge information to Neopets sponsors is included as part of the consent form, under the guise that these activities "help keep Neopets free for everyone" ("Neopets Parental Consent Form," 1999-2005). Nonetheless, many parents willingly agree to these conditions and grant consent on behalf of their child. As Rodgers (2004) reports, "The company gets between 400 and 600 such consent forms faxed to its offices daily and more come through a P.O. box." The resulting research findings and customized studies are bought by various Fortune 1000 companies and advertising agencies. Neopets is also a primary provider of market research and demographic information for advertising industry trade publications, including *Advertising Age's* yearly report on the state of the children's market.

Opportunities for market research abound within the Neopets site, which offers users a complex community of interest enveloped within an overarching narrative structure that is constantly developing and evolving in real time, as well as adapting to the needs and demands of its users and advertising partners. In addition to over 140 mini-games and virtual pet-related activities (most of which revolve around acquiring food and other items for the pet's consumption) contained within the site, *NeoPets.com* also includes hundreds of forums, an in-

game email service (called "NeoMail"), and a number of multiplayer games wherein players can interact with one another. In the forums, players discuss a variety of topics, from favourite bands and celebrities ("Who's Better: Kelly Clarkson or Hillary Duff?"), to the impact Viacom's recent purchase of Neopets, Inc. might have on the site's content ("So what does everyone think of neopets being sold for 160 Million?"). The site promotes various contests and collaborative features (such as the daily Neopets newspaper, *The Neopian Times*) to which players can submit their creative works and projects. Players are also provided with limited space to construct their own webpages. Through their participation in the community-building and participatory aspects of the site, Neopets users produce a considerable proportion of the site's storyline and content. As described in the NeoPets Press Kit (1999-2005), "In total, members have created more than 12 million pages of content, including more than 2 million pet homepages, 1 million guilds (clubs), and nearly 10 million members' shops."

On the other hand, through the terms outlined in its TOS agreement, Neopets, Inc. also claims full proprietary rights over any and all content produced by users on its site, including submissions to forum threads and contests, personal webpages, and other player creations. By contributing content to the site, the TOS contract stipulates, users:

[A]utomatically grant...to Neopets a perpetual, royalty-free, irrevocable, nonexclusive right and license [*sic*] to use, reproduce, modify, adapt, publish, translate, create derivative works from, and distribute such materials or incorporate such materials into any form, medium, or technology (now known or hereafter developed or devised) throughout the universe. ("Terms/Conditions," 1999-2005)

In addition, the site claims that by agreeing to the terms of the site, the user is also agreeing to waive any “moral rights”—including those recognized by domestic law and international trade agreements—over their thoughts and content. *Neopets.com* presents a particularly unique case, as it is one of only two sites included in the analysis that provided young users with a child-friendly version of the TOS. While the child-friendly portion of the TOS explains that the site claims the right to use anything users post on the site and that “it’s even all right for us to use it in an ad” (“Terms/Conditions,” 1999-2005), the scope and breadth of the IPR claims being made, as well as the greater implications (such as exclusivity, for instance), are only superficially addressed.

Furthermore, although users are theoretically expected to read the TOS agreement in its entirety and assumed to understand that their submissions become the property of the site once submitted, actual player discourse would seem to indicate otherwise. On the players’ personal webpages, for example, users warn other players not to “steal” the content and images they have produced and posted on their sites. On one such webpage²³, the creator threatens, “Steal idea [*sic*], codes or whatever and you’ll be frozen!” The language used here mirrors that found on the corporate-produced sections of the site, which similarly notify users that, “Anyone found to be breaking our Neorules will have their account permanently frozen” (“Neoboards,” 1999-2005). The user’s apparent confusion around issues of ownership and property rights relating to their submitted content, as well as the internalization of corporate

²³ http://home.neopets.com/templates/homepage.phtml?pet_name=Ximaku

discourse surrounding copyright and conditions of use, reveals a limited understanding of the legal processes at work, and illustrates the type of contradictions that can arise when the particulars, function and purpose of TOS contracts are not made clear to a site's young users.

While the popularity of *Neopets.com* among children and young teens seems to have peaked in 2003, the company's continued expansion (both geographically and textually) and recent purchase by media giant Viacom, Inc. indicates a vast potential for continued growth. Although originally, Neopets users were predominantly located in the US, Canada and the UK (English language countries), the site is now available in nine additional languages (including Japanese, Traditional Chinese, Simplified Chinese, Spanish, German, French, Italian, Korean and Portuguese) ("NeoPets Press Kit," 1999-2005), signalling a global strategy to expand the Neopets brand to children worldwide. The success of the website has also paved the way for a number of cross-media partnerships and licensing agreements. In 2003, the company launched a magazine (called *Neopets: The Official Magazine*) and its own collectible card game, both of which linked back directly to the website and associated online activities. Neopets has also successfully expanded into merchandising—with their own line of Neopets toys (both collectible plush toys and voice-activated, interactive "pets"), Neopets stationary and school supplies, action figures, and clothing. In March 2005, the company signed a multiple-movie deal with Warner Bros. Pictures to produce a series of animated films based on the site's storyline and characters ("Warner Bros. Pictures," 2005). That same month, the company

signed a deal with In-Fusio to bring *Neopets.com* to mobile phones (Olsen, 2004), adding to previously existing plans to expand the game to multiple platforms (including a video game for the Sony PlayStation 2 (PS2), *Neopets: The Darkest Faerie*, to be released in August, 2005, as well as *Neopets Petpet Adventure: The Wand of Wishing* for the new PlayStation Portable (PSP)). If successful, Neopets could thus soon follow in the footsteps of other globalized children's brands, such as Pokémon and Disney.

Terms of Service, Terms of Play?

While the TOS contracts reviewed vary significantly in some respects (such as length, structure, etc.), a number of shared patterns or conventions are nonetheless apparent. One of the most striking is the way in which TOS contracts on sites directed toward, or known to be highly frequented by, children address issues involving intellectual property. In almost all cases, intellectual property ownership is claimed not only in relation to game items (the focus of the debates between adult online game players and game owners), but also encompass players' online communications, postings to forums and chatrooms, and even email contents. Only a minimum effort is made to make the contents of these contracts accessible to children—in some cases, players are not even directly instructed to read the TOS, assuming instead a prior knowledge and experience of copyright and contracts that many children do not have. It remains questionable whether it is reasonable to expect children to have the skills and knowledge required to understand the concepts and implications of many of the clauses and items included in TOS contracts—assuming, of course, that they are

inclined and able to read through these lengthy and difficult texts in the first place. It is also unclear whether current contract laws, in Canada, the US or elsewhere, even allow for corporations to enter children (either directly or through parental consent) into legal contracts of this nature.

In terms of parental consent, there appears to be no standard format or framework for establishing the parent's roles and responsibilities in terms of their children's interactions and activities within these sites. In cases where parental consent was sought, the sites reviewed did not display any consistent strategy for ensuring that an actual parent was granting consent. Furthermore, while the inclusion of clauses naming the parent as an agreeing party, or requiring that parental consent be granted for children to participate in the sites, may offer some degree of protection to the sites in terms of liability, they do not adequately address or account for the rights of the child player who will be engaging with the interactive and immersive features of the sites on a regular (often unsupervised) basis. The sites also fail to establish that the consent granted by child users or their parents is truly *informed* consent. Very few details are provided about how children's non-personally identifiable data is collected and used, and practically no mention is made of the nature and function of data-mining and market research practices within these sites. In the case of Neopets, the Parental Consent Form confounds and equates player-driven participatory activities, such as email and forums, with marketing surveys ("Neopets Parental Consent Form," 1999-2005). The ethical implications of conducting research without first

establishing informed consent from the participants are immense, particularly when the respondents are under the age of legal majority.

In comparing these sites with the MMOGs at the centre of the adult player debates, it also becomes clear that although the majority of the TOS contracts featured on today's most popular children's online games contain most of the same stipulations found in adult-oriented agreements, the sites themselves do not offer the same opportunities for social interaction and cultural participation as games directed more specifically at teens and adults. Most of the games reviewed were much smaller and less sophisticated than adult-oriented MMOGs, both in terms of the design and the level of interactivity and interaction allowed. This was true even in the case of Disney's *Toontown Online*, the one game reviewed that truly qualified as a MMOG comparable to *EverQuest* or *Ultima Online*, which limited communication between most players to pre-determined "Speechchat" dialogue options. Nonetheless, the content analysis findings do show that a significant amount of cultural participation does occur within children's online games, through forums, creative submissions, and even gameplay—despite the fact that these environments are perhaps more confined and commercially-defined than adult-oriented MMOGs. That children's participation and contributions to online games is more limited, and oftentimes specifically directed to yield valuable market research and information about consumer preferences, only strengthens the argument that children's online culture is undermined by sweeping TOS contracts. If children's cultural participation can be legitimately transformed into intellectual property for commercial purposes, then it

is only logical that corporate entities will attempt to evoke and extract the most commercially valuable forms of content from them.

In many ways, however, it is not surprising that children's online games are more heavily characterized by consumer themes and advertising messages than games aimed specifically at adults. From the very beginning, children's cultural industries have shared a close relationship with marketers and children's goods manufacturers. As early as the 1930s and 1940s, the radio industry had established norms of sponsorship and promotion in children's programming. Early children's television, such as *Howdy Doody* and *Winky Dink and You* in the 1950s, included segments in which the hosts gave children explicit directions to buy a sponsored product or related merchandise. With the introduction of *The Mickey Mouse Club* in 1955, the merger between children's programming and marketing was fully formed. *The Mickey Mouse Club*, Spigel (1998) describes, was "created as one big advertisement for Walt Disney's theme park" (p.127), promising children that the fantastic "never-never land" setting of the show could be theirs if they could just persuade their parents to bring them to Anaheim, California. By the 1980s, American and Canadian children's television, particularly during Saturday morning timeslots, was heavily characterized by the "thirty-minute commercial"—wherein an entire show was built around the introduction and promotion of a new toy or product line (Engelhardt, 1986).

The assimilation of children's culture and play activities into corporate branding initiatives recalls Kinder's (1991) description of the media "supersystem"—the type of cross-media intertextuality that occurs when a brand

or pop culture icon becomes extended and diversified to the point of cultural saturation. Within children's culture, and especially children's media entertainment culture, the supersystem:

[...] works to position consumers as powerful players while disavowing commercial manipulation. It levels all ideological conflict within the single narrative of an all-encompassing game. And it valorises superprotean flexibility as a substitute for the imaginary uniqueness of the unified subject. (pp. 119-120)

The contradictory positioning of consumers as the active agents of their own commercial manipulation and ultimate commodification is particularly evident in the cases reviewed herein. Through their enframing of advertising and market research as a new form of play, commercialized gamesites create an illusion of power and agency that works to obscure the true functioning and motivations of these spaces. The fact that children flock to these types of sites over non-commercial, or even self-generated, websites is indicative of how successful this obfuscation truly is. The endless barrage of fun and entertainment being offered on these gamesites, oftentimes paired with empowering opportunities for participation and decision-making, privileges the child user (their preferences, thoughts and autonomy) in a way that most contemporary children's spaces do not. At the same time however, to the site operators the child player is important and valued primarily in terms of their function as an audience (for advertisements), as a commercially valuable source of research data, or even as a commodity product to be packaged and sold in the form of research and trend reports. Thus, while commercial gamesites do provide children with a somewhat interactive and participatory playspace, they do so within the context of economic

and legal processes that reconstruct “childhood as a cultural space constituted by consumerism” (Langer, 2004, p. 260).

In cases like *EverythingGirl.com*, which supplies players with a complete gamut of commodity and entertainment products (from dolls and software, to movies and music, to clothing and home furnishings), the surrounding marketing strategy can also be understood as an infantilized form of lifestyle branding. Kapur (1999) relates lifestyle branding strategies to Baudrillard’s concept of “consumption nets or webs,” which she proposes are useful in “understanding how consumer industries create a children’s culture as a whole system that is fundamental to establishing a person’s identity as a child” (p. 127). Rather than limit promotion to a single object or brand, lifestyle branding offers consumers a collection of objects, services and activities, which only construct the desired meaning when positioned (i.e. owned) in concert with one another. Although Kapur (1999) traces lifestyle branding back to the conjoining of fairy tale culture, commodities, and organized leisure found in Disney’s early television productions, more recent attempts have successfully extended the approach to a variety of subjects and ‘lifestyle choices,’ such as extreme sports, speciality television channels (including Nickelodeon and the Cartoon Network), celebrity personalities (such as Hillary Duff or Mary-Kate and Ashley Olsen), and now online game communities. The integration of children’s preferred online activities—which include chat, email, website construction and gameplay—into branded Barbie or Disney environments, for instance, expands the brand or “lifestyle” even further, encompassing an ever-broader spectrum of children’s

daily activities and social interactions. In the current political and social climate, as children and teens continue to spend an increasing amount of time online and manipulating ICTs, opportunities for lifestyle branding of this nature are sure to increase substantially.

As in the example of the adult MMOG game players and the game owners engaged in intellectual property conflicts over in-game assets, the TOS contracts contained within children's gamesites would seem to create a highly industry focused copyright system, one that clearly disadvantages the player. Yet, as Taylor (2002) argues, online games are not merely pre-packaged cultural products, they are also spaces in which groups of players invest significant amounts of time communicating, developing characters and storylines, and participating in shared leisure activities. As a result, online games often foster compelling online cultures and communities, requiring the collective participation of its players in order to produce shared and cohesive social meanings. Thus, the players play a central function in the creation and maintenance of online games, a role that is not recognized in most current TOS contracts. The key difference between these cases and the children's cases examined herein is the amount of resistance that corporate game owners have encountered in their attempt to enforce stringent IP regimes onto the adult player community. The unsanctioned secondary economy that has arisen out of online player auctions continues to expand, infiltrating new MMOGs as they are introduced and encompassing an ever-greater assortment of in-game items and activities. Concurrently, the ensuing debate and the property and ethical issues it raises have garnered

growing attention from both academics and the popular press. Game owners are now scrambling to reconsider the game industry's initial, somewhat united stance on IPRs. The owners of the popular online game *Second Life*, for example, recently transferred all intellectual property rights over player-created items, storylines and characters back to the players themselves. As children's online games have yet to receive the same level of attention as adult-oriented MMOGs, an equivalent level of discourse or critique around the TOS contracts contained therein has yet to arise. The risk in this case, however, is that children lack sufficient knowledge or familiarity with the processes and concepts involved—including intellectual property, privacy and authorship—to produce a comparably effective form of player resistance.

A further concern in the case of child players is the negative impact excessively stringent copyright systems could have on children's emerging rights as cultural producers. Whereas children are highly encouraged, through the press, media education programs and within popular children's gamesites, to participate in online cultures and to form online communities and other social networks, TOS contracts undermine many of the potential benefits and value that children might otherwise derive from their newfound roles as cultural producers. While gamesites seemingly empower children by providing them with the tools and venues required to create and sustain an authentic online children's culture, this culture is simultaneously appropriated and commodified as potential fodder for marketing initiatives and new product development. By claiming ownership over children's autonomous online culture, the TOS contracts delimit and define

children's online play as merely a new source of market research. Even though the legality of these contracts remains dubious at present, the as yet unchallenged authority of these agreements could nonetheless potentially allow them to determine how authorship and intellectual property in children's online games and communities come to be defined in the future. As Coombe (1998) argues, "People's anticipations of law (however reasonable, ill informed, mythical, or even paranoid) may actually shape law and the property rights it protects" (p. 9). This process is only minimally hindered by the newly implemented Internet laws and policies, such as COPPA in the US (which focuses almost exclusively on "protecting" children instead of promoting children's rights and participatory roles in relation to ICTs), and PIPEDA in Canada (which was explicitly designed "to encourage the ongoing accumulation and trade of digitized personal and other information" (Barney, 2000, p. 229)). Thus, despite the widespread rhetoric of the savvy "cyberchild," or perhaps because of the false expectations and assumptions this discourse produces about children's knowledge of Internet processes, children's interests are not yet truly being represented within key areas of this emerging digital culture.

Conclusion

While the findings drawn from the present analysis are preliminary, and a survey of a broader, more representative sample has yet to be conducted, the patterns found in the TOS contracts of the most popular children's sites certainly present justification for further research in this area. Above all, it is clear that the legal terms and conditions of children's online play are not accessible to young

readers. Current measures aimed at ensuring that informed consent is granted by children and their parents are inadequate and inconsistent. In addition, the intellectual property issues raised herein warrant a deeper analysis, especially in terms of how children's online content is shaped and used for commercial interests. Similarly, better insight into children's production of online content and culture is required, in order to determine how children interpret and potentially resist the imposition of commercial copyright systems.

The example of intellectual property disputes among adult MMOG players and game owners presents an important starting point for this and further analysis of children's online games, as it forces a consideration of the meaning of culture and community—in addition to economic themes such as authorship and ownership. Moreover, whereas the research to date on children's usage of the Internet has predominantly ignored children's experience as cultural producers, the case of online games offers an important point of departure from this tendency, through its repositioning of users as active players, and highlighting of the central function of the user in the construction and maintenance of online culture. Thus, in positioning children as active producers instead of passive audience members, the present analysis of the TOS contracts found in children's gamesites reveals that children's interests are not adequately represented or addressed within many of their favourite online destinations.

In contrasting the findings of the content analysis with the in-depth case study of *Neopets.com*, it becomes clear that not only are children engaged in much more than simple play when they visit popular gamesites, but that they are

also being enlisted in intrusive market research strategies that make full use of the creativity, community and agency contained in their online contributions. The underlying legal and economic implications suggested by the stringent IPR claims found among the TOS contracts reviewed are confirmed through *Neopets.com's* successful business practice of creating and selling youth trend reports and behavioural studies. As international conventions and national law have previously established that minors warrant special status and consideration in such commercial (as well as legal) matters, the lack of attention that has thus far been granted to this exchange must be remedied if children's rights are to be effectively upheld and protected online. If children's online contributions and activities are to continue to be used and defined as fodder for market researchers, Internet and media policies, as well as accepted ethical standards for online market research conducted on children, need to be updated and revised. On the other hand, if children's cultural participation is something we truly wish to foster and promote, then the appropriateness and potential consequences of these exchanges need to be evaluated and redefined through rigorous public and legal debate.

Appendix A: TOS Content Analysis Coding Protocol

CONTENT ANALYSIS CHECKLIST	A1	A2	A3	A4	A5	A6
Website Design						
Presence of TOS on homepage	Yes	No				
Presence of Privacy Policy on homepage	Yes	No				
Placement of TOS on homepage	Top of page	Side tool bar	Bottom of page – no scroll	Bottom of page - scroll	Embedded in text	
Placement of Privacy Policy on homepage	Top of page	Side tool bar	Bottom of page – no scroll	Bottom of page – scroll	Embedded in text	
Presence of TOS on subsequent pages	All other pages	All pages where info is collected	Some pages where info is collected	In a special “legal” section	Some other pages	No other pages
Presence of Privacy Policy on subsequent pages	All other pages	All pages where info is collected	Some pages where info is collected	In a special “legal” section	Some other pages	No other pages
Placement of TOS on subsequent pages	Top of page	Side tool bar	Bottom of page – no scroll	Bottom of page – scroll	Embedded in text	
Placement of Privacy Policy on subsequent pages	Top of page	Side tool bar	Bottom of page – no scroll	Bottom of page – scroll	Embedded in text	
Visibility of Privacy Policy - use of markers (different colour, size, font)	Colour	Size	Font	Other	None	
Visibility of TOS - use of markers (different colour, size, font)	Colour	Size	Font	Other	None	
Are players explicitly asked to read the TOS?	Yes	No				
Are players explicitly asked to read the Privacy Policy?	Yes	No				
Do you have to read the TOS to sign-up?	Yes	No				
Do you have to read the Privacy Policy to sign-up?	Yes	No				
Website Contents						
Does the site solicit personally identifiable information?	Yes	No				

Does the site include social software tools (chat, forums, etc.)?	Yes	No				
Does the site include interactive games?	Yes	No				
Does the site include interactive advergames?	Yes	No				
Does the site allow space or opportunities for creative submissions (poetry contests, writing contests)?	Yes	No				
Does the site allow players space for websites, user-created polls, reviews, etc.?	Yes	No				
Does the site grant players space for creating part of the game?	Yes	No				
Does the site include polls or surveys?	Yes	No				
Does the site include polls or surveys directly related to products/consumer goods?	Yes	No				
Does participation require membership?	Yes	No				
Is membership free or only available through paid subscription?	Yes	No				
Is membership restricted according to age?	Yes	No				
Is parental permission required for children under the age of 13 years?	Yes	No				
If yes, are steps made to confirm/secure parental permission for players under the age of 13?	Yes	No				
If yes, are parents required to read the TOS before granting permission for their child to participate?	Yes	No				
Format of TOS						
How long is the TOS in printed pages?	1-2 pages	2-5 pages	5-8 pages	8-12 pages	Over 12 pages	
How long does it take to read?						
What is the vocabulary level?	Easy	Moderate	Advanced			
Proportion of legal terminology	0-25%	25-50%	50-75%	75-100%		
Does the TOS contain child-friendly language?	Most of all	More than half	Less than half	None		

If not, is a separate, child-friendly version offered?	Yes	No				
If yes, how similar are the two versions (adult, child)	All the same items	Most of the same items	Some of the same items	None of the same items		
Content of TOS (Russo's 15 points)						
1) The parties identified in the agreement	Yes	No				
2) Negotiability of Terms	Yes	No				
3) Changes in Terms or Conditions	Yes	No				
4) Responsibility for notification of changes	Yes	No				
5) Linked Sites	Yes	No				
6) User Submissions - Who Owns?	Yes	No				
6a) What parts of user submissions are included?	Yes	No				
6b) What can the company do with them?	Yes	No				
7) Reproduction or redistribution of software	Yes	No				
7a) Reproduction or redistribution of contents	Yes	No				
8) Reliability	Yes	No				
9) Representation	Yes	No				
10) Liability	Yes	No				
11) Right to Terminate Users	Yes	No				
12) Legal Venue	Yes	No				
13) Consent to exclusivity of venue	Yes	No				
14) Nested Loophole - Unauthorized if local laws don't fully recognize the terms	Yes	No				
15) Indemnity	Yes	No				

Appendix B: Russo's "15 Significant Points" of EULAs

Russo's (2001) checklist of "15 significant points" to look for when analyzing End-User Licence Agreements (EULAs):

- 1) Are the parties identified in the agreement?
- 2) Negotiability of Terms
- 3) Changes in Terms or Conditions
- 4) Responsibility for notification of changes
- 5) Linked Sites
- 6) User Submissions - Who Owns?
 - 6a) What parts of user submissions are included?
 - 6b) What can the company do with them?
- 7) Reproduction or redistribution of software
 - 7a) Reproduction or redistribution of contents
- 8) Reliability
- 9) Representation
- 10) Liability
- 11) Right to Terminate Users
- 12) Legal Venue
- 13) Consent to exclusivity of venue
- 14) Nested Loophole - Unauthorized if local laws don't fully recognize the terms
- 15) Indemnity

Appendix C: Sites Selected for Analysis, Based on Ranking Among Children and Youth

<i>Game</i>	<i>Corporate Owner</i>	<i>Industry</i>	<i>Rank</i>	<i>Source</i>	<i>Date</i>	
Yahoo!Games	Yahoo!, Inc.	Internet search engine and portal, e-Commerce, Advertising and marketing	1	Nielsen/Netratings	08/2003	
- Yahoo! Fantasy Sports Baseball			3	Hitwise	07/2003	
- Yahoo! Fantasy Sports			7	Hitwise	07/2003	
- Yahoo! Fantasy Sports Football			8	Hitwise	07/2003	
EA Online	Electronic Arts, Inc.	Entertainment and games software	2	Hitwise	07/2003	
- Pogo			2	Nielsen/Netratings	08/2003	
MSN Game Zone	Microsoft Corp.	Computer software, e-Commerce	6	Hitwise	07/2003	
			3	Nielsen/Netratings	08/2003	
Kraft Entertainment	Kraft Foods, Inc. (Altria Group)	Food	6	Nielsen/Netratings	08/2003	
Neopets	Neopets, Inc.	Advertising and marketing, Licenced merchandise and apparel, Multi-media content provider	4	Hitwise	07/2003	
EverythingGirl	Mattel, Inc.		Toys and games, Licenced merchandise and apparel, Multi-media content provider	1	Nielsen/Netratings	09/2003
- Diva Starz				3	Nielsen/Netratings	09/2003
- Polly Pocket		4		Nielsen/Netratings	09/2003	
- Barbie						
Disney Online	The Walt Disney Company, Ltd. iVillage, Inc.	Media, Licenced merchandise and apparel	2	Nielsen/Netratings	09/2003	
- Toontown Online			5	Nielsen/Netratings	09/2003	
- DisneyChannel. gURL.com		Internet search engine and portal, Internet content provider	4	Nielsen/Netratings	07/2002	

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