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The Duty To 'Play': Ethics, EULAs and MMOs

ABSTRACT

In the last ten years, there has been a steady increase in the attention paid to Massively Multiplayer Online Role Play Games (MMOs) as a site of academic research. A number of large and influential academic studies have been undertaken in a range of disciplines inside MMOs such as *EverQuest* (Taylor, 2006), *Star Wars Galaxies* (Ducheneaut & Moore, 2004), *Lineage I and II* (Steinkeuhler, 2004) and *EverQuestIII* (Castronova et al, 2009). Generally, these studies require the researcher to be embedded in-world, participating as a player in the game. In this paper, we ask: what bounds on research, if any, are ostensibly set by the contractual terms of service of MMOs by which all participants are bound—in particular the duty to “play”; whether this has any problematic bearing on the practice of research; and, if so, whether there are solutions to these problems? This paper will consider the contractual terms used in the End User Licence Agreements (EULAs) of two MMOs, *EvE Online* and *City of Heroes*, in order to further explore the practical implications of those terms. This paper concludes that researchers need to consider whether their research is ethical, both in terms of formal compliance with Institutional Research Board (IRB) requirements and how it may impact upon or disrupt the player community. If it does have a disruptive impact, this may take the research not only outside the notion of ethical research, but also outside of the concept of “play” authorised by the EULA itself.

INTRODUCTION

Massively Multiplayer Online Role Play Games (MMOs) are attractive as laboratory or test-sites for a range of researchers, especially those in the social sciences (Bainbridge, 2010; Giles, 2007). This is because MMOs provide a rich platform for the observation of and potentially experimentation with human behaviour as a result of the vast spectrum of activities that occur within them. Further, this form of research can be appealing on the basis that it facilitates participation across a broad spectrum of actors without requiring the research team to leave the comfort of its own offices and can involve experiments and studies that would be physically or financially impossible in real space.

From the perspective of the researcher's interaction with an MMO, research can be seen to fall into one of three categories:

- *world-design view aka the 'petri-dish' approach* - where a virtual world is created or altered specifically for the purposes of the study, which is conducted from the outside (see Williams, 2010; Castronova, 2005; & Castronova, 2006);
- *avatar or in-world immersion view* - where the researcher is immersed as a participant avatar in the MMO; and
- *database-view/back-end analysis* - where researchers, with the co-operation and assistance of the game provider, can access and analyse data generated by player interactions and transactions, such as chat logs, transactional records, behaviour data, etc. (Castronova et al, 2009).

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There are distinct ethical issues in each of these forms of research (Grimes et al, 2009). In this paper, however, we focus only on the avatar or in-world view.

If we assume that the majority of the avatars under observation in an MMO are (or, at least, are the online/computer mediated embodiment of) people, it follows that in-game research is a form of ethnography/participant observation research (regardless of whether those “people” may have non-human attributes through the mediation of a particular type of software [Lindsay, de Zwart, & Collins, 2010]). Therefore, as people are the subjects of this research, human ethics approval will usually be required in order to for it to be undertaken. Therefore, as with all human research, in designing their research methodology and approach, researchers should ask themselves whether there are ethical dimensions to their activities within such environments and limits to their behaviour that might reasonably be applied.

In this paper, we suggest that, when considering using a particular MMO as a site of in-game research and the ethics of such a practice, the researcher and IRB should take into account an intersecting set of factors which are likely to provide boundaries on the range of research acts open to them in the context of that MMO. In part, such considerations would take into account factors such as fixed limitations and barriers established by the code of the MMO, i.e., the physics of the virtual environment (Bartle, 2006). This would encompass limitations coded into the MMO itself, for example, choosing an avatar in WoW from the Alliance would render communication with members of the Horde impossible (Bainbridge, 2010). In addition to coded laws, we suggest that three intersecting sets of normative forces should be considered. These are:

- The MMO contract being the Terms of Service (ToS) or End User License Agreement (EULA);
- Normative ethical considerations of community participation; and
- Established norms of research as interpreted by the relevant IRB (Institutional Research Board) or HREC (Human Research Ethics Committee).

That is, we reject the popular media view of MMOs—that they are spaces separate from the “real world” where no rules apply. MMOs are, in fact, the opposite of this. Every act within MMOs is normatively governed by a set of overlapping forces such as those noted above. Furthermore, behaviour within an MMO now stands in a long tradition such that any user might have a reasonable expectation of what is considered proper conduct (Reynolds [2007] argues that some of these traditions are sufficient to constitute moral norms).

Research Question

Given this background, we examine what ethical bounds to in-game MMO research might reasonably be said to be evident from the intersection of the three sets of normative forces outlined above (ToS, Normative Ethics, and IRB requirements). The particular consideration we give primacy to in this paper is the interplay between common contractual obligations and research practice.

More specifically, for the purposes of this paper, we consider the scenario where a researcher is using a COTS (commercial off the shelf) MMO through a game account purchased via standard methods and used, at least in part, for research. Critically, this means that the researcher has signed up to the prevailing ToS and

is contractually bound to them through their agreement (click wrap) and consideration (fee). By way of concrete examples, we will focus upon a close examination of two virtual worlds: *City of Heroes* and *EvE Online*. These worlds have been chosen because they each involve role-play, although requiring different levels of customisation, and they have both generated academic interest due to the activities that occur in-world. Further, both worlds include a specific contractual obligation that users of the MMO should “play”—this is common to most MMOs and, as we will demonstrate, is key to the considerations at hand.

This paper will also consider research in the context of the application of institutional human research ethics guidelines to research conducted in online virtual worlds, in particular the research ethics approval processes and protocols that are used in Australia and the UK (as these are the most familiar to the authors). These general principles will also apply to other jurisdictions, such as the IRB process in the U.S.

As we will show, this context leads to the question of whether human research may legally (contractually) be conducted inside virtual worlds or whether the conduct of research is in breach of the ToS by virtue of breaching the contractual obligation to play.

IN-GAME RESEARCH

There are certain forms of research and certain research questions where it is generally agreed the only valid and effective way to conduct research is to be immersed in the community that is the focus (or locus) of the study. This is necessary due to the fact that you simply cannot be a mere observer in such worlds and must participate through the creation of an avatar (McKee & Porter, 2009; Boellstorff, 2010). Therefore, a significant number of studies that have been undertaken in virtual worlds have been ethnographic in nature (see, for example, Nick Yee’s *Daedalus*¹ and the work of Tom Boellstorff [2008]). Most MMOs require a defined level of skill before certain areas, events, abilities, and attributes are open to you. But further than this, researchers also report a certain level of skepticism from virtual world participants about the bona fides of the researcher, which must be overcome in order to elicit survey responses. See, for example, Williams, Kennedy, and Moore (2010), who note, with respect to their study of role playing in *EverQuestII*, the importance of the researcher attaining significant in-world skills in order to overcome player resistance to outsiders:

Recruiting individuals to participate in the study was a challenge only overcome by attaining insider status. Legitimacy was an issue, as calls for participation were posted to channels; here we were not only competing for attention with the ongoing conversations, but also chat-channel spam. One participant asked outright if the research was legitimate and not spam or pornography when given the link to the online consent form. Participants also “tested” the interviewer to see if it was a real person with true research motivations. There was much more success in recruitment and participation when the interviewer had established an “insider” status within the community, and participants suggested others who might be interested in an interview.’ (Williams, Kennedy, & Moore, 2010, pp. 17-18)

¹ <http://www.nickyee.com/daedalus/> accessed 28 March 2010.

These practices put the researchers in a particular relationship with the MMO and other users of it, given the researchers' dual role as observers and participants. Williams, Kennedy, and Moore (2010) noted in their study that the knowledge that they were observing and collecting data rather than engaging with the game for social or relaxation purposes, in and of itself, automatically meant that they were not engaged in the same experience as the other players: "Observing, detailing, describing and interacting with the EQII world provided valuable knowledge. However, the awareness gained from the process of becoming insiders still situated the experience and knowledge from our standpoint as researchers, rather than the standpoint of the players" (p. 16).

In this case, Williams, Kennedy, and Moore (2010) had the support and co-operation of Sony Online Entertainment with their project. They were able to access the Sony databases, administer a large-scale survey and even to offer a customized virtual item as a reward for participation in the survey. (The research was conducted pursuant to approval from the relevant IRB, completion of online consent forms, and anonymisation of data). However, as we will see, the stance of the researchers in other cases may have broader implications for the viability of the research they wish to pursue.

RESEARCH ETHICS: INSTITUTIONAL REQUIREMENTS

As introduced above, one of the three key sets of factors that researchers need to take into account when considering in-game research are the institutional ethics clearance processes that must be followed in order to conduct the research. Here, we outline the general nature of IRB considerations as applied to human subject research.

In Australia, UK, and the U.S., university staff and students who want to undertake research involving human subjects are required by the rules of their institution and/or the relevant funding body to obtain ethics approval. Human research includes the collection of data from human subjects via interview, survey, or observation and the collection of information from databases. Therefore, research in virtual worlds that involves observation of or interaction with avatars is human research.

The Australian Code for the Responsible Conduct of Research (NHMRC, 2007a) provides research institutions with a guide to good practice in research practices. Compliance with the Code is a prerequisite for the receipt of National Health and Medical Research Council and Australian Research Council grants (the major sources of research funding in Australia). It is anticipated that institutions will develop their own practice and procedure of good research governance on the basis of the Code. Therefore, the principles outlined in the Code should be reflected in the research policy and procedures of all research institutes in Australia.

The Code stresses that a strong research culture will demonstrate:

- Honesty and integrity;
- Respect for human participants, animals, and the environment;
- Good stewardship of public resources used to conduct research;

- Appropriate acknowledgement of the role of others in research; and
- Responsible communication of results.

It is envisaged that researchers must design and conduct their project in accordance with the Code and the relevant institutional guidelines and obtain approval from their institutional ethics approval board. This involves describing how the project will be undertaken, identifying any risks that are foreseen with the conduct of the research, how it is proposed these risks may be avoided or minimized and how the results of the research may be published. Institutions must ensure that there is adequate training and support of research staff and ensure that the ethics procedures are followed and regularly monitored. Researchers are required to report any difficulties back to the ethics committee and provide them with copies of approval letters and consent forms. Thus, ethics compliance is an ongoing process, extending well beyond project design and ethics application approval, to the ongoing conduct of the project.

IRB's and MMOs

Looking briefly at how these considerations might apply to an MMO we need to be cognizant of fact that MMOs are multi-player games. Thus, being an active participant in an MMO is likely to lead a researcher into a situation of competition with other actors. In the case of the Player-vs-Player (PvP) elements of an MMO (a common aspect of MMOs) the researcher may be seeking to “kill” other players or be “killed” by them.

Relevantly the Code states that: “Researchers must foster and maintain a research environment of intellectual honesty and integrity, and scholarly and scientific rigour. Researchers must:

- respect the truth and the rights of those affected by their research;
- manage conflicts of interest so that ambition and personal advantage do not compromise ethical or scholarly considerations;
- adopt methods appropriate for achieving the aims of each research proposal; and
- follow proper practices for safety and security” (NHMRC, 2007a).

Further, the Code stresses that: “Researchers should conduct their research so as to minimise adverse effects on the wider community and the environment” (NHMRC, 2007a).

Other documents elaborate upon the ethical problems identified in the Code. For example, the National Statement on Ethical Conduct in Human Research (NHMRC, 2007b), which sets out guiding principles regarding various aspects of research, states that, researchers should consider the potential of “social harms,” which it states include: “damage to social networks or relationships with others.”

Generally, researchers are required to obtain “informed consent” from the human subjects of their research. This means that researchers must identify their subjects in advance and explain to them the nature of the research being conducted, any risks that may be involved, and what to do in the event the subject becomes distressed or otherwise adversely affected, and gaining their consent to participate in the project.

Recalling that MMO is short hand for Massively Multiplayer Online Role Play Game, we must also note that in-game research may also necessitate some degree of role-play. The guidelines do contemplate situations where there may be a need for limited disclosure to participants and even deception, and this explicitly includes situations of role-play. But we feel that there is a significant gap in the understanding that most ethics committees would have about what this actually means for members of virtual worlds.

A researcher may wish to interact with an MMO in a way that is actively disruptive, that is through cheating or griefing—this may give rise to the issue of disconnect between the researcher’s interests and the interests of the broader MMO community. The Code describes a “conflict of interest” as follows:

A conflict of interest exists where there is a divergence between the individual interests of a person and their professional responsibilities such that an independent observer might reasonably conclude that the professional actions of that person are unduly influenced by their own interests.

IRB’s and MMOs: Initial Issues

This brief view of the intersection of IRBs, potential research practices, and MMOs immediately gives rise to a number of issues, including:

- Has the researcher disclosed the fact that he or she is engaged in research and is observing/interacting with other players for the purposes of gathering research data?
- Is there a conflict of interest between the researcher’s research activity and the object of the game/interests of other players?
- How does the research project impact upon the community and general game play?
- Is there any benefit/risk to the MMO community from the research?
- How can researchers comply with the requirement of their institution’s ethics committee, when there are requirements for signatures, consent forms, disclosures, and identification?
- Is the research project permitted under the Terms of Service?
- Is research game play?

There is also the question of how these issues can be dealt with in a role-play situation where a researcher wants to maintain a particular style of play?

To give this a little more context—consider, for example, an economist who is buying up the total supply of a particular commodity in WoW in order to examine how that will affect the price of that commodity elsewhere? Here, it is almost inevitable that the conflict of interest cannot be overcome during the course of the study. Further, there are issues of ethical obligations towards other players as individuals and the community as a whole (Reid, 1996; Fairfield, 2009).

Consent

Thus it appears that even the most simple MMO-immersed research project involves multiple levels of consent. In order to enter the MMO, the player/researcher must consent to the ToS, which imposes a duty to play and a range of other specific obligations. These obligations are owed to and enforceable only by the MMO provider. Upon participating in and interacting with the MMO environment, the player/researcher then

enters into a relationship of mutual consent with the other players, establishing a loose relationship of community norms and expectations (subject to griefers, who represent the “deviant” element of that society) (Smith, 2010). This scenario aptly recalls William Gibson’s original description of “cyberspace” as a “consensual hallucination experienced daily by billions of legitimate operators, in every nation” (Gibson, 1984) and reflects the player/researcher’s consent to participate in the game world according to broad community norms. This consent is not legally enforceable by the members of the MMO, but can lead to player censure, exclusion, or harassment. However, consent to participate in an MMO cannot equate to consent to being observed or experimented upon.

Finally, then, some explicit form of consent is required to becoming a subject of the research project being conducted in-world.

The simplest way to collect consent is to declare oneself as a researcher by some explicit act, such as a character name including the word “researcher” or the name of the relevant research project or institute. Further information may be included in the researcher’s player profile, which can be viewed by other players, clearly declaring the researcher’s intentions regarding in-world participation and observation. However, of course, consent requires more than disclosure of the researcher’s status; it requires an acknowledgement from the subject of the research.

In obtaining such an acknowledgement of consent from participants to involvement in an in-world research project, the authors have been compelled to take screenshots of avatar interaction and to prepare records of chat or IM in order to provide sufficient proof of consent to their IRB, in the absence of being able to obtain signed letters of consent. Clearly such artificial conduct breaks game play (and particularly role-play) norms and can only be effected where covert observation is not required. However, most IRB-approved research would require such a level of consent.

WHAT DOES THE CONTRACT SAY?

Having examined how an IRB may view in-game MMO research, we now turn to what the MMO contract might say about the limits of research practice. Here, we recall that the situation we wish to consider is that where a researcher is using a COTS-based MMO.

All commercial MMOs that we are aware of require the user to agree to a set of terms and conditions each and every time they wish to use the MMO client software to access the game world. Typically, these terms and conditions provide that you are licensed to use the client software and the game content only whilst you are in compliance with the End User License Agreement (EULA) and/or Terms of Service (ToS) and whatever related documents the particular contract names—this might include documents such as a good conduct guide, game rules, etc.

Much of the ToS of a typical MMO will be familiar to anyone with a passing knowledge of software licenses. However, as noted above, what is particular about MMOs is that they are games, and, as we will demonstrate below, this is not a mere fact of the matter; it also finds its way into specific obligations in the ToS. We suggest that above all of the clauses in a typical ToS, these clauses require examination to understand what relevance they do or do not have for the practice of research. Further, we suggest that the meaning of a clause that obligates play is not as immediately transparent as most elements of a typical software license. We also note that the game clauses are not alone in being potentially problematic to researchers.

To illustrate this, we shall examine two examples of typical MMO contracts. Our examples come from *EvE Online* (EvE) published by CCP (Crowd Control Productions) based in Iceland, and *City of Heroes* (CoH) published by NCSOFT based in South Korea (with regional offices in a number of countries including the U.S. and UK).

EvE Online

EvE Online is a space-themed MMO. EvE is considered by many to be the most complex of any MMO, indeed, possibly the most complex single game ever invented. EvE has a richly intricate economy, and CCP employ a full-time economist to oversee some of the underlying game structures. The game play in EvE is predominated by PvP on a grand scale where thousands of players are engaged in on-going wars, alliances, and espionage. Turning to the contract, CCP's EvE Online EULA provides:

EvE is a multiplayer role playing game that allows the participation of thousands of players around the world, interacting in the same game environment.²

The EULA grants the user a license to "play" EvE in the following terms:

Subject to the terms of the EULA, CCP grants you a limited, non-exclusive, revocable license to use the Software and its accompanying documentation solely in connection with accessing the System in order to play EvE using a single valid Account.

In several places throughout the EULA, the terms make reference to the fact that the license is granted for the purposes of "playing the Game" and to "play EvE online." A player's "continued access to the System and license to play the Game is subject to proper conduct." Users are not permitted to intercept any information accessible through the System "for any purpose other than playing EvE in accordance with the EULA." Any breach of the EULA (including the Rules of Conduct) may result in immediate suspension of the Account and material breach of the EULA, unauthorised use of the System or Software or any game play, chat, or activity that is in violation of the Rules of Conduct can result in account termination.

Further, the EULA states:

² EvE Online End User Licence Agreement, Updated 19 January 2008, Accessed: 25 February 2010, <http://www.eveonline.com/pnp/eula.asp>.

Accounts may not be used for business purposes. Access to the System and playing EVE is intended for your personal entertainment, enjoyment and recreation, and not for corporate, business, commercial or income-seeking activities. Business entities and anyone who is acting for or on behalf of a business or for business purposes may not establish an Account, access the System or play EVE. Accessing the System or using the Game for commercial, business or income-seeking purposes is strictly prohibited.

This raises an interesting commercial/data question that we will return to below.

City of Heroes

City of Heroes is an MMO based in the world of superheroes. In many respects, it is a somewhat typical MMO in that it is based on a relatively standard quest/character-level model that can be found in games such as EverQuest, World of Warcraft, etc.

Despite the difference in genre and, to a degree, play style, similar contractual conditions apply in City of Heroes as in EVE—indeed, this is illustrative of a general point that most MMO terms and conditions have almost identical provisions. The NCsoft City of Heroes User Agreement, provides: “The Game” means the City of Heroes and/or City of Villains software, including, but not limited to, all and any items accompanying the software itself, such as user manuals and serial codes. The Terms of Agreement then grant the Customer a license to play the Game:

Terms of Agreement. The Publisher offers to allow the Customer to play its Game conditional upon his agreement to all of the terms and conditions contained in this Agreement and his compliance with the Specific agreements [...] ³

The CoH User Agreement further provides:

6. CONTENT AND CUSTOMER CONDUCT

[...]

(b) Rights in Content. The Customer acknowledges that the Publisher and its related providers of Game Content ("Game Content Providers") have rights in their respective Game Content under copyright and other applicable laws, and that he accepts full responsibility and liability for his use of any Game Content in violation of any such rights. The Publisher and its related Game Content Providers grant to Customers the right to use the Game Content for non-commercial, personal purposes, including in connection with creating non-commercial fan fiction or fan web sites regarding the same. However, the Customer acknowledges and agrees that he shall not reproduce, prepare derivative works based upon, distribute, publicly perform, or transmit any Game Content for commercial uses without first obtaining the express written consent of the Publisher.

³ City of Heroes User Agreement, Last Modified February 2006, Accessed: 25 February 2010, <http://eu.ncsoft.com/en-gb/legal/user-agreements/city-of-heroes-user-agreement.html>.

The participant issue

Looking at these clauses in the light of the Ethics Code above (NHMRC, 2007a), one issue that is immediately apparent is the potential contradiction between an IRB's typical requirement to identify a subject's details and clauses such as City of Heroes Rules of Conduct, which state:

2. You may not post or communicate any player's real world information (name, address, account name, etc.) through the City of Heroes game or on the official City of Heroes website.⁴

This has an impact on human subject research in terms of obtaining specific and accurate data regarding research subjects. It also raises an issue of how consent may validly be obtained from such research participants. Is consent from an avatar, using the avatar's name, sufficient in this context? Certainly, this term prohibits the researcher from matching in-world to real world identity, seemingly even where the player consents to this.

8. You may not market, promote, advertise, or solicit within the City of Heroes game or on the official City of Heroes website.

This rule may prevent recruitment of people for studies in-game, and possibly for play that is for a study.

The personal use issue

Whilst it is arguable that research is not "business" in the sense that the researcher is not directly making any money from the in-world project, it is generally the case that academic research is conducted pursuant to an employment contract. Thus to some degree any researcher using an MMO even if they are "playing," is being paid to play. The same would apply to any research assistants paid to use the MMO. Hence, it seems that there is a prima facie case to suggest that the relationship between a researcher using an MMO for in-game research and these contractual clauses in both the EvE and CoH that restrict the use of the software to "personal" use is at best ambiguous.

Moreover, while use of data for research is "non-commercial," it is also not "personal." Hence, this clause seems to rule out the use of game content in research results. There might also be the issue of rights of others in their content—does a researcher need to agree to a license with players to use or reproduce elements of content or game play? For such an agreement not to be in breach, this would also have to be a non-commercial agreement. Further, researchers often use small financial rewards to encourage participants to complete surveys. This also appears to breach the CoH rules of conduct. Generally, such incentives are overlooked by game providers on the basis that they are small-scale rewards, and are not provided by commercial entities, but rather by universities, schools, and colleges. Ethics boards also need to approve the use of incentives and rewards.

⁴ <http://eu.ncsoft.com/en-gb/legal/user-agreements/city-of-heroes-rules-of-conduct.html>, Last Modified September 2004, Accessed: 25 Feb 2010

The game issue

Lastly, we note that both agreements stress that the MMO is to be used for “play.” This provision seems central to the agreement as evidenced by the fact that, in the cases we cite, it is part of the opening contractual statement that defines the very nature of what it is the user has a license for (i.e., a game), and what purpose is intended (i.e., “play”).

This seems to mean that, in order to access the virtual world, the researcher must be primarily involved in “play” and if what they are doing is not “play” that they may have their account terminated, thus removing their capacity to conduct the research project. This raises fundamental question such as—is research play? And, more generally, what does a contractual obligation to play mean?

HOW THEN DO WE ASSESS WHAT IS MEANT BY A CONTRACTUAL OBLIGATION TO PLAY?

The two examples given above (EvE and CoH) have explicit contractual statements that appear to bind the user of the MMO to agree to use it to “play.” This brings us to the central question of this paper—what is the meaning of such an obligation in the context at hand?

While virtual worlds are 30 years old, few cases involving them have made it to court (and even fewer to final hearing and judgment) in the UK, EU, U.S., or Australia. An increasing number of cases are being decided, and relevant legislation is being generated in Asia—in particular, South Korea and China. Thus we have both a relatively small number of judgments and legislation specifically on virtual worlds on which to base a view of the contractual meaning of play, moreover the examples we do have are from a mix of jurisdictions and legal traditions. Having said that, as we will demonstrate, one can discern a number of schools of legal thought in respect of virtual worlds and play.

Our focus here is the contractual obligation to “play,” which, in respect of the legal duty, is not necessarily tied to the medium in which the play is occurring. This means we may have a rich source of cases relating to forms of play, in particular from sport law, from which we might draw upon to illuminate what our MMO contract means.

Thus our task seems to be to determine whether there is compelling legal logic that characterizes contractual provisions relating to an obligation to “play”; then discern whether such logic can be reasonably applied in the case of an MMO; and, lastly, what this tells us about a researcher’s legal duty in the particular scenarios we are examining here. As an ancillary issue, we need to make some suggestion as to what is meant by “play” in the circumstances under consideration. For the avoidance of doubt, our effort herein is to establish a reasonable interpretation of contractual provisions that researchers and IRBs should be aware of. It is not our intention to establish a strong argument for the exact contractual meaning of “play” within any given jurisdiction.

Turning first to sports law, there is a large body of case law from around the world that deal, in one way or another, with the boundary of what acts are and are not within the scope of the sport. These cases typically deal with violent conduct, and the question at hand tends to be whether the violence was or was not part of play.

Do courts recognize the concept of play?

One of the cases most often cited in this field is the Canadian Ice Hockey case of *Regina v Cey* 48 C.C.C. (3d) 480 (Sask. CA., 1989). The tests outlined by Gerwing in that case are often used to determine whether an act can be considered to be within the scope of play (and, in this case, like many others involving violence, whether the act is within the scope of what one might reasonably consent to—which implicitly is bound into the notion of play):

32 The conditions under which the game in question is played, the nature of the act which forms the subject matter of the charge, the extent of the force employed, the degree of risk of injury, and the probabilities of serious harm are, of course, all matters of fact to be determined with reference to the whole of the circumstances. In large part, they form the ingredients which ought to be looked to in determining whether in all of the circumstances the ambit of the consent at issue in any given case was exceeded.

For our purposes, the key part of this is Gerwing's first assertion that to know what it is to be playing you look at the "conditions under which the game in question is played." That is, to know what play is, you look at the practice at hand. While this is self-referential, it is usefully self-referential. What is interesting is that Gerwing also notes that, in the case under consideration, practice is more important than rules:

24 It is clear that in agreeing to play the game a hockey player consents to some forms of intentional bodily contact and to the risk of injury therefrom. Those forms sanctioned by the rules are the clearest example. Other forms, denounced by the rules but falling within the accepted standards by which the game is played, may also come within the scope of the consent.

In summary, *Cey* tells us that courts recognize the concept of play and have given it legal status—moreover, they interpret it not merely as what is set out by rules but what is accepted as custom and practice by those actually playing the game.

Do courts recognize a contractual link to the act of play?

In the UK Case concerning rugby, *Gravil v Carroll* and another Court of Appeal, 18 June 2008; [2008] EWCA Civ 689 [2008] I.C.R. 1222, the question before the court was whether a Rugby Club was vicariously liable for a tort – specifically, one player being punched by another, by virtue of the person committing the tort being employed by the club to "play the game of rugby." For our purposes, this case raises two questions: First, whether you can be under contract to "play"; Second, what the boundary of that contract is. Sir Anthony Clarke MR, delivering the judgment of the Court, stated:

23 There was in our opinion a very close connection between the punch and the first defendant's employment. He was employed to play rugby for the club and was doing so at the time as a second row forward. As we said in para 4 above, when he punched the claimant there was still a melée of the kind

which frequently occurs during rugby matches, notwithstanding the fact that the whistle has gone. The DVD shows that the melée was part of the game. It was certainly not in any way independent of it. The melée was just the kind of thing that both clubs would have expected to occur. Regrettably the throwing of punches is not uncommon in situations like this, when the scrum is breaking up after the whistle has gone. Indeed, they can fairly be regarded as an ordinary (though undesirable) incident of a rugby match. In these circumstances there was in our opinion a close, indeed a very close, connection between the first defendant's employment as a second row forward and his punching and injuring the claimant as a prop on the other side.

24 That closeness can be seen both from the facts just described and from the terms of the contract. The contract provides in clause 3 of the schedule for the player to abide by the rules of the game and expressly contemplates in clause 3.2 of the contract itself that he may receive a yellow or red card. The schedule provides in clause 3 that the player must not bring the game into disrepute and in clause 3.1.1 that he must not physically assault an opponent. The punch was thus a breach of an express term of the contract. The first defendant was also in breach of clauses 3.1.2 and 3.2.2. By the express terms of clause 6.4 of the schedule, the contract expressly contemplates that the club may be vicariously liable for the acts of the player during the employment. That can only be on the basis that the act might be committed in the course of the employment, that is while playing rugby for the club.

Our first question "can you be contracted to play?" is trivial – the entire world of professional sport is predicated upon a contract to play and, this case, confirms that such a contract has force with respect to the expected bounds of acts and, in particular, the interface with tort and criminal law. Furthermore, this case confirms the view of Cey, above, that the Court considers play to be not only what is defined by the rules, but what custom and practice lead us to expect. Moreover, this case makes it clear that the Court considers the contract to "play" to encompass the full range of such custom and practice.

To put this another way—both cases suggest that the law considers "play" to be both what the express rules define play as and the scope of things that the rules would suggest are variously not-play (outside of the rules) and cheating (contrary to the rules), but that practice would lead us to reasonably expect to occur.

That's OK for sport, but does this apply to MMOs?

The few relevant cases that have arisen in respect of MMOs have tended to settle out of court. One of the few that has received any form of full court hearing and judgment is the U.S. case (heard in the District Court of Arizona) of MDY Industries, LLC vs Blizzard Entertainment, Inc. and Vivendi Games, Inc.⁵ This case concerned the use of a third party piece of software to play the game of World of Warcraft on behalf of the player. While much of the case turned on the nature of copyright, elements of the judgment explicitly examined the relationship between the EULA and player action (at 9):

The provisions of section 4 thus make clear that although users are licensed to play WoW and to use the game client software while playing, they are not licensed to exercise other rights belonging exclusively to Blizzard as the copyright holder – copying, distributing, or modifying the work. The provisions are limits on the scope of the license granted by Blizzard.

Section 5 of the TOU is different. It is titled "Rules of Conduct." Id. at 4. The subsections of section 5 are titled "Rules Related to Usernames and Guild Designations" (§ 5(A)), "Rules Related to 'Chat' and

⁵ No. 06-2555, 2008 U.S. Dist. LEXIS 53988, 2008 WL 2757357 (D. Ariz. Jul. 14, 2008).

Interaction With Other Users” (§ 5(B)), and “Rules Related to Game Play” (§ 5(C)). Section 5 thus sets rules for the game, whereas section 4 establishes limits more clearly designed to preserve Blizzard’s copyright interests. The section 5 rules also regulate relatively minor matters such as the use of celebrity names (§ 5(A)(4)) or offensive language (§ 5(A)(2)) for WoW characters. Section 5 establishes game rules by contract.

Here we have a case in a U.S. court that makes a direct link between the contract that a user has with an MMO provider and in-game acts. Moreover the case makes explicit link to the EULA and ToS. The MDY case, however, turns on a specific clause in the Blizzard EULA, one that notes that the use of “bots” (that is, automated programs) is outside what is considered play.

In South Korea, the legal system has more developed approach to online video games, as these are a more embedded part of the culture. The Korean approach to online games, including MMOs, can be seen as akin to the legal views of sport that we established above.

In January of 2010, the Supreme Court of South Korea acquitted two players of the MMO *Lineage* of significant fines imposed by lower courts, effectively holding that it was not a criminal act to convert currency created in an on-line game to hard currency. This conclusion appears to apply provided that: the game in question is one of skill rather than luck and the currency was gained through “normal play” rather than “abnormal play,” such as through the use of bots, hacking, or purchased through gold farming sweat shops (Choe & Lee, 2010).

The defendants in this case, Kim and Lee, played NCsoft’s *Lineage*, which uses in-game currency known as “Aden.” They purchased Aden, worth 234 million won (US\$207,558), from unauthorised web traders (as is typically the case in MMOs, this was in breach of the ToS). Kim and Lee then sold this in-world currency to other players for hard currency, making a profit of approximately 20 million won. A lower court found these acts to be against Korean criminal law and fined the defendants Kim and Lee five million and three million won, respectively, in a summary trial in March 2008. These penalties were reduced at a full trial and, in July 2009, the decision was overturned, with this appeal decision being upheld by the Supreme Court.

The focus of the debate between the lower and appeal courts was whether *Lineage* was game of skill or gambling. The original court found the defendants guilty as it interpreted *Lineage* as a game of luck. The appellate found that *Lineage* involves NPC combat as well as PVP and P2P trading—the latter two both can earn in-game currency and require effort and skill. Further, the Court said that “constant efforts to get as much Aden as possible can also be regarded as a game that requires much time and effort” (Choe & Lee, 2010). Hence the laws applying to games of chance do not apply.

This ruling provides a set of bounds on “play” that suggests that, whilst “play” can extend beyond the strict realm of the game software to web sites and ancillary forums, “play” does not involve bots, hacking, or sweatshops.

What this case demonstrates is the traditional legal logic that has applied to sport can apply to MMOs. That is, users that agree to play are held within certain bounds and that these are determined in part by the

written rules of the game, but, where there is a boundary case, a court will look to custom and practice as well as those rules. Thus in the Korean judgment above, the court looked to the rules of the game and the general notion of online play to determine what acts constituted play. But, crucially, the court looks beyond the EULA, which banned so-called real money trading and judged that the defendants' conduct was acceptable just so long as the in-game money was generated through "normal" play.

IS RESEARCH 'PLAY'?

We are now in a position to bring together a contractually-based and IRB Code-based view of what constitutes acceptable MMO research practices and reflect on these from a traditional position of normative ethics. This we can do by examining some of the issues and boundary cases that have been highlighted by our analysis.

IRB and Contract

We assume that, where a research practice would clearly breach an MMO contract, an IRB would prohibit such a practice. Where it is arguable whether a practice is or is not breach of the MMO terms, we suggest that IRB's encourage researchers to enter into a dialog with the MMO provider.

Paid to Play

As we have noted above, researchers are typically paid and thus in-game research may be part of their employment, hence they are being paid to use the game software. This raises the question of whether, in virtue of this fact alone, a researcher is in breach of an MMO contract.

From a game theoretical perspective, we reflect on the analysis provided by Juul (2003). Drawing upon the earlier work on ludology, Juul (2003) provides a description of the "classic game model, a list of six features that are necessary and sufficient for something to be a game." Importantly for our purposes, Juul (2003) considers that games are activities which may have "negotiable consequences," meaning that, although a game may involve money-making for one player, that purpose or outcome does not mean that the game ceases to be a game for the players that are not involved in money-making. Thus a game may be assigned real-life consequences for some players (such as researchers or for those reaping the benefits of real money trade). In particular, Juul (2003) addresses the argument made by Roger Caillois that a professional athlete is working rather than playing (Caillois, 1958). Juul (2003) states that this argument would render all games/events, which include a professional athlete as no longer a game, despite the potentially large number of amateur participants. Juul (2003) states: "A better description is to say that even professional players are *playing a game*, but in this specific *game session*, the consequences have been negotiated to be financial and career-determining" (Part 6). And to this we might add: provided that their conduct remains within the rules of the game.

Hence we conclude that a researcher is not in breach of an obligation to play merely by virtue of his or her being paid to play an MMO. However, we note that some MMO contracts add further provisions to the play clause, such as the EvE Online's "entertainment, enjoyment, and recreation" proviso. In this case, it might be argued that the research is in breach of contract, and we note our earlier submission that, in such cases, researchers should enter into a dialog with the MMO publisher.

Custom, Practice, and Intentionality

Our examination of cases above leads us to conclude that there are two critical elements in an examination of whether an act would be considered to be part of play or not; these are: custom and practice and intent. On this latter point—we are discriminating between acts of research practice where the researcher has "ludic intent," i.e., he or she has a genuine intent to play the game, and the opposing case where he or she is using the game merely to practice research. Moreover, we assume, for the purposes of setting up a logical schema, that the ostensible acts in both cases of intent are identical.

Thus we can examine four distinct scenarios of research practice; that is, where the research practice is:

- Within Custom and Practice of the MMO and has ludic intent
- Within Custom and Practice of the MMO and does not have ludic intent
- Outside Custom and Practice of the MMO and has ludic intent
- Outside Custom and Practice of the MMO and does not have ludic intent

Within Custom and Practice of the MMO and has ludic intent

Research practices that fall in this category will typically be both within IRB Guidelines and the MMO contract (noting the Paid to Play issue above).

Within Custom and Practice of the MMO and does not have ludic intent

The approach adopted here would depend upon whether a project requires the researcher to act covertly or whether it permits the researcher to flag him or herself as a researcher. This second approach is the one most frequently adopted by researchers as outlined above. However, where outing oneself as a researcher may distort the research results, the researcher must present him or herself as a "player," even if ludic intent is absent.

We would argue that this is a case of deception (in the literal rather than normative sense). Ethical research does contemplate the need in certain limited circumstances to conduct covert research (Israel and Hay 2006, NHMRC 2007 Ch 2.3). Therefore it must be concluded that institutional IRB ethical requirements accept a limited legitimate place for role-playing, deception, and non-disclosure. This would extend to situations only where lack of consent is a necessary part of the research design and where participation in the research will not cause harm to those (unknowing) participants. Researchers should be aware of and disclose the possible impact of this research on the game community (Reid, 1996). Approval of such research would involve the weighing of the risks and benefits of the research and would likely only be approved if some

overall benefit beyond the completion of the research could be pointed to. Even well-meaning in-world research has led to unwanted consequences, such as directing focus upon marginal groups or burdensome requests to observe and participate in the community, therefore making it difficult to argue that the community benefits from the research in those circumstances (Reid, 1996).

The contractual case is arguable. From a theoretical perspective, a researcher may cite Juul (2003) to argue that research is akin to professional sports thus within an accepted notion of play. However, it is certainly possible that an MMO community or publisher might take a different view and may see the game as being “used” in a projective sense. We would thus conclude that, again, it is advisable to enter into a dialog with the MMO publisher in such cases.

Outside Custom and Practice of the MMO and has ludic intent

This is a difficult scenario that may prove difficult to determine from both a contractual and IRB perspective, as it turns on identifying the boundary of custom and practice. Here, it is key that we note that our example cases showed us that not only are custom and practice not bounded by the written rules but that they include acts outside of those rules, but within expected bounds. Moreover, as Fairfield (2008) reminds us, the ToS do not encapsulate a complete articulation of the social norms of a community, as they articulate only the relationship between the platform provider and each of the participants; they do not form a contract between each of the players.

Using Salen and Zimmerman’s (2004) typology of “Five Player Types,” we would suggest that practices of this type might be typified as “cheating,” because, while being outside the rules, they are done with ludic intent. Thus a determination of whether such practices were either breach of contract or breach of IRB Code is likely to turn on the very same question of the precise nature of the acts and the circumstances of the particular game context of the act.

The difficulty in interpretation will be the question of whether conduct *does* fall outside the rules of the game and the complexity involved in drawing a bright line is illustrated by the range of cases involving amateur sports and whether rough play of varying degrees is outside the rules. (See, for example, *Kerr v Willis* [2009] EWCA Civ 1248 which considered liability for injury in a five-a-side football game played according to “local rules” in a sports hall. The plaintiff was severely injured when pushed into the wall as a consequence of a tackle. The question for the Court was, in part, was the tackle a “foul”? This was difficult to determine given the context-specific nature of the rules, which had been devised amongst the players, and the fact that the pitch layout was unmarked.). Therefore, from the perspective of legal interpretation for any given game, this may result in a very narrow or very broad set of options, as they will be based on the expectations of a given community.

Outside Custom and Practice of the MMO and does not have ludic intent

This last case is what Salen and Zimmerman (2004) would categorize as a “Spoil Sport”; that is, the acts are both outside the game rules and practice and are not being conducted to further the actor’s play. This is a

problematic case, as, while the acts turn on a similar determination to the “cheating” examined above, they have they added issue of a lack of engagement.

In this case, we would urge researchers and IRBs to examine closely the ethical nature of such research practices and certainly enter into a dialog with the MMO publisher and possibly the broader MMO community.

CONCLUSION

What the above analysis suggests is that the question regarding whether research conducted within an MMO is in breach of the ToS depends upon both the intent and the conduct of the researcher and whether they both fall within the concept of “play.” The mere presence of money-making or a purpose having an impact outside of the game will not necessarily be sufficient to destroy the notion of play. However, it is clear that activities that are in breach of the rules of the game and have no ludic intention are logically outside the notion of play.

The contractual duty to play found in the language of two contracts we noted above, which is common in many MMO contracts, puts a limit of action on researchers that they must use the software to “play.” Moreover, we have shown that there is good case evidence that a court would interpret this as being acts that fall within the custom and practice of a given game, and that, at the limits of those acts, factors such as intentionality will apply.

It seems reasonable to suggest that the practice of academic research is not an accepted part of MMO play, hence it would appear that, as a consequence of the contractual requirement to play, a range of research practices, such as in-game recruitment of subjects and openly self-defined play for research, may be caught between IRB/human research ethics good practice and contract law, thus leaving the researcher in breach of contract and vulnerable to being excluded from the MMO. Further, it would also seem reasonable to suggest that a good deal of these research practices are, in no-way, unethical in any generally accepted sense.

Research that would not be acceptable under any interpretation of above cases is research, which is clearly in breach of the ToS and generally accepted community norms. Such research would require the permission of the game provider and, most likely, the participants in or subjects of the research (i.e., informed consent). If deception or concealment is a necessary part of the research, this should be noted in the application to the IRB or HREC and processes put in place to inform participants (insofar as is possible with an ever-changing group) after the research has been completed. Thus simply labeling something as “research” will not be sufficient to bring it within the ToS.

How do we get around this? We propose that MMO publishers are urged to include within their EULA a provision that allows for academic research if approved by an IRB. However, as the ToS is a contract between the game provider and the end user, it is not an agreement between all of the users of the game.

Therefore, it is appropriate that researchers are reminded that, even if they are permitted to conduct research under the terms of the ToS, that does not absolve them from potential disclosure and permission requirements from other users. It is also important that MMO researchers are well-versed in such issues in order to be equipped to educate IRBs/HRECs about the pitfalls outlined above and to be able to make a case for the importance of ethical research in such environments.

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