

Rules of Play

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“At the root of this sacred right we recognize unmistakably the imperishable need of man to live in beauty. There is no satisfying this need save in play.”

—Johan Huizinga¹

Introduction

In July of 2007, Blizzard Entertainment issued a press release stating that over nine million individuals across the world were subscribed to *World of Warcraft*, its online multi-player game. For Vivendi Entertainment, Blizzard’s parent company, revenues generated in 2007 from *World of Warcraft* rivaled the revenues generated from its better-known recording industry subsidiaries, Universal Music and BMG. Microsoft’s 2007 release of *Halo III* reportedly garnered \$170 million dollars in a single day, eclipsing the opening weekend sales of most blockbuster movies (Gamastura, 2007).

These numbers are impressive, but video games have been a big business for quite a while. Twenty-five years ago, in 1982, the United States was gripped with “Pac-Man Fever.” Many American households were buying or had already purchased home gaming consoles such as the popular Atari 2600, the Cro-Magnon ancestor of today’s Xbox 360, Wii, and PS3. Blizzard’s *World of Warcraft* and Microsoft’s *Halo III* are simply the latest heirs in their own dynasties. *World of Warcraft* is based on a game world created in series of extremely popular *Warcraft* single and multi-player computer games.

But there is something quite new going on in video games today. The video games of the past (like *Pac-Man*, *Super Mario*, *Tetris*, and *The Sims*) were generally

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¹ Huizinga, J. (1938). *Homo Ludens: A Study of the Play Element in Culture*, p. 63. The “sacred rite” referred to by Huizinga was the *kula* exchange of the Trobriand Islanders.

played by one player, occasionally with the option to permit two players, and very rarely allowing four player options. The popular *World of Warcraft* game, by contrast, allows thousands of players to play in a shared digital space, in which they control player representations known as “avatars,” “toons,” or “characters.” The online world is hosted on computers owned by Blizzard, which communicate via the Internet with subscriber client software. Other companies, such as Microsoft and Sony, are pursuing similar online gaming architectures.

The structure of *World of Warcraft* characterizes all “massively multi-player online role-playing games” (“MMORPG”s), of which there are hundreds. The groundbreaking graphical MMORPG *Everquest* launched in the late 1990’s, gained hundreds of thousands of subscribers. It is still in operation alongside a successor title, *Everquest II*. The MMORPG genre is not really new—it traces its lineage back to the text MUDs that were made popular in the early 1980’s and allowed hundreds of players to play simultaneously (Bartle, 2005). The improvement of Internet computing technology, however, has gradually made MMORPG gaming more feasible and enjoyable. At this point, however, *World of Warcraft* is the most successful MMORPG in history.

MMORPGs like *World of Warcraft* are novel because they are socially complex in ways that traditional video games are not. In solo video games, a player often struggles against certain restraints in a machine in a manner analogous to an offline player struggling with a complicated puzzle or technical feat. In two player games, potential conflicts and collaborations are limited. Virtual worlds like *World of Warcraft*, being more social, allow and often require players to collaborate or come into conflict with each other. Players frequently set up novel social practices that blur offline socialization and online “in-game” activity.

Probably the most well-known of these novel social practices is the player-to-player trade of cash for virtual property, called “real money trading” or “RMT” for short (Castronova, 2005, pp. 161-204; Dibbell, 2005, p. 12). Most game companies forbid RMT in the license agreements that accompany their game software (the terms of which must be “accepted” by players in order for the software to operate). Many players are opposed to RMT as well.

Yet given that RMT can provide substantial monetary benefits, the mere ire of game companies and players has not been sufficient to prevent the practice. Not surprisingly, there have been some efforts to enforce the rules prohibiting RMT. Currently, Blizzard is litigating claims in two federal courts where it seeks to prevent businesses from engaging in and enabling RMT (*Blizzard Entm’t, Inc. v. In Game Dollar*, 2007; *MDY Indus., L.L.C. v. Blizzard Entm’t, Inc.*, 2006). Another class action

suit is being brought by players of *World of Warcraft* against RMT companies (*Hernandez v. Internet Gaming Entertainment, Ltd.*, 2007).

The video game industry is certainly no stranger to litigation (Festinger, 2005). Given its size, importance, and novelty, companies in the industry have been in court constantly ever since the patents on *Pong* were litigated. Yet, the questions concerning *World of Warcraft* and RMT seem novel to many legal scholars. A proliferation of articles and student notes suggest that many legal commentators feel that multiplayer games are raising important new types of legal questions. Over thirty articles and notes in law reviews have been published in recent years exploring law and virtual worlds, a number greater than the number of cases that have actually been litigated in this area.

The contemporary legal interest in MMORPGs is probably best explained by the social architecture of these games. Similar conflicts (and similar legal scholarship) are arising in many other forms of online social media. The growing interest of lawyers in MMORPGs is paralleled by growing legal interests in weblogs, search engines, online music, online social networking websites, and other forms of technological innovation.

Yet while MMORPGs have some things in common with weblogs and social networks, they are also very different from other forms of online activity. MMORPGs are *games*, and the fact that they are games has been often ignored or downplayed in legal scholarship. And while MMORPGs share important roots with videogames, they are also importantly different given their social architecture.

The rest of this essay discusses games—mostly of the offline variety—and their rules. Lawyers and judges have not, in the past, either possessed or needed to possess a very sophisticated understanding of games. While lawyers have taken the financial aspects of video games very seriously for several decades, they have not taken the *rules* of games very seriously at all. As I will explain below, there are good reasons why this is so. But at the present moment, with regard to virtual worlds, the failure of law to understand games is problematic.

I. What is Play?

Game rules are rules that inform, condition, and give special significance to social practices of play. Both “game” and “play” are notoriously difficult terms to define, but there have been some sustained attempts to understand the meaning and function of games and play in culture.

One of the first scholars to seriously focus on the notion of “play” was Johan Huizinga, a Dutch historian writing in the first half of the twentieth century. In his book, *Homo Ludens*, Huizinga argued that human culture originated in play (Huizinga, 1938, p. 46). Huizinga’s book was a highly ambitious work. He sought—across a broad range of cultures, literatures, and languages—to find evidence of a distinct and separate “play concept” which constituted a “concretely definable thing.” In the course of the book, he claimed play was present in a myriad of cultural practices. According to Huizinga, the “play concept” was not just found where it might be expected (*i.e.* in games and sports) but play also animated law, art, war, poetry, ritual, and philosophy.

Trained as a linguist, Huizinga was sensitive to the potential and variant meanings of the term “play.” Indeed, he spent the entire second chapter of *Homo Ludens* drawing out the subtly different understandings of the term in Greek, Latin, Sanskrit, Japanese, Arabic, German, Hebrew, Chinese, Old Saxon, and numerous other languages. His ultimate definition of the play, to the extent he could fix it concisely, was (translated in English):

[A] free activity standing quite consciously outside ‘ordinary’ life as being ‘not serious,’ but at the same time absorbing the player intensely and utterly. It is an activity connected with no material interest, and no profit can be gained by it. It proceeds within its own proper boundaries of time and space according to fixed rules and in an orderly manner.

Ludwig Wittgenstein (years later) observed that “game,” like many words, need not be defined in order to be socially functional (Wittgenstein, 1953). Yet Huizinga’s definition of play is worth extended consideration, if only due to the fact that subsequent writers on the subject of play, such as Roger Caillois (1958), Bernard Suits (1978), Brian Sutton-Smith (1997), and Jesper Juul (2005), have confirmed, followed, or at least reacted to Huizinga’s definition.

Huizinga is often associated with the concept of a “magic circle” of play, although Huizinga in fact he did not use this term in the definitions quoted above. Still, the term “magic circle” is a fair way to encapsulate Huizinga’s most important point. Play, for Huizinga, is activity *set apart from ordinary life* and engaged in *for its own sake*. (Huizinga, 1931, p. 46.)

Huizinga consistently argued that the goals of players are not linked to productive activity or material rewards. He did, however, admit that success in play can sometimes result in important reputational gains (*Ibid.*, pp 50-51). Still, from the standpoint of “ordinary life,” Huizinga felt that games could be understood primarily as irrational pursuits (*Ibid.*, p. 4). Bernard Suits, following Huizinga in

much the same vein, described play as a “lusory attitude” that promoted “activity directed towards bringing about a specific state of affairs, using only means permitted by rules, where the rules prohibit more efficient in favor of less efficient means...” (Suits, 1987; Sammons, 2003, pp. 277-287). This also implies that game play is irrational behavior. To strive to accomplish a goal in a “less efficient manner” makes little sense in ordinary life.

While Huizinga insisted that play is separate, unproductive and enjoyable, he denied that it is simply folly. (Huizinga, 1931, p. 6.) Rather, he attempted to rehabilitate play by stressing its internal order and its historic association with the realm of the sacred. He stressed that while play exists in tension with ordinary life and seriousness, it proceeds with an “utmost seriousness, with an absorption, a devotion that passes into rapture... Play may rise to heights of beauty and sublimity that leave seriousness far beneath.” (*Ibid.*, p. 8.) Huizinga often united play with ritual, and, as in the quote that introduces this essay, with an effort to reach the sublime. (*Ibid.*, p. 16-17.) Rhetorically, these arguments seemed targeted at redeeming the social status of play.

However, Huizinga’s argument that play constitutes a “sacred ritual” proved perhaps the least popular aspect of his approach to games. Perhaps the link between play and the sacred was simply too jarring to conventional sensibilities. An early reviewer of *Homo Ludens* who complained that:

[T]he author fails to realize the width of the gulf which divides the romping of children and animals from the kinds of play which he so admirably describes. The rules and conventions, the hallowed spot, the set occasion, the special dress, and the sense of achievement felt by all concerned which characterize a religious rite, a state banquet, a folk-dance festival and a cup-tie, must have their origin elsewhere than in mere ebullitions of superfluous energy. But where? (Raglan, 1949, 58-59).

The sociologist Roger Caillois, though mimicking Huizinga’s conceptions of play in almost all particulars, seemed to agree with this reviewer, and insisting on segregating play into two large sets of activities. The superior set, coined as *ludus*, consisted of serious, civilized and rule-dominated play. The inferior set, *paidia*, consisted of primitive, vertiginous and fantasy play. According to Caillois, children and “primitive” cultures engaged in *paidia*. Adult competitions and wagers were aligned with *ludus*. But Caillois did not valorize either activity. Instead, he often drew upon animal and insects as examples of his theory and characterized play as primarily an occasion of “pure waste.” (Caillois, 1958, 5).

In a way, Huizinga's very definition of play ensured the marginality that he sought to avoid. By insisting that play existed as separate and distinct from ordinary life, Huizinga defined play primarily by its (willful) refusal to accord with the productive behaviors of ordinary existence. Games and play were set up as mysterious and incongruous practices performed in the sacred confines of magic circles. Yet outside those circles, modern culture and scientific progress would proceed unhindered by play.

As Julian Dibbell and Thomas Malaby have noted, Huizinga's definition is perhaps better understood as evidence of play's antithesis as evidence of play itself. There is a specter haunting play and it is the specter of Protestant capitalism. For Huizinga, writing at the moment when the twentieth century corporation loomed large, technological progress transformed society, and the bureaucratic state arose in power, play proffered an alternative. The future promised increasing and comprehensive social control organized toward rational and utilitarian aims. All of this must have been on the mind of Huizinga, primarily a historian of the Middle Ages. It is all the more poignant that *Homo Ludens* was completed before the end of World War II while the author was imprisoned by the Nazis.²

Despite being a deeply historic account, Huizinga's definition of play insists on an oppositional stance toward the ordinary, rational, productive and joyless. This move, while understandable in context, poses significant difficulties for according play any weight in a political calculus. If play is that activity which, by its very definition, is divorced from and lacking real significance in ordinary life, is play not inherently deserving of denigration? As Brian Sutton-Smith explains in his recent account:

The frivolity of playfulness, which at first seemed to be just a mildly amusing relic of Puritanism, takes on a much more serious purpose when we view it as an implicit form of political or scholarly denigration... In scholarship the denigration of play in intellectual terms is shown by the absence of the key term *play* from the index of almost every book about the behavior of human beings. (Sutton-Smith, 1997, pp. 207-08).

Of course, even if play is, as Caillois calls it, a waste of time and energy, we would have to admit it is abundantly common and financially significant. After all, the collective moods and popular status of American cities can often depend upon

² Huizinga was arrested due to his political views. He was detained in the remote Danish town of De Steeg and died shortly before the end of the war. (Dibbell, 2006, p. 60; Anchor, 1978).

the success or failure a sports team. This is increasingly true today, but was true throughout most of the twentieth century as well. The NFL, the NBA, the PGA and many other professional gaming associations vie to maximize popular hysteria over their events, teams, celebrity players, and merchandise.

Even if we ignore the commercial engine of professional spectator sports and the massive cultural impact of those activities, we can still find organized play at the heart of most every local community. For at least the last century, amateur sports and athletics have constituted prominent components of both our primary and secondary educational systems. As a result, we spend billions of dollars each year teaching our children and youth to play games and valorizing their efforts. Governments and individuals make investments in play such as stadiums, plasma television screens, sports camps, and skill trainers. And on top of this all, we might add board games, fitness activities, Sudoku, and—let us not forget—video games.

Despite all of this, when we are pressed to justify the prominence of games in culture, can we do much better than Huizinga? For most of us, the social importance of games goes largely unexamined. Defenders of game activities, when pressed on the point, seem to generally appeal to their (largely tangential) capacity to valorize physical fitness, to build character (in some vague sense), to stimulate the economy, or to achieve some other *post-hoc* objective. Just recently, video games have been drafted into the service of “serious” agendas, implicitly suggesting that they are in need of being reoriented toward some more significant cultural purpose.

Huizinga’s definition of play therefore seems useful in describing what seems to be a deep contradiction in our attitude toward play. Play is the antithesis of the productive, sensible, and useful. Yet for all this, play is pervasive and popular and engaged in with passion.

Perhaps the key to understanding the social commitment to play lies in understanding the rules of play, for they are most peculiar.

II. Rules of Play

“Golf is a game whose aim is to hit a very small ball into an even smaller hole, with weapons singularly ill-designed for the purpose.”

—Winston Churchill (Cooke, 1979. p. 145).

Huizinga describes play as occurring in staked-out spatial fields and magic circles. Golf is played on a special “course,” while basketball and tennis occur on “courts” with neatly marked linear boundaries. Games are also delimited in time: whistles, guns, and time-keeping devices punctuate the start and stop of play. But these temporal and spatial boundaries do little to help us understand play. The most important way that play operates is through the instantiation of a separate and novel set of rules and significations. These rules order human activity within the game’s time and space. They set games apart from ordinary life.

As Churchill’s quotation shows, golf seems deeply nonsensical. Bernard Suits agrees (Suits, 1978, p. 26). Yet it only via these strange and nonsensical rules that we establish the game of golf. Huizinga constantly stresses that games are *ordered* spheres—not just separate territories, but separate *jurisdictions* characterized by special rules. Rules of play within games serve both to liberate and to constrain the player.

When the sumo wrestler enters the “magic circle” of the *dohyo* or the professional boxer enters the space and time of the bout, the rules of what social behaviors are desirable and forbidden are suddenly, radically changed. Violent and powerful physical attacks against another person, which are normally forbidden by law and social norms, become the obligatory mode of conduct. At the same time, polite and acceptable behavior may become inappropriate. For a boxer in the midst of a bout to attempt polite conversation with an opponent would be a gross breach of decorum. As one court noted: “subjecting another to unreasonable risk of harm, the essence of negligence, is inherent in the game of football...” (*Hackbart v. Cininnati Bengals*, 1979).

Game spheres also bring down upon players a separate set of aims that motivate and channel behavior. Outside the game, there is no practical need to ensure that particular balls of various shapes and sizes are placed in holes or nets. Yet in many games, this become paramount, and must be performed in conformity with extensive rules that make the goal more difficult to achieve.

As Jesper Juul has noted, the fascination with the performance of play activities flows only from a shared social understanding of rules and their significance. (Juul, 2005, p. 40, 58). Outside a game, expending great energy struggling to place a ball in a net or hole might be considered absurd. Yet the same actions, if performed in accordance with game rules during game time, may constitute the achievement of a lifetime and elate the spirits of a city or nation. Individuals, like Tiger Woods or Garry Kasparov, who consistently out-perform others in otherwise “absurd” play activities, can become heroes within contemporary culture.

The appeal of play no doubt comes in part from the peculiar *type* of ordering that it creates. Though many games offer incredibly complex systems of rules, at the same time they radical simplify the complexity of human action. A game's tight regulations, clear objectives, and limited system of symbols and boundaries allow the significance of almost all performative player actions to be understood and evaluated by both participants and spectators.

Most game rules seem to serve either two broad objectives. First, game rules serve to define a particular set of performance *skills* that are essential to the game play. The skills desired are generally pleasurable for the player to deploy, due to either their inherent kinesthetic appeal (running, throwing, hitting), the aesthetic context of their performance (the green turf, the clean lines of a game board), or the intellectual stimulation they provide (solving puzzles, perfecting and discovering play strategies). Many games combine these elements.

In order to isolate these skills in competitive or solo play, external techniques that supersede the key skills are generally forbidden. Thus, driving a motorcycle is not allowed in a marathon, the use of dictionaries in *Scrabble* is circumscribed by rules and most athletes are barred by their organizations from using performance-enhancing drugs that might harm their bodies while affording them "unnatural" abilities. As Huizinga noted, rules that focus play on certain skills also serve to promote interplayer "fairness" by preventing some contestants from gaining advantages over others.

A second broad set of game rules promotes the *aesthetics* of the play processes. Because these rules also serve to constrain and reward certain types of performance, they are not discontinuous with the first set. However, they differ slightly in that they seek to ensure the process of play is optimally interesting for both participants and spectators.

In his important article, *Beyond Play*, Thomas Malaby observes how certain adaptations of sports rules, such as the shot clock rule in basketball and the "tuck rule" in football, demonstrate that rules of play can be contingent and resist conclusive formal definition (Malaby, 2007, p. 103). Yet while this is important to observe, it is also interesting to note how the shot clock rule evolved to prevent the institution of a dominant strategy and to promote "interesting choices." (Juul, 2005, 59, 66-67). Dribbling out remaining game time in basketball, if it became a dominant strategy, would have rendered the final minutes of many basketball games less interesting for both players and spectators. The shot clock rule avoided this outcome.

It might be observed that to the extent that rules of play promote clear goals and interesting choices, they conform to the “flow” model of optimal experience proposed by Mihaly Csikszentmihalyi (Juul, 2005, 112-115). In the state of flow, an actor has clear goals that may be achieved by a skillful course of action. (Csikszentmihalyi, 1990, 49). But while the state of flow can be found in work situations as well as play situations, the alternative and aesthetically calibrated rules of play make states of flow within games particularly appealing.

One might also make the claim that by establishing a separate realm of clearer order, transparent motivations, and enjoyable actions with shared social significance, play provides temporary relief from existential crisis. A common condition in ordinary life is that individuals rarely know exactly what they must do at any given moment. Even if we know what must be done, we generally do not know when we must do it, why we must do it, how we must do it, and after doing it, whether we have really done it well (or better than we did yesterday, or better than other people have done it). And even in circumstances where we know all these things, the activity in ordinary life may be characterized by uninteresting choices. Ordinary life, though it may claim importance above play, is characterized by conflicting desires, objectives, and burdensome tasks at hand. Play states, by their very artificiality and lack of consequence, enable the player and spectator to be immersed in an alternative and clearer order.

When the rules of play descend on the player, they offer a much *greater* degree of order than is found in ordinary life. Rules of play block out the complexity and flexibility of individual choice and action. The heightened constraints of the game liberate both the player (and the spectators who identify with the player) from all but a highly simplified set of considerations and objectives. Optimally, this order enables behaviors that are satisfying both as play processes and, for spectators who observe and identify with the player, as significant and appraisable events.

The adoption of an alternative rule set to guide player practice is therefore a key to play. The rule set constitutes the “lusory attitude” of play (Suits, 1978), which is only a frame of mind away. Play is pendent in all circumstances, at all times. A child walking on a sidewalk may suddenly, in a spirit of play, decide not to step on the joints between the tiles. This is a game. The lusory attitude will accord a positive significance to being able to perform this task and a negative significance to its failure.

Yet according to Huizinga’s definition, if the child were to truly and mistakenly assume that by placing a foot on a joint, some calamity might befall a certain member of the family, the activity would cease to be play. If avoiding

sidewalk joints were deemed instrumental by the player and necessary to secure an important outcome in ordinary life, it would not be a game. It might be a pleasurable activity, but not play because it would not be performed for its own sake.

III. State Rules and Contracts

The rules of play just discussed should be contrasted to rules of law. Since the beginning of human civilization, government “rulers” have imposed their laws on societies. As everyone knows, most societies have rules that forbid and punish certain types of violence against persons, most require payments of taxes and the performance of certain forms of state service and most set certain standards of duties that citizens owe to one another (such as a respect for property rights). There are, of course, myriad varieties of additional types of laws.

In the United States, most contemporary state rules are to be found either embodied in complex statutory texts (like the tax code, immigration laws, or federal sentencing guidelines) or in bodies of case law (such as doctrines of constitutional rights, or the common laws of contract, tort, and property). Most lawyers specialize in the application of just one facet of the legal order. No individual could possibly keep abreast with all the constantly changing rules and regulations by which federal, state, and local governments attempt to limit and regulate human behavior, though all are required to obey the rules.

Still, most citizens are aware of some important subset of the rules by which the state expects them to abide. For instance, the local traffic laws are assumed to be understood by all. To the extent they are understood, most laws are amenable to a form of concise popular restatement. For instance two of the rules that limit driving conduct on a certain street might be “do not park in front of fire hydrants” and “do not drive over 25 mile per hour.”

Given the scope of law’s regulation, it is dangerous to make any quick categorical claims about the general purposes served by the rules promulgated by government. Ideally, or at least according to the popular theories of John Rawls, the laws of a democratic society should be structured to benefit the society as a whole, and should not allow one more powerful subgroup to dominate another (Rawls, 1971). At least the rhetoric that surrounds state rules often gives lip service to such principles of justice. New laws are generally claimed to be rules which will bring benefits to society as a whole.

For instance, the proponent or enforcer of a state rule will generally claim that the rule, *e.g.*, generates increased wealth for the majority of the public, protects the public against a serious threat or solves what would otherwise be a vexing public problem.

Often (though not always) state rules can be framed in terms of a balance between social costs and benefits. The rule that prohibits driving over 25 miles per hour on a street is a compromise between allowing those who own automobiles to benefit from their technology and ensuring that automobiles will not be an unreasonable threat to public safety. The rule against parking in front of fire hydrants reflects a similar compromise between public safety and the individual convenience of a car owner.

Yet not all legal rules are designed by legislatures or administrative agencies. A major exception is found in the rules of private contracts. Individuals and companies can create specialized “rules” that are legally binding on the parties that create them. Parties to a contract promise certain mutual exchanges (*e.g.* a payment is made for the delivery of a property or the performance of a service). Unlike a speed limit, the performance of a contract is not a thing *required* of any person by the state. However, once two parties enter into voluntary agreement to do a certain thing, the failure of one party to abide by the agreement may give rise to a legal remedy. The state may require the party that breached the contract to pay resulting damages or may even, in rare cases, order that the contract be performed as required by the contract.

Why should the state enforce rules that it does not create? Today, the dominant (though not exclusive) theory of contract law is economic in nature. The enforcement of individual contracts is said to benefit society because it promotes a process of beneficial market exchanges of goods and services. A person (X) who needs a sack of sugar and has twenty dollars will trade with a person (Y) who needs twenty dollars and has a sack of sugar. Both X and Y stand to benefit from this exchange, which places resources in the hands of those who wish to make use of them. State enforcement of contracts is thought to create confidence in market exchanges that increase efficiency, productivity and wealth.

Though we have barely sketched the justifications of legal rules, let us contrast them now with rules of play, for the differences will be readily apparent.

While it is true that the state may intercede to regulate and curtail the practice of some game activities on the basis that they may be hazardous to participants other others (*e.g.* boxing, dog fighting, or skate boarding), the state generally seems to permit play to proceed as a self-organized and self-regulated

activity. Thus, it might be claimed, the rules of games are a perfect match for the rules of contract. Yet it is rarely that parties enter into contractual arrangement when they play games. While some rules may be negotiated, the most important rules of games are generally established before the play process begins.

The notion that these rules are uniform may suggest that they resemble state rules, but neither does this follow. Unlike rules of a state, most play rules cannot be justified by appealing to the manner in which they provide benefits to society.

As a result, it is hard to say exactly why we have the rules of games, which are, as Churchill and Suits noted, often rather absurd. Justice Scalia, considering in one case whether the PGA's prohibition on the use of golf carts should be considered an "essential rule of golf," opined:

[T]he rules are the rules. They are (as in all games) entirely arbitrary, and there is no basis on which anyone—not even the Supreme Court of the United States—can pronounce one or another of them to be “nonessential”... (*PGA Tour v. Martin*, 2001).

While Scalia wrote in dissent (the other Justices felt that a prohibition against using a golf cart in a golf competition was indeed “nonessential”), Scalia's clearly felt confident that game rules are “entirely arbitrary.” This is entirely consistent with Huizinga's claim that game rules diverge in important ways from what is rational and reasonable.

It should be no surprise, therefore, that some courts have even suggested that rules of play should be considered their own jurisdiction. The Supreme Court of Georgia for instance, declared itself to be “without authority to review decisions of . . . referees because those decisions do not present judicial controversies.” (*High School Assn. v. Waddell*, 1981). Consistently, it might be observed that over 16 states have adopted legislation that protects sports officials from liability for the decisions that they make during games (Biedzynski, 1994). This legislation essentially shields the decisions of referees from state review, acknowledging that rules of play constitute a separate sphere, importantly independent from rules of law.

IV. The Rules of MMORPGs

As stated above, there is currently substantial interest among lawyers and legal scholars in the growing industry of MMORPGs such as *World of Warcraft*. Social conflicts are becoming more prevalent and lawsuits are beginning to appear,

forcing courts to consider the relationship between the rules of law and the rules that govern game play within MMORPGs. One such game rule is the prohibition against the “real money trade” or RMT.

RMT and the rules prohibiting it are probably of interest to lawyers primarily because there is money involved in the activity, making the prospect of litigation over the rule more likely. Engaging in RMT trading can be both financially profitable to the trader and financially costly (to police) for a company seeking to prohibit the trading. The prohibition against RMT appears to be a fairly neat matter of online contract law. The specific terms of its software contract should presumably give a company like Blizzard the legal right to take action against those who break the rule. (And Blizzard does take this action regularly by cancelling game accounts).

Yet viewed as a matter of contract law, the rule against RMT seems odd. First, it would seem counter-intuitive to the economic logic of the situation. Instances of RMT generally involve trades between two individuals who are players of the game. If contract law is defended on the basis that it allows individuals to engage in mutually beneficial trading, then it would seem that contracting over the sale of a virtual items in *World of Warcraft* should be treated no differently than any other form of contract. A person (X) who needs a virtual sword and has twenty dollars trades with a person (Y) who needs twenty dollars and has a virtual sword. After the exchange, both parties have obtained the resource they have desired. In economic talk, the result of RMT trading is a “Pareto Superior” distribution of resources. Yet is it Blizzard (Z), not a party to the trade, that is seeking to prevent the contract from occurring.

From the traditional perspective of facilitating efficient and mutual beneficial exchanges through contract, anti-RMT clauses should seem quite backward and inefficient. The contractual term allows the interests of game owner to prevail over the interests of private parties. Enforcing rules against the RMT might seem tantamount to sanctioning a centrally planned economy. The regulatory schemes forbidding RMT constrains market activity and therefore one might argue that it harms, rather than helps, the society of players.

Yet that view is wrong. Although the rule against RMT appears to be a mechanism that limits the freedom of players to contract, the prohibition against RMT is actually a rule of play. Just as one team in a sport is not allowed to purchase an additional four players, or, perhaps more aptly, a runner in a marathon is not allowed to take a short cut while riding a bicycle and using performance-enhancing drugs, the prohibition against RMT is designed to define and focus play within a MMORPG.

The rule prohibiting players from purchasing gold or items within a game defines the particular skill set that is vital to the game and requires all players to begin at the same starting position with the same chances of success. The player who trades money for virtual property gains an advantage forbidden by the game rules. Thus, thinking of prohibitions against RMT in terms of efficient contract rules can be very misleading.

To make things more complex, anti-RMT clauses also have some interesting similarities to state rules. As Dan Hunter and I explained in a prior article, the controller of a virtual world, simply by virtue of the MMORPG's technological architecture, might be understood as akin to a ruler (or perhaps a deity) within the game environment (Lastowka & Hunter, 2004, pp. 59-62). The technological power in the hands of a game company allows it to be a much more effective referee than the judge of any offline game.

The game company crafts a dynamic world and must endeavor to attract and retain game participants. In theory, game companies should therefore have an incentive to establish rule systems that create maximum social benefits for players. So, if the majority of players are opposed to RMT, as seems to be the case, the inclusion of an anti-RMT clause in a game's software contract might be justified as an expression of the desires of the majority of players.

Yet the analogy of the game company to a benevolent government should not be taken too far. As explained above, games are often systems of artificial and arbitrary goals which are made more difficult to achieve by additional rules and limitations on the player. All players seek to accomplish certain game objectives, but the game company has an interest in denying them what they want—or at least ensuring that the means by which it is obtained is inefficient. This is where the analogy to state rules breaks down. Because games are premised on contra-logical rules and special shared significations, game companies are partially engaged in creatively denying players that which they most desire.

Rules of play are paradoxical. State rules and contracts can almost always be measured by the outcomes they produce. If the adoption of a rule system provides a new surplus of resources or security, it is deemed a good rule (all other things being equal). Yet success in games is not simply a matter of obtaining a set of outcomes. A player arriving at a game course where 18 of her golf balls were pre-placed in holes would not find this pleasing. Success in a game is understood by true participants not as an end point, but as something that can only be achieved by a legitimate, rule-abiding, and often needlessly inefficient process.

The rules against RMT should therefore be understood primarily as rules of play. Although anti-RMT rules appear in player-company contracts and are drafted by lawyers for game companies, they do not primarily benefit of the game company vis-à-vis the player who accedes to them. And although the anti-RMT rules promote the interests of player, they do so in a way that defies most conventional notions of individual liberty and economic efficiency. Anti-RMT rules thus stand in stark contrast to the rules of “ordinary life.”

As the MMORPG genre grows in scale and social importance, it will become important for courts to develop some way of grappling with these types of rules of play. The path seems prone with pitfalls. Between the denigration of play, the possible confusion of game rules with state rules and contracts, and the failure of play to conform to the reason and logic of “ordinary life,” there would seem to be an abundance of ways for courts to disrespect the orderings of play.

Yet Huizinga claimed that play animates and pervades culture and this seems to be true—even perhaps increasingly true—today. It may be wishful thinking to hope that courts will get RMT right. But for all its high fantasy and technological flash, the rules of *World of Warcraft* are not all that different from the rules that govern the gridiron, the golf course, the baseball field and the game board. These social spheres are intimate to us, even if their intimacy is dimly understood. If lawyers and judges can simply spot the elemental kinship of play, they can start out on the right foot.

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