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Annette L. Hurst, Esq.

Annette.Hurst@hellerehrman.com

Copyright Law Aspects of Virtual Property

- Does the copyright owner have the right to control the market for virtual property created within its game universe?
 - Is the virtual property a derivative work?
 - If so, is the sale of virtual property privileged as a fair use?
 - Does the first sale doctrine privilege the sale of virtual property?
- If copyright law does not grant the copyright owner control over the market for virtual property, does it affirmatively prohibit such control? Or, can the right be obtained by contract?

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Is virtual property a copyright derivative work?

- "A work based on one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted."
- If there is aftermarket economic value, the copyright owner is entitled to exploit it.
 - *Mirage Eds., Inc. v. Albuquerque A.R.T. Co.*, 856 F.2d 1341 (9th Cir. 1988)
 - *Micro Star v. Formgen Inc.*, 154 F.3d 1107 (9th Cir. 1998)
- The copyright owner does not own all conceivable aftermarket economic value.
 - *Lee v. A.R.T. Company*, 125 F.3d 580 (7th Cir. 1997)
 - *Lewis Galoob Toys, Inc. v. Nintendo of Am.*, 964 F.2d 965 (9th Cir. 1992)
 - *Ty, Inc. v. Pubs Int'l Ltd.*, 292 F.3d 512 (7th Cir. 2002)^{Heller Ehrman LLP}

Can commerce in copyright virtual property be a protected fair use?

- Yes: *Lewis Galoob Toys, Inc. v. Nintendo of Am.*, 964 F.2d 965 (9th Cir. 1992)
- No: *Micro Star v. Formgen, Inc.*, 154 F.3d 1107 (9th Cir. 1998)

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Does the first sale doctrine protect commerce in virtual property?

- Is the transaction a "sale" or "license"?
- Even if denominated a license, should it be considered for policy reasons to be a "sale"?

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Does copyright law preempt control of virtual property?

- First Sale Doctrine
 - *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (contractual restriction not preempted)
 - *Softman Prods. Co. v. Adobe Sys. Inc.*, 171 F.Supp.2d 1075 (C.D.Cal. 2001) (contractual restriction preempted)
- Fair Use
 - *Vault Corp. v. Quaid Software*, 847 F.2d 255 (5th Cir. 1988) (contractual restriction preempted)
 - *Bowers v. Baystate*, 320 F.3d 1317 (Fed Cir. 2003) (contractual restriction not preempted)

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Trademark Law Aspects of Virtual Property

- Does trademark law give the trademark owner the right to exclude others from the market for virtual property?
 - *Marvel Enterprises, Inc. v. NCSoft Corp.*, 2005 WL 878090 (C.D.Cal. Mar. 9, 2005) (no "use in commerce")\
 - *1-800-Contacts v. When-U.com Inc.*, 414 F.3d 400 (2d Cir. 2005) (no "use in commerce")
 - *Playboy Enterprises, Inc. v. Netscape Communications Corp. and Excite, Inc.*, 354 F.3d 1020 (9th Cir. 2004) ("use in commerce")
 - *GEICO v. Google Inc.*, 330 F.Supp.2d 700 (E.D. Va. 2004) ("use in commerce")

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Competition Law Aspects of Virtual Property

- Does antitrust law have any relevance to the IP owner's attempt to control the virtual property aftermarket?
 - *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451 (1992)
- Copyright Misuse
 - *Lasercomb v. Reynolds*, 911 F.2d 970 (4th Cir. 1990)
 - *Practice Mgt. v. AMA*, 121 F.3d 516 (9th Cir. 1997)
 - *In re Napster, Inc. Copyright Litig.*, 191 F.Supp.2d 1087 (N.D. Cal. 2002)

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Anchorage

510 L Street
Suite 500
Anchorage, AK 99501-1959
Telephone: +1.907.277.1900

Beijing

Units 01-02 Level 14
China World Tower 1
1 Jian Guo Men Wai Avenue
Beijing, 100004 China
Telephone: +86.10.5866.9738

Hong Kong

35th Floor
One Exchange Square
8 Connaught Place
Central, Hong Kong
Telephone: +852.2292.2000

Los Angeles

333 South Hope Street
39th Floor
Los Angeles, CA 90071
Telephone: +1.213.689.0200

Madison, WI

One East Main Street
Suite 201
Madison, WI 53703-5118
Telephone: +1.608.663.7460

New York

Times Square Tower
7 Times Square
New York, NY 10036
Telephone: +1.212.832.8300

San Diego

4350 La Jolla Village Drive
7th Floor
San Diego, CA 92122-1246
Telephone: +1.858.450.8400

San Francisco

333 Bush Street
San Francisco, CA 94104-2878
Telephone: +1.415.772.6000

Seattle

701 Fifth Avenue
Suite 6100
Seattle, WA 98104-7098
Telephone: +1.206.447.0900

Silicon Valley

275 Middlefield Road
Menlo Park, CA 94025-3506
Telephone: +1.650.324.7000

Singapore

50 Raffles Place
17-04 Singapore Land Tower
Singapore 048623
Telephone: +65.6538.1756

Washington, D.C.

1717 Rhode Island Avenue, NW
Washington, D.C. 20036-3001
Telephone: +1.202.912.2000

For more information, visit our web site: www.hellerehrman.com