The Law of Virtual Worlds and Internet Social Networks

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2.1 The Genealogy of Virtual Worlds and Social Networks

In this chapter we will examine the issue of how legally binding contracts are made within virtual environments and Internet social networks. The generic term for business conducted within virtual worlds is virtual commerce or v-commerce. We will use these terms throughout the book.

To understand virtual worlds requires an appreciation of their genealogy, an examination of how they operate and what features they possess.

The Internet has evolved as a universal interconnected network of audio, video and electronic text communications that blur the distinction between interpersonal and mass communication, and between public and private communication. It allows forms of communication, that were previously separate, to overlap and interconnect. The latest indications are that whilst people are spending more time online they are visiting fewer websites. People often access the same websites so many Internet websites are seldom visited and remain unknown.

Virtual worlds are the perfect manifestation of this evolution. They become destination environments for Internet users and hence fit the trend of more focussed Internet access and, above all, they are participative.

Social network websites enable their inhabitants to connect to friends and colleagues, send emails and instant messages, blog and post personal information profiles. These profiles can include photographs, videos, images and audio. Some social networks are dedicated to particular topics or groups.

Virtual world content is created in an online game like 3D digital environment. Typically they provide inhabitants with a scripting language and development environment which enables them to build new objects.

Social networks are varied but typically share certain characteristics. Many social networks allow users to create a profile of themselves and ‘friend’ (connect with) other users. Examples include Facebook and MySpace. Users grant access to their profile to other people through ‘friending’. These profiles allow people to share photographs, comments and news of events. Users can also create groups to signal through association their values or ideals. Other networks focus on specific forms of expression. For example, Twitter is a social network tool based around ‘microblogging’, and features small dispatches that are

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akin to short ‘status’ updates – where someone is, something they have seen or a brief thought. Websites like Flickr focus on photos, videos or music. These have been augmented by platforms that facilitate the exchange of ideas and that help collaborative working. One of the most important features of social network technologies is that they allow inhabitants to create, map, visualise and define ideas, connections and relationships.

How are virtual worlds defined? There are doubtless many descriptions and indeed those will vary according to the precise characteristic of the particular world.

Individuals are represented within the world typically as ‘avatars’. This is the inhabitant’s virtual representation of himself in a computer game.

Philip Rosedale, the creator of Second Life has said virtual worlds are what we always expected the Internet to be. Cyberspace was always supposed to be full of other people, but when you are on a website, in fact there is nobody else there. A virtual world is a changeable 3D world that everybody collectively owns and which you can alter. That is what makes virtual worlds so different and what makes the experience of being there so different. Virtual worlds contextualise social encounters in a way that social networking cannot do. Without places it is hard to have activities. Rosedale says that the bowling alley or alcohol does not matter as much as the people but if you do not have the bowling alley or the alcohol it is just an empty room and no-one comes. Virtual worlds are social networks with a purpose. Games have always been a platform for engagement between people.

It is estimated that the combined value of the major virtual world economies now exceeds the Gross Domestic Product of many nation states. That value is built around the creation, acquisition and trading of virtual property and possessions. Each can be bought and sold in-world and may even be auctioned online. There is an increasing array of virtual worlds. In addition, the manner in which one participates is becoming more diverse. Most worlds are active worlds wherein participants interact with a variety of avatars both individual and corporate. However, more recently a series of private worlds have developed. These environments can be branded to an organisation’s particular brand. They are in essence ‘white labelled’ worlds with customised orientation areas. The attraction of such environments includes the ability of a company to wholly control the fixtures and participants in-world. They can, for example, exclude competitor companies from the environment. They can configure the world so that the entire experience is the brand. By contrast, active worlds have an element of chaos because of the lack of direct influence.

Virtual worlds offer the user a much richer experience than a website. There is, of course, the ability to see each others avatars and then communicate by text. In addition, virtual worlds allow the operator to see who is looking at what part of the virtual environment – rather like being able to see which web pages are being viewed.

There are many potential business applications for virtual worlds. It is useful to briefly consider some of these before we turn to a review of how contracts can be formed in-world. For example, one can own land in-world. Indeed most virtual worlds operate on the basis of land ownership within the environment. This allows inhabitants to build, display, and store their virtual creations, as well as host events and businesses. Users can purchase land and develop their own piece of the virtual world. Typically, this is by payment of a monthly fee plus a land use fee proportional to the amount of land the user owns.
Collaborative design also lends itself perfectly to the virtual environment. Customers and partners in disparate locations can co-create a real life product or service in real time. The environment software usually provides flexible building tools to allow manipulation of geometric primitives in a simple interface. These can be stretched into new shapes, their textures and physical qualities altered. One can create objects of all kinds and sizes. It is possible to import into the environment jpegs and other standard graphic files to texture the objects one creates. Technology also enables the objects to respond to gravity, inertia, propulsion, and wind from in-world weather systems. Objects cast shadows and can appear to be illuminated by the sun.

Simulation of real life environments can be done at low cost, enabling anonymous feedback. Companies have used the virtual environment to demonstrate how it can be used to design the real world customer experience of a real world building. This included the layout of the building, systems and user interaction with corporate personnel using role play. A synthetic modelling environment can be built to test real world physical environments before building them. At the touch of a button a variety of designs can be accessed. Such collaborative design can address health and safety issues. Uses have included the design of petrol stations. The forecourt can be made transparent by the click of the mouse revealing the intricacies of pipes, pumps and tanks that the driver needs to be aware of when reversing the petrol tanker into the petrol station. Airport terminal building prototypes can be used to simulate the customer check-in procedure, role playing emergency procedures when a suspect package is found.

Marketing opportunities exist. In Chapter 6 we will consider marketing as it applies to virtual worlds in detail. Businesses can run marketing campaigns to test a real world campaign. Virtual focus groups can be set up. Product placement can be undertaken in-world as can brand positioning.

Virtual conferencing and meetings are yet another feature of virtual worlds. Using the multiple communication streams of audio and video media gives inhabitants a rich experience and an environment in which to be innovative.

Learning and training within the corporate organisation can be delivered by peer to peer group communication of complex information using the 3D spatial element within virtual worlds. It is possible to train customers and employees in an immersive environment using realistic role playing scenarios to practice business processes. It is interesting to note the opinion of Sir Tim Berners-Lee, recognised as the creator of the first website and the World Wide Web who said; ‘What’s exciting is that people are building new social systems, new systems of review, new systems of governance. My hope is that those will produce ... new ways of working together effectively and fairly which we can use globally to manage ourselves as a planet.’

Berners-Lee sees virtual worlds as credible tools and the continuance of this process of development which underpins the Internet.

It is clear whether the virtual world is active or customised for a company, there is still the ability to form legally binding contracts in-world.

The manner in which contractual relations can be forged is itself fascinating. It is possible to sell virtual world’s assets purely in-world or into the real world. For example, Domino’s Pizzas who are represented in Second Life, may take your pizza order in-world and deliver the actual pizza in the real world. These contracts may be between the virtual

Sir Tim Berners-Lee talking to BBC Online in March 2008.
world operator and its users, or between users themselves – avatar to avatar. Finally contracts may be formed between users and the outside world.

It is also possible to sell virtual world assets, for example on eBay – itself a phenomenon of modern society. One can also buy Linden Dollars on eBay. In fact, the whole process of contractual formation in the digital environment is at once easy to accomplish, and easy to bring about significant and sometimes unintended consequences.

One often thinks of contracts as weighty legal agreements signed in the physical world by the instrument of the pen. Of course the concept of contractual relations has evolved with every technological innovation from the telephone to the fax machine. Binding legal relations can be created by exchange of email, SMS text message and over the Internet by interacting with an e-commerce website.

Clearly there are many in-world interactions which do not constitute meaningful legal relations. They are not intended by the principals who direct their avatars to be anything more than a forum for fascinating exchange between individuals whose interests coincide on a virtual island. Even where the environment is populated by well-known retailers often this presence is simply to promote the brand in an otherwise baron setting.

However, well-known brands such as Dell Computers also have representation in virtual worlds. Their presence is fascinating because they are depicted as physical shops with all the associated corporate branding and product display. One’s avatar moves about within the environment freely. The environment lends itself to a form of community with other avatars. One can talk to other users through their avatars about the products. Dell, for their part, can see who is looking at which of their products and in what part of the virtual shop.

Payment for products can be made in-world using Linden Dollars, for example, in the case of Second Life, or in that forum, ‘round world’ via a transactional website from a Second Life hyperlink generally in US Dollars. Linden Dollars are exchangeable for US Dollars.

As business, in particular, comes to adopt these most unique networks then the potential for enforceable contractual relations becomes manifest.

However, it is also clear that the very nature of virtual worlds presents a raft of new legal problems. At what point would a contract come into existence? To understand how a participant, whether business or virtual consumer, can operate safely in such worlds, it is necessary to consider how English law approaches the matter of contract formation generally. This is because these long established legal principles will doubtless apply to v-commerce and shape the way which virtual environments must be configured.

In this section we will examine these contract law considerations and see how a contract can be made in-world.

The assertion by Bill Gates in his book *The Road Ahead* that the Internet ‘will carry us into a new world of low friction, low overhead capitalism, in which market information will be plentiful and transaction costs low’ has proved correct. However, it is likely that not even Gates had in mind the advent of the avatar.

Virtual worlds represent a triumph of technology over the bonds which hitherto prevented instantaneous communication on a truly global scale.

Since these worlds fit within an established legal framework, so it is necessary to understand the process of contract formation.

Such an appreciation is vital to in-world business as the sheer openness of the environments can cause problems.
2.2 Creating an Avatar and Navigating the Virtual World

It is worth considering briefly how an inhabitant of a virtual world enters the environment and begins to navigate within the world.

The user must first design their in-world profile and form their avatar. Virtual worlds are essentially about personal expression and one’s avatar is the most personal expression of all. The avatar is your persona in the virtual world. Despite offering almost infinite possibilities, the tool to personalise the avatar is very simple to use. An inhabitant may compile physical characteristics which usually mirror their own physical appearance. This includes choosing body shape, skin tone, hair and eye colour. They will then clothe the avatar and may select garments from a menu. Most virtual worlds employ tools to guide the user and these consist of the map which allows users to find other inhabitants and view upcoming events’ information.

A search menu then permits the user to learn more about a particular event seen on the in-world map. The user may then search for it, and read its description. If it appears to be an aspect of the virtual world they find of interest they can move (or ‘teleport’) there.

Once the user arrives, they may find out about the other inhabitants in that section by right-clicking on anybody’s avatar and choosing the ‘View Profile’ option to learn about them. The user can then move about the environment and this travel is graphically depicted so that points of perspective in the environment may be viewed by the user.

Typically, within a short period of time other inhabitants will approach the new users’ avatar and introduce themselves.

Within this dynamic society of people, the idea is to find people with similar interests to the user. Once the user meets people they have an affinity with, it is easy to communicate and maintain contact with them.

At any time there are many events where the user inhabitant can socialise, for example, party at nightclubs, attend fashion shows and art openings or just play games. Inhabitants may also form groups ranging from neighbourhood associations to fans of science fiction movies.

The ability also exists to move between virtual world environments so that one can take on avatar and seamlessly cross multiple virtual worlds. In this way it is possible to build a cross-worlds community of users and stimulate cross-worlds interactions.

2.3 How Contract Law enters Virtual Worlds and Social Networks

So, we have seen how an inhabitant enters a virtual environment and engages others by way of an avatar. The question then arises whether contracts can be made through that identity with others?

English law requires a number of things to happen before a legally binding contract can be said to have been formed. A contract is founded on agreement. In its purest form agreement arises from offer and acceptance. One person makes an offer, another person accepts that offer. For present purposes those people may be operating through avatars but if the substance of their interaction satisfies the legal tests for formulation of viable contracts then, with certain other necessities being achieved, they can form binding
relations. Every avatar, of course, has a human being sitting at a computer directing their avatar’s actions.

This of course is conceptually difficult to imagine and, in fact, the practical experience in-world may still preclude the effective enforcement of a contract even though the constituent parts which are usually required may exist. For example, one of the attractions of an avatar existence is simply that one can relate in-world but never disclose one’s true identity. This makes contract enforcement problematic. In addition, it might be that the avatar is directed by someone who lacks the legal capacity to form contractual relations – such as a child.

However, our review must focus on what the law demands for contract formation. There are four elements to constitute a legally enforceable contract. They are:

1. Offer.
2. Acceptance.
3. Consideration (usually payment).
4. An intention to create legal relations.

2.3.1 OFFER

An offer is a proposition put by one person (or persons) to another person (or persons) coupled by an intimation that he is willing to be bound to that proposition. The Offeror, that is, the person who makes the offer, may make his offer to a particular person, or to a group of persons or, as in the context of the Internet, the entire world. Offers made in the virtual world environment are most likely made by businesses in-world to other participants in that world, or similarly by individuals through their avatars to other individuals acting through their own avatars.

This offer may be made in writing, in the case of the virtual world this will be by in-world email, or in spoken words, or even by conduct. The first two can be grasped immediately. Often in the real world the written contract takes the form of an elaborate document with numerous clauses and sub clauses. In the virtual world however such written contracts might simply be an exchange between avatars whereby one communicates to the other by email,

‘I’m selling my motorcycle for £1,000, would you like to buy it?’ The response also made by email text ‘Yes I would’ followed by other messages culminating in an agreement to transfer ownership of the motorcycle in the real world could amount to an enforceable contract in law.

How can conduct create an offer? Well, an every day act of conduct which constitutes an offer can be found in a bus driver pulling up at a bus stop.

The intimation that the Offeror is willing to be bound need not be stated in words be they written or spoken. It may be, and frequently is, inferred from the nature of the Offeror’s proposition or from the circumstances from which the proposition is made.

When you make an offer, you are expressing a desire to enter into a contract based on specified terms and conditions on the understanding that if the other party accepts, the agreement will be legally binding.

Offers can be made using almost any form of communication. Over the years, as new means of communication developed, the courts had to establish how contracts were to be formed by the use of developing mediums. From simple letter post, to the advent of
the telephone, fax machine, more recently by email, SMS text, the Internet and of course through virtual world environments. In virtual worlds an inhabitant does not necessarily talk – you and your avatar type.

It is vital to consider in the context of virtual worlds, this legal explanation of what constitutes an ‘offer’. English law states that if a reasonable person would interpret a particular action or communication as an offer (a readiness to bind oneself), it is an offer whether the party intended it or not.

It is therefore the appearance of an offer which is more important than actual intent. It can be seen that this is where the danger to virtual world presence exists. Careless in-world statements or poorly designed in-world representations could amount to a business making unintentional offers to other participants in the virtual world which could result in unwanted binding legal contracts once consumers (via their avatars) accept.

Offers can be of goods or services. It is an interesting question in the context of virtual worlds, what is the legal nature of ‘assets’ sold in-world? Aside from physical goods sold via the virtual world into the real world, virtual assets are unlikely to be characterised as ‘goods’. Under English law those virtual assets are most likely to be classed as ‘services’.

This distinction is significant because there is differing treatment under the law between contracts for the supply of goods and contracts for the supply of services.

If we consider the transfer of in-world assets only as between inhabitants those are unlikely to be classed as a sale of goods. They might constitute a supply of services. If one considers the actual form of what would be happening it can be seen that a digital asset within the virtual world is simply a piece of software code which enables the virtual representation of the particular asset. When a software code is usually supplied to a user, its use is granted by way of licence to use that software. For example, most of us are familiar with Microsoft products and will know that when those products are used they are being used under a standard software licence issued by Microsoft. Thus, given that in-world experiences are founded on computer programs, it follows that any transfer of digital assets must be regarded as a transfer of software code. The proper manner in which software code is made available for use is by software licence.

Now, in the case of the Microsoft or other software supplier licences, one is presented with a licence agreement which is accepted online by the user clicking on the ‘I Accept’ command upon installation of the software. In the case of the transfer of a digital asset in-world, whilst we have seen that it must be regarded as a software licence, there will be no in-world command which makes it clear that the transferee is being granted a licence to use the digital asset. The transfer will most likely just occur seamlessly.

Whilst the property featured in virtual worlds may be just that – virtual, it has not prevented real world money being made by individuals from transacting such property. The most notorious at the time of writing is Ailin Graef, a German woman who became a millionaire through the development of ‘land’ in Second Life. In the US there has been litigation in the courts in the form of a case by a Pennsylvanian lawyer, Marc Bragg, over his purchase of a large amount of online real estate which was condemned as improper by Second Life and confiscated.
2.3.2 V-COMMERCE OFFERS DISTINGUISHED FROM INVITATIONS TO TREAT.

There is a concept in English Contract law which might appear strange at first hearing but which is founded on sound reasoning and very necessary in any sales environment. In-world retailing is no exception.

It is necessary to distinguish a true offer from an ‘invitation to treat’ The importance of the distinction is that if a true offer is made and is then accepted the person making the offer is bound by it. Conversely, if what the person making the offer said or did is not a true offer, but merely an invitation to treat, the other person cannot, by saying ‘I accept’, bind the offeror and thus create a contract. Important though this distinction is, it is not always easy to make.

The contrast between the two principles can best be illustrated by the use of examples common to commercial life.

First, the tender situation. Here, the distinction between an offer and an invitation to treat is reasonably clearly seen. If a company asks a number of suppliers to put in tenders for supplying it with some particular goods or services, the company is not, thereby, making an offer to those suppliers. Consequently, the company is not bound to accept the lowest or any other tender. It is not the company which makes the offer, the offer comes from the supplier in the form of a tender or estimate.

The next example of an invitation to treat is the display of articles on shelves in a shop. The offer is not made by the shop owner. They are only making an invitation to treat. The offer is in fact made by the customer taking the item or items to the cash desk and tendering money to purchase. That offer by the customer can then be accepted or refused by the shop. The courts take the same view of goods displayed in a shop window.

If we pursue this legal analysis into the virtual world or social network environment we may conclude that the display for example of virtual assets in-world by a virtual commerce retailer would not in itself constitute an offer for sale of those assets to inhabitants visiting the retailers island. The island site would amount to an invitation to treat. The inhabitant makes the offer to purchase the assets by approaching the island and initiating the purchase process. The in-world retailer would be free at that stage to decide whether to continue with the sale of the virtual assets, or indeed physical goods where the inhabitant is afforded the ability to teleport from the in-world environment to the in-world retailers’ e-commerce website.

The same rule applies to an in-world advertisement. The general rule is that an advertisement is not an offer, merely an invitation to treat. We consider advertisements in the context of virtual worlds and social networks in Chapter 6.

For the virtual commerce business to protect itself from making unintentional offers, it therefore needs to observe the fine distinction between an offer and an invitation.

The Internet of course uses modern digital technology. It is not a closed system like telex and it offers much more through its interconnecting networks. Anyone with a PC or suitably enabled mobile phone, a modem, suitable programs and a paid up subscription to one of the Internet Service Providers (ISPs) or telecommunication companies, can gain access to the system. The user can obtain information from websites, send messages through email, and order merchandise and services.
There is a distinction however between the Internet at large and the kind of environments which are the subject of this book. Virtual worlds and Internet social networks are in many respects closed environments though they each rely on the open system which is the Internet. They are based on communities which inherently introduce a degree of restriction albeit that the numbers of participants to such environments may be millions.

The point to appreciate is that a contract need not be a detailed formal document. It is possible to form a legally binding contract by the simple exchange of email or in-world text as between avatars or between users of a social network. Whilst this is true in reality there might be arguments over the uncertainty of the precise terms in such a situation. The court may refuse to confirm an in-world contract if there are so many aspects of the purported agreement so unclear as to make the contract void for uncertainty. Nonetheless, simple in-world email or text exchange can create legal relations so care must be taken.

### 2.3.3 THE VIRTUAL WORLD OR SOCIAL NETWORK WEBSITE

A Website operated by a virtual world provider or social network provider is primarily a forum for interaction between inhabitants of the environments. However, if there are opportunities for business transaction – v-commerce in the case of virtual worlds, such websites also become the electronic equivalent of a shop window.

It is important the virtual world or social network operator makes it clear that its website does not constitute an irrevocable offer for sale of the various merchandise or services made available through the website.

If one contemplates the issue, if that part of the content available for sale in a virtual world or social network constitutes an offer at law then the in-world business will have no control over to whom it becomes legally bound. This would be a commercially intolerable scenario, applying to both operators of such environments and to the v-commerce retailers who occupy an island presence or are situated within a social network.

By the inclusion of an appropriate disclaimer, each will ensure that it has the ability to select inhabitants and manage its supply of content, merchandise or services.

There are many practical reasons why operators of virtual worlds or social networks and the in-world retailers they host may not wish to deal with all inhabitants of their environments. For example, those inhabitants might be from several jurisdictions around the world. The social network or virtual world website may be targeted to specific audiences and it is common for companies to operate various websites if the company is international, perhaps with one site covering Europe, and another governing the US market. Thus, it is important for the operator of the environment to retain the power to accept or refuse. In this way it can decline inhabitants without the fear of being in breach of contract.

This issue of jurisdiction is important and if, for example, a v-commerce retailer only ever intends to accept in-world orders from inhabitants based in the UK it must, in its e-commerce website to which the inhabitant teleports, place a notice on that website stating that the contents of its website are for UK customers only.
2.3.4 V-COMMERCE EXCLUSION CLAUSES

Most people are familiar with clauses in contracts which seek to restrict or limit a company’s legal liability in certain situations. Such devices are called Disclaimers or Exclusion Clauses. They are terms in a contract which seek to exempt one of the parties from liability in certain events. The same principles apply to what are called Limitation Clauses. These are clauses which attempt to limit, rather than wholly exclude, a party’s liability. An example is a clause which states that complaints must be made within a certain period of time.

Exclusion clauses are a perfectly legitimate device in contracts between parties of equal bargaining power. In general, the courts will regard two businesses which wish to enter into a contract, as having equal bargaining power. Clearly, there are in reality, significant differences in commercial strength between businesses and many commercial dealings are entered into on terms favourable to the stronger party. That is simple commercial reality. Broadly though, the law treats both businesses as having a greater understanding of commercial transactions than say the individual consumer. The same can be said in the context of v-commerce business dealings. If an in-world company strikes a poor commercial deal with another in-world company, the courts are not likely to intervene for that reason alone.

However, there are circumstances where the courts will intervene and which actually have great relevance to v-commerce transactions. This is where the parties are unequal. Here, exclusion clauses may be unfair. The law will regard a business and a consumer as unequal parties – the business treated as the dominant party. In essence, the law says that businesses are more likely to be savvy when it comes to striking deals than the average consumer. The relative positions therefore mean that the consumer is in a potentially vulnerable capacity. For this reason in the UK, as indeed throughout the EU, consumers are afforded considerable protection when dealing with businesses. It is that policy which dictates much of the law relating to online sales to consumers and which we consider in this book in the context of virtual worlds and social networks. It is of clear application to v-commerce transactions because it is very likely the individual who controls the avatar in the virtual environment, or indeed the person who participates in an Internet social network, will be a private consumer rather than a business. Moreover, both these environments attract younger people, frequently teenagers, and so the inhabitants are also likely to be inexperienced in commercial dealings.

Online consumer trade, of course, has seen huge growth in recent years, particularly for items such as flight bookings, hotel bookings, books, CD and DVD purchases. It has fulfilled even the most ambitious expectations for e-commerce although the journey has been long and many early commercial entrants to online retailing failed along the way.

As stated, the law assumes that consumers deserve greater legal protection. It is therefore essential the v-commerce retailer appreciates who its in-world presence is targeted towards as this will determine the nature and extent of the virtual world legal terms and conditions it will operate. The same restraint also applies to the operators of virtual worlds and social networks. In Chapter 3 we consider some examples of virtual world legal terms and conditions.

Virtual worlds do not operate in a vacuum. Over many years the law has evolved. There are a number of Acts of Parliament and European Regulations which are designed to give the consumer high levels of protection when dealing with businesses. It is useful
to consider these briefly. These laws are not written for v-commerce trade alone but have particular relevance to it.

2.3.4.1 The Unfair Contract Terms Act 1977

The first significant statutory attempt to regulate unfair contract terms is now more than thirty years old but still governs today. The Unfair Contract Terms Act 1977 (as amended) (UCTA) is the Act which dominates exclusion and limitation clauses and how they are to be regarded at law. The Act undoubtedly applies to v-commerce legal terms imposed on consumers and to in-world sales of goods or services.

It is first necessary to study two definitions in the Act. First, ‘Business Liability’ and second, ‘Deals as Consumer’. Most of the Act applies only to business liability and the consumer has a specially favoured status under the legislation.

‘Business Liability’ is liability arising from things done by a person in the course of business or from the occupation of business premises. The latter element is of interest in the context of virtual worlds. Could a virtual island presence of a retailer be regarded as occupation of business premises?

Clearly, when this legislation was framed virtual worlds had not been conceived. The question may fall for determination in future case law but it is submitted that the better view is that the courts would not regard a virtual island on which a retailer resides, as occupation of business premises within the meaning of the Act. In any event, the first element of the definition, ‘in the course of business’ is more likely to bring an in-world retailer within the ambit of the Act. Clearly, even though it may be configured for trade virtually, an in-world retailer is still acting as a business.

A person ‘Deals as Consumer’ if he does not make the contract in the course of a business and the other party does make the contract in the course of a business. Thus, an inhabitant of a virtual world acting via their avatar may well deal as a consumer even though they do so in the realm of virtual reality.

If the v-commerce contract is for the supply of goods, there is an additional point, namely that the goods must be of a type ordinarily supplied for private use or consumption.

The Act provides various safeguards for consumers. In the case of loss or damage, an in-world retailer company cannot exclude or restrict its business liability for negligence except insofar as the terms or notice satisfies the requirement of reasonableness.

This requirement of reasonableness would operate in the context of v-commerce as follows. The term in the v-commerce contract must be a fair and reasonable one to be included in the contract having regard to all the circumstances which were, or ought to have been, known to or in the contemplation of the parties when the contract was made.

The Act lays down guidelines for the application of the reasonableness test. So, for example, when one party deals as an in-world consumer or on the in-world retailers standard written terms of business that retailer cannot:

- If it is in breach of contract exclude or restrict its business liability in respect of the breach.
- Claim to be entitled to render a contractual performance substantially different from that which was reasonably expected of it.
Claim to be entitled to render no performance at all, except in all three cases, subject to the requirement of reasonableness.

2.3.4.2 The Unfair Terms in Consumer Contracts Regulations 1994

Further protection for consumers is contained in The Unfair Terms in Consumer Contracts Regulations 1994. These Regulations came into force on 1 July 1995.

Once again, in common with many other laws considered in this book, they have application throughout the EU as they give effect to a European Community Directive (93/13/EEC). This Directive exists to promote harmonisation of the laws of member states so as to ensure that contracts with consumers do not include terms which are unfair to the consumer. They apply to standard contracts entered into between the sellers or suppliers of goods or services to consumers and will have application to v-commerce transactions between in-world retailers and consumers acting by their avatar. Similarly, they apply to online contracts conducted between businesses and consumers within Internet social networks. The Regulations introduce a general concept of ‘unfairness’ in contract terms.

V-commerce contract terms are subject to a test of fairness. If they are regarded as unfair they will be of no legal effect. Regulation 5(1) states that if such terms are unfair ‘they shall not be binding on the consumer’. The definition of a consumer under the Regulations is quite wide. Regulation 2(1) defines a consumer as a ‘natural person who, in making a contract to which these Regulations apply, is acting for purposes which are outside his business’. This definition includes small business persons for activities which are incidental to their business. It can be seen that the Regulations will apply to v-commerce transactions. Although an individual may act through the medium of an avatar whilst in the environment, that individual is still a natural person.

2.3.4.3 The Consumer Protection from Unfair Trading Regulations 2008

The protection which consumers have under the general law within the UK and the EU extends further with the introduction of new Regulations which again have their source in the European Commission. These laws, written with the interests of consumers in the physical world in mind, nonetheless have application to the activity of in-world retailers and so we shall briefly consider their ambit.


The Regulations state that unfair commercial practices are prohibited. If we apply their provisions in the context of Internet virtual worlds or social networks, a commercial practice is unfair if:

a) it contravenes the requirements of professional diligence; and
b) it materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product.

A commercial practice is also unfair if:

a) it is a misleading action;

b) it is a misleading omission;
c) it is aggressive.

The Regulations also recite what constitutes misleading actions. An in-world commercial practice is a misleading action:

a) if it contains false information and is therefore untruthful or its overall presentation in any way deceives or is likely to deceive the average consumer, even if the information is factually correct; and
b) it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.

An in-world commercial practice satisfies the conditions of this paragraph if:

a) it concerns any marketing of a product (including comparative advertising) which creates confusion with any products, trademarks, trade names or other distinguishing marks of a competitor; or
b) it concerns any failure by an in-world trader to comply with a commitment contained in a code of conduct which the virtual trader has undertaken to comply with, if:

i) the in-world trader indicates in a commercial practice that he is bound by that code of conduct, and
ii) the commitment is firm and capable of being verified and is not aspirational, and it causes or is likely to cause the average consumer inhabiting the virtual world or social network to take a transactional decision he would not have taken otherwise, taking account of its factual context and of all its features and circumstances.

The matters referred to above include:

a) the existence or nature of the product;
b) the main characteristics of the product;
c) the extent of the in-world trader’s commitments;
d) the motives for the commercial practice;
e) the nature of the sales process;
f) any statement or symbol relating to direct or indirect sponsorship or approval of the trader or the product;
g) the price or the manner in which the price is calculated;
h) the existence of a specific price advantage;
i) the need for a service, part, replacement or repair;
j) the nature, attributes and rights of the in-world trader;
k) the consumer’s rights or the risks he may face.

The Regulations state that the ‘main characteristics of the product’ include several issues and it is worth reciting these here:

a) availability of the product;
b) benefits of the product;
c) risks of the product;
d) execution of the product;

e) composition of the product;
f) accessories of the product;
g) after-sale customer assistance concerning the product;
h) the handling of complaints about the product;
i) the method and date of manufacture of the product;
j) the method and date of provision of the product;
k) delivery of the product;
l) fitness for purpose of the product;
m) usage of the product;
n) quantity of the product;
o) specification of the product;
p) geographical or commercial origin of the product — this of course has special relevance in the context of virtual world commerce; and
q) results to be expected from use of the product.

The Regulations also define the ‘nature, attributes and rights’ as far as concern the in-world trader and these include the virtual trader’s:

a) identity;
b) assets;
c) qualifications;
d) status;
e) approval;
f) affiliations or connections;
g) ownership of industrial, commercial or intellectual property rights; and
h) awards and distinctions.

2.3.4.3.1 Misleading v-commerce Practices

The Regulations make clear that an (in-world) commercial practice is a misleading omission if, in its factual context, the (in-world) commercial practice omits material information, or perhaps the (in-world) commercial practice hides material information, or provides material information in a manner which is unclear, unintelligible, ambiguous or untimely, or fails to identify its commercial intent, unless this is already apparent. If any of these things causes or is likely to cause the average consumer inhabitant of a virtual world to take a transactional decision he would not have taken otherwise.

The matters referred to above are:

a) all the features and circumstances of the commercial practice;
b) the limitations of the medium used to communicate the commercial practice (including limitations of space or time). This has particular application to virtual world or social network environments because by their very nature they may have inherent limitations whether in terms of graphical depiction or constraints on text.

Finally, where the medium used to communicate the commercial practice imposes limitations of space or time, any measures taken by the virtual trader to make the
information available to consumer inhabitants by other means. So, perhaps the virtual retailer might also communicate information by providing a hyperlink to its full e-commerce website from the virtual world. Alternatively, it might (by obtaining and abiding by the Data Protection requirements explained in Chapter 7) send the inhabitant relevant information to the inhabitant’s physical home address.

The Regulations confirm that ‘material information’ means:

a) the information which the average consumer needs, according to the context, to take an informed transactional decision; and
b) any information requirement which applies in relation to a commercial communication as a result of other legal obligation which apply within the EU – such as Data Protection (Chapter 7) or the E-commerce Regulations which we examine in Chapter 4.

Where a commercial practice is an invitation to purchase, the following information will be material if not already apparent from the context in addition to any other information which is material information:

a) the main characteristics of the in-world product, to the extent appropriate to the medium by which the invitation to purchase is communicated;
b) the identity of the virtual trader, such as his trading name, and the identity of any other trader on whose behalf the trader is acting;
c) the geographical address of the virtual trader and the geographical address of any other trader on whose behalf the trader is acting;
d) either:
   i) the price, including any taxes; or
   ii) where the nature of the in-world product is such that the price cannot reasonably be calculated in advance, the manner in which the price is calculated.

e) where appropriate, either:
   i) all additional freight, delivery or postal charges; or
   ii) where such charges cannot reasonably be calculated in advance, the fact that such charges may be payable;

In addition, the following matters:

a) arrangements for payment;
b) arrangements for delivery;
c) arrangements for performance;
d) complaint handling policy;
e) for products and transactions involving a right of withdrawal or cancellation, the existence of such a right.
2.3.4.3.2 Aggressive v-commerce Practices
A commercial practice is aggressive if, in its factual context, taking account of all of its features and circumstances:

a) it significantly impairs or is likely significantly to impair the average consumer inhabitant's freedom of choice or conduct in relation to the product concerned through the use of harassment, coercion or undue influence; and

b) it thereby causes or is likely to cause him to take a transactional decision he would not have taken otherwise.

In determining whether an in-world commercial practice uses harassment, coercion or undue influence account shall be taken of for example:

a) its timing, location, nature or persistence;

b) the use of threatening or abusive language or behaviour;

c) any onerous or disproportionate non-contractual barrier imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader; and

d) any threat to take any action which cannot legally be taken.

'Undue influence' means exploiting a position of power in relation to the consumer inhabitant so as to apply pressure in a way which significantly limits the consumer inhabitant's ability to make an informed decision.

It must be stated that an operator of a virtual world or social network should and most likely would feature in its in-world legal terms and conditions, and generally clear guidelines for its in-world retailers to meet these legal obligations.

An in-world retailer is guilty of an offence if:

a) he knowingly or recklessly engages in a commercial practice which contravenes the requirements of professional diligence; and

b) the practice materially distorts or is likely to materially distort the economic behaviour of the average consumer with regard to the product under regulation.

An in-world retailer who engages in a commercial practice without regard to whether the practice contravenes the requirements of professional diligence shall be deemed recklessly to engage in the practice, whether or not the virtual retailer has reason for believing that the practice might contravene those requirements.

An in-world retailer guilty of an offence under the Regulations is liable:

a) on summary conviction, to a fine not exceeding the statutory maximum; or

b) on conviction on indictment, to a fine or imprisonment for a term not exceeding two years or both.

Where an offence under the Regulations committed by a virtual retailer company is proved:
a) to have been committed with the consent or connivance of an officer of the company; or
b) to be attributable to any neglect on his part, the officer as well as the virtual retailer company is guilty of the offence and liable to be proceeded against.

Reference to an officer of a virtual retailer company includes reference to:

a) a director, manager, secretary or other similar officer; and
b) a person purporting to act as a director, manager, secretary or other similar officer.

It is a defence for an in-world retailer to prove:

a) that the commission of the offence was due to:
   i) a mistake;
   ii) reliance on information supplied to him by another person;
   iii) the act or default of another person;
   iv) an accident; or
   v) another cause beyond his control; and
b) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by himself or any person under his control.

2.4 Capacity

Online games and virtual worlds are not just the preserve of adults. Young children are embracing the genre through websites such as webkinz.com where children can play online games and look after virtual pets. Most of the child focussed worlds are free to join, making their money from advertising (see Chapter 6) and by selling accessories for the pet or avatar. Large media companies have identified the potential for this pre-teenage market by adopting the tactic of controlling and exploiting the gaming environment through acquisition and ownership. In 2005 Viacom acquired Neopets, a virtual world for children for £150m. Disney's own Virtual Magic Kingdom is one of the most popular sites in terms of global web traffic. Club Penguin is another virtual world targeted at the very young.

It is clear therefore that these worlds are growing and the temptation for their owners is to market and promote their own products or those of others in-world to the children who participate.

There are, however, contextual issues to appreciate. Virtual worlds are addictive environments, rather like computer games. The question of age restrictions features large.

How does the law address this question of contracting with children in virtual worlds?

Under the English law of contract, people below the age of majority, which is eighteen, are called minors (children). The law is founded on two principles. The first, is that the law must protect the child against his or her inexperience, which may enable an adult
to take unfair advantage of him or to induce him to enter into an improvident contract. This principle is on the basis of the general rule that a child is not bound by his contracts, except for the supply of ‘necessaries’ not likely to apply in the virtual world.

The second principle is that the law should not cause unnecessary hardship to adults who deal fairly with children. Under this principle certain contracts with children are valid.

Whilst it is beyond the scope of this book to examine the various situations where v-commerce contracts can be upheld against children, suffice it to say that the law in this sphere has equal application to virtual worlds and social networks.