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LAW AND LIBERTY IN VIRTUAL WORLDS

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The legal regulation of virtual worlds has become a pressing issue in cyberlaw as increasing numbers of people flock to virtual worlds and invest their time and resources there. This essay discusses some basic questions of freedom and regulation in virtual environments. In the pages that follow, I offer four basic points about what liberty and regulation in virtual worlds will look like.

First, the right of players to play in virtual worlds and the right of game designers to create and maintain these worlds overlap in important respects with the constitutional rights of freedom of speech, expression, and association. However, because the First Amendment only protects against state action, it does not adequately protect many important elements of the rights to play and design from interference by private parties.

Second, virtually all activity in virtual worlds must begin as some form of expression, and therefore most forms of tort liability in virtual worlds will be communications torts such as defamation, invasion of privacy, fraud, or infringements of trademark and copyright.

Third, rights between players and designers of virtual worlds are primarily determined by contract. This allows owners of the game platform to police misbehavior by the players. It also offers enormous control over the game space, which platform owners may conceivably abuse. Legislation and administrative regulation, however, can alter these contractual rights. Political pressures for regulation of virtual worlds will become pronounced as more people invest more time and energy in these worlds. Players will begin to

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demand property rights for their virtual possessions, and legal protection from invasions of privacy and other forms of overreaching by platform owners and other players.

Fourth, many virtual spaces are becoming sites of real world and virtual world commerce. In the future, game designers will likely attempt to invoke the First Amendment both to protect their artistic vision and to avoid regulation of their business practices. However, to the extent that spaces are designed for and encourage buying and selling of real and virtual goods, the First Amendment will not shield game designers from the application of consumer protection laws.

I. Three Kinds of Virtual Liberty

There are three kinds of freedom in virtual worlds. The first is the freedom of the players to participate in the virtual world and interact with each other through their in-game representations, or avatars. This is the freedom to play.[1] The second is the freedom of the game designer or platform owner[2] to plan, construct, and maintain the virtual world. This is the freedom to design. The third kind of freedom is the collective right of the designers and players to build and enhance the game space together. Many game spaces give players considerable freedom to add things to the game space, which makes them, in effect, the sub-designers of the virtual world. Moreover, at some point there will surely be open source game platforms that will allow the participants to design entire game spaces from the ground up. We might call this the freedom to design together.

Platform owners control virtual worlds through two basic devices — code and contract. Platform owners can write (or rewrite) the software that shapes the physics and ontology of the game space and sets parameters about what people can do there. Game designers can also regulate the game through contract. Usually players must sign an agreement to participate in the virtual world. The

1. *See* Edward Castronova, *The Right To Play*, 49 N.Y.L. Sch. L. Rev. 185 (2004).

2. The designers and owners of the game platform may be different people and, accordingly, may have different rights. For purposes of this discussion, I will assume that they work for the same entity. Therefore, I will use the terms "game designer" and "platform owner" interchangeably.

contract is generally called the Terms of Service ("ToS") or End User License Agreement ("EULA"). In most cases, the EULA covers rules about proper play, appropriate behavior, and decorum in the virtual space that the platform owner cannot easily impose through code. The platform owner can discipline players who violate the EULA, take away their privileges and powers, or even kick them out of the game space and eliminate their avatars.

The platform owner's freedom to design and the players' freedom to play are often synergistic. The code and the EULA create the architecture and social contract of the virtual world; they allow people to play within it. To a very considerable extent, the players' freedom to play is the freedom to play within the rules the platform owners have created. Imagine, for example, that a designer creates a game called The Gulag Online, which simulates a Soviet-era prison camp in Siberia. The right to play in The Gulag Online is the right to experience — and to be subjected to — what can happen in that space. Some of these experiences will not be at all pleasant for one's avatar, but that is the point of the game. The right to play in a particular virtual space depends in large part on what kind of space it is and what kind of game the platform owner is trying to create. Players who take on the role of political prisoners in The Gulag Online can hardly complain if their avatars cannot order virtual room service in their prison barracks. They can, however, strategize among themselves and revolt against their Soviet oppressors to the extent that the rules permit it.

Platform owners, particularly those who are in the business of making money from selling licenses to play in game spaces, are usually eager to keep the players happy so that they stay and bring even more people into the game space. For this reason, they often seek out the opinions of the player community about how to improve the game to make it more fun to play, how different features can be tweaked, how loopholes can be eliminated, and how previously unanticipated forms of player behavior, which are thought unfair or not in the spirit of the game, can be prevented through code or prohibited by the EULA. The platform owner usually cannot make everyone happy because the suggestions may run in very different directions; some people may want to have a certain behavior prohibited, while others want it to become a legitimate part of the

game. Nevertheless, the interaction between the platform owner and the player community assists both the freedom to design and the freedom to play; it is one aspect — although certainly not the only one — of the freedom to design together.

Even so, the interests and desires of players and platform owners can also conflict. Although the freedom to play generally exists within the rules of the game, platform owners may run their spaces in ways that the players believe are unfair or tyrannical.[3] As a result, claims about the platform owners' freedom to design may clash with players' claims about the freedom to play, and the law may have to arbitrate between them. For example, players may complain that platform owners have defrauded or misled them, stolen their intellectual property, or invaded their privacy. The enormous power that platform owners wield over events in the game space, and their ability to see everything that is going on in that space, means that they have abundant opportunity to abuse their authority. The fact that players have signed an agreement with the platform owner and can voluntarily exit from the space does not necessarily settle the matter. Although players make the initial choice of where to play, over time they often invest considerable time and energy in the game world and in their in-world identities.[4] Investment in game spaces and the desire to maintain social connections within the game space may make exit difficult, and it may be unfair to insist that exit is a player's only legal remedy.

Conversely, some players may behave in ways that the platform owners — and other players — think is inappropriate, undermines the rules of the game, or makes it less fun for everyone else. The platform owner may rewrite the code, change the EULA, or kick the offending players out. When this happens, these players may also argue — although with somewhat less justification — that the platform owner has abridged their right to play because the platform owner is behaving arbitrarily or illegally. Inevitably, the law

3. *See* Raph Koster, *Declaration of the Rights of Avatars* (Aug. 27, 2000) (arguing that platform owners should treat avatars of players with a certain minimum level of respect), *available at* http://www.legendmud.org/raph/gaming/playerrights.html (last visited Feb. 27, 2004).

4. *See* F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CAL. L. REV. 1, 5-11 (2004) (describing the growing numbers of people who inhabit virtual worlds and the importance of these virtual communities to their lives).

will have to settle some of these disputes. Many of the most important legal problems in virtual worlds arise out of the potential conflicts between platform owners' assertions of the right to design and players' opposing assertions of the right to play.

In fact, there can be a number of different relationships between the platform owners, the players, and the state. For example, there can be disputes:

(1) between the platform owner and the state about how the game space is designed and maintained;

(2) between the players and the state about whether players may participate in certain game spaces and what they may do inside them;

(3) between players and platform owners about what players and platform owners may do (and not do) in the game space;

(4) between players about whether the in-game activities of one violated the legal rights of another;

(5) between the platform owner and third parties not playing the game who complain about activities within the game space that harm the third party's legally protected interests; and

(6) between players and third parties not playing the game who claim that the player's in-game activities harmed the third party's legally protected interests.

These different types of disputes are not mutually exclusive. For example, disputes between platform owners and players may implicate each party's rights against the state; so too might disputes between the platform owner (or the players) and third parties. Consider a case in which a player creates an avatar decorated with a Microsoft logo that makes fun of Microsoft. Microsoft may argue that the player has infringed its intellectual property rights by using its logo without its permission, and that the platform owner has contributed to the infringement by allowing the virtual object to remain in the space. The platform owner may complain that the player has violated the EULA or the Terms of Service agreement. Finally, the player may insist that he or she has a First Amendment right to use the logo to engage in parody. The point of this hypothetical is not to decide who would win on the merits, but rather to demonstrate the wide range of public and private rights that even the simplest disputes in virtual worlds can implicate.

II. Virtual Liberty and the First Amendment

The rights to design and play in virtual worlds overlap in important respects with the constitutional rights of freedom of speech, expression, and association. In the future, both platform owners and players will invoke the First Amendment as a defense against government attempts to regulate virtual worlds. However, the law of the First Amendment, as it currently exists, does not adequately protect many important features of the rights to design and play. The most obvious reason is that the right of freedom of speech protects individuals from abridgements by the state, and not by private parties. Some features of the rights to design and play concern freedom from state regulation of virtual worlds, but other features balance the competing interests of the private parties — the platform owners, players, and third parties. The state is always involved, of course, in adjusting legal rights between private parties. Some adjustments of these rights, for example, in libel or privacy law, can violate the First Amendment.[5] But not all laws that adjust rights of private parties violate the First Amendment under current doctrine, even when these laws have very significant effects on the practical ability of people to express themselves. To protect the rights to design and play fully, one must go beyond the confines of existing First Amendment doctrine.

Nevertheless, it is well worth exploring First Amendment protections for the rights to design and play. When the state regulates virtual spaces because of disapproval of the ideas expressed by the activities of the players and the designers, the free speech principle is surely implicated. But that is true of almost any activity: if the government punishes only arsonists who are critical of the government, this violates the First Amendment notwithstanding the fact that the government may make arson a crime. A different question, however, is whether design and play in virtual spaces are themselves protected forms of speech, like dance, charitable solicitation, picketing, leafleting, playing a musical instrument, or using a printing press to publish a newspaper.[6]

5. *See* New York Times v. Sullivan, 376 U.S. 254 (1964) (holding that enforcement of common law defamation rules violated First Amendment).

6. *See, e.g.*, Ward v. Rock Against Racism, 491 U.S. 781 (1989) (music); United States v. Grace, 461 U.S. 171 (1983) (picketing and leafleting); Schad v. Borough of

Protected expression under the First Amendment is a historically contingent category, whose contours change with time as new conventions and technologies emerge. In general, the question is whether a particular activity serves as a medium for the communication of ideas.[7] A medium of communication combines technologies, conventions, and social practices. Motion pictures are a good example. Instead of thinking of movies as "speech," think of the practices of making and exhibiting motion pictures as a medium for the communication of ideas. This medium includes both the technologies for making and exhibiting movies, and social practices and conventions for expression using those technologies. In 1915, the Supreme Court did not consider motion pictures protected speech — that is, it did not regard movies as a medium for the communication of ideas. Instead, it saw movies as a form of mere "entertainment" like baseball or hockey.[8] Today it seems obvious to us that motion pictures, and the conventions and practices of telling stories within motion picture technology, are very much a medium for the communication of ideas, and, not surprisingly, the Supreme Court eventually came around to that assessment as well.[9]

Should we understand the developing technologies and social practices of designing and playing games, including the cooperative features of play that I have called the freedom to design together, as a new medium for the communication of ideas? I think the arguments are quite compelling. Courts already recognize much simpler games — so-called first person shooter games — as artistic creations entitled to First Amendment protection.[10] If anything,

Mount Ephraim, 452 U.S. 61 (1981) (entertainment, motion pictures, musical and dramatic works, live entertainment); Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) (charitable solicitation); Near v. Minnesota, 283 U.S. 697 (1931) (printing newspapers).

7. *See* Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1252-55 (1995) (noting that "[t]he 'ideas' prized by First Amendment jurisprudence are often as much a product of First Amendment media as they are independent 'entities' transparently conveyed by such media.").

8. *See id.* at 1252-53; Mutual Film Corp. v. Industrial Comm., 236 U.S. 230, 243-45 (1915).

9. *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952).

10. *See* Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954 (8th Cir. 2003) (digital video games protected by the First Amendment); American Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 577-78 (7th Cir. 2001); Sanders v. Acclaim Entm't, Inc., 188 F. Supp. 2d 1264 (D. Colo. 2002). *See also* James v. Meow Media, Inc.

the arguments for treating the design and play of massively multiplayer online games or virtual worlds as artistic creations or forms of expression are even stronger than those for first person shooter games.

Designers understand themselves to be creating new worlds in which communities can form and stories can be told. Players, in turn, use the game platform to create identities, have adventures, and tell their own stories. The technologies for producing animated motion pictures and building virtual worlds have been merging for some time now. The design of movies and virtual worlds are similar in many respects, except that virtual worlds allow interactivity. This interactivity makes virtual worlds even more a medium for the communication and exchange of ideas than motion pictures, for not only can the platform owner exercise his or her imagination in the creation of new worlds, but so too can the players.[11] Motion pictures allow images to be viewed by a mass audience. But multiplayer online games convert that mass audience into active participants and storytellers. Virtual spaces allow players to add new features to the worlds they inhabit. Virtual worlds permit contingent events, path dependencies, and cumulative effects. In short, they permit the development of histories. They allow the players to make new meanings, to have new adventures, to take on new personas, to form new communities, and to express themselves and interact with and communicate with others in ever new ways.

300 F.3d 683 (6th Cir. 2002) (attaching tort liability to the communicative aspect of the video games implicates First Amendment); Wilson v. Midway Games, 198 F. Supp. 2d 167, 181 (D. Conn. 2002) ("While video games that are merely digitized pinball machines are not protected speech, those that are analytically indistinguishable from other protected media, such as motion pictures or books, which convey information or evoke emotions by imagery, are protected under the First Amendment."). Several older decisions have held that video games are not protected on the grounds that they lack communicative content: *Cf.* America's Best Family Showplace v. City of New York, 536 F. Supp. 170, 174 (E.D.N.Y. 1982) (video games are "pure entertainment with no informational element"); Rothner v. Chicago, 929 F.2d 297 (7th Cir. 1991) (video games lack a vital informative element); Caswell v. Licensing Comm'n for Brockton, 444 N.E.2d 922, 926-27 (Mass. 1983) ("[A]ny communication or expression of ideas that occurs during the playing of a video game is purely inconsequential."); Malden Amusement Co. v. City of Malden, 582 F. Supp. 297, 299 (D. Mass 1983) (video games unprotected by First Amendment).

11. *See* Wilson v. Midway Games, 198 F. Supp. 2d 167, 181-82 (D. Conn. 2002) (arguing that interactivity cuts in favor of First Amendment protection of video games).

We might make a useful, if imperfect, analogy between virtual worlds and improvisational theater. Just as the platform owner can determine who gets to participate in the virtual space, but cannot fully control the players' actions, the director of an improvisational troupe has control over who participates in the improvisation, but does not have complete control over the scene as it develops. Improvisational theater is a combination of freedom and constraint that enlists the participation and the creativity of the actors to produce new works that none of the participants could have created on their own. In the same way, game platforms enlist the participation and creativity of the players to create new characters and new stories that could not otherwise have been produced.

For this reason, both platform owners and players can assert First Amendment rights against state interference with rights to design and play. I predict that both game designers and players will regularly invoke the First Amendment in future years to challenge legal regulation of virtual worlds, much as telecommunications companies and media corporations regularly invoke the First Amendment to avoid regulation of their businesses.[12] As the analogy to telecommunications regulation suggests, some of the platform owners' and players' activities should be protected by the free speech principle, while others — like violations of consumer protection laws — should not. If the state dislikes the theme and design of the game, or dislikes the ideas that players and programmers communicate in the game space because these ideas are violent, offensive, or indecent, the state may not restrict the content of the design or the activities of the players under the First Amendment any more than it could ban books or movies because of the ideas expressed in them. The major exceptions to this principle are the same that apply to books and movies: the state may ban obscene expression,[13] and it may protect children from exposure to indecency.[14] Concerns about indecency, however, are best

12. *See* Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 19-23 (2004).

13. *See* Miller v. California, 413 U.S. 15, 23-24 (1973); Paris Adult Theater I v. Slaton, 413 U.S. 49, 54 (1973).

14. *See* F.C.C. v. Pacifica Foundation, 438 U.S. 726, 749-750 (1978) (plurality opinion); Ginsberg v. New York, 390 U.S. 629, 637 (1968).

dealt with not by restricting the speech of adults in virtual spaces,[15] but by restricting access to minors, or zoning the virtual space so that minors cannot enter certain areas of the virtual space.

III. Regulating the Game Space — Torts and Crimes in Virtual Worlds

The fact that players and designers have First Amendment rights does not mean that virtual spaces are regulation free zones. One of the most compelling reasons for state intervention is that the boundaries between the game space and real space are permeable. What happens to people (or their avatars) in the game space may have real world effects on them and on third parties who are not part of the game.

Generally speaking, the destruction of virtual property or the killing of one avatar by another raises no problem that would require special state regulation, as long as it occurs within the rules of the game. The ability to destroy or steal another's virtual possessions, or exterminate another character, is part of what it means to participate in the medium. To the extent that these actions are within the rules, they are presumptively protected by the First Amendment. To return to the previous example of The Gulag Online, the platform owner has a First Amendment right to create a space in which some avatars (guards) imprison other avatars (prisoners) and shoot them if they try to escape. Accordingly, the players have a First Amendment right, as long as they are playing within the rules, to imprison, shoot, and attempt to escape.

To be sure, what is within the rules is sometimes disputed. Players are enormously creative, and often come up with new strategies and devices that the platform owners could not have foreseen. As a result, internal norms arise in many virtual worlds to regulate what players may do in the spaces; people can shun or punish people who misbehave and some players have created in world tribunals to adjudicate disputes.[16] The platform owner can also regulate

15. *See* Butler v. Michigan, 352 U.S. 380, 383 (1957) (holding that the state may not "reduce the adult population . . . to reading only what is fit for children.").

16. *See* Jennifer L. Mnookin, *Virtual(ly) Law: The Emergence of Law in LambdaMOO*, 2 J. Computer-Mediated Comm. (1996) (describing the rise of community norms in the virtual space of LamdaMOO), *available at* http://www.ascusc.org/jcmc/vol2/issue1/lambda.html (last visited Feb. 27, 2004). The multiplayer online game, A Tale in the

behavior in the game space by altering the code or the EULA. It can sanction or expel players who hack into the game to give themselves special abilities, or who otherwise violate the rules or the spirit of the game. When the platform owner does so, it is invoking its real world contractual rights. To this extent, state regulation is always involved in the governance of the game space.

Apart from violating contract terms, in world behavior can have real world effects that states may have special reason to regulate or prevent. Most of these situations involve communications torts — a category of legal causes of action in which people are harmed by speech acts of others that are not otherwise protected by the First Amendment.[17] Communications torts are likely to be a central feature of the legal regulation of game spaces for a simple reason; all activity in virtual worlds must begin as a form of speech. When people injure each other in virtual worlds in ways that the law will recognize, they are almost always committing some form of communications tort.

Among the most important examples of communications torts that can apply in virtual worlds are violations of intellectual property protections like copyright and trademark. (Although these are statutory schemes instead of common law causes of action, I include them in the category of communications torts because people legally injure each other through communication.) Publication or reproduction of copyrighted material in a virtual space may violate copyright, and creating virtual items with company logos may violate trademark rights. Because many virtual worlds encourage the creation and design of virtual items, the possibilities for infringement are plentiful indeed. If the platform owner allows the players to hold copyrights in their own designs, the game owner is inviting the law into the game space and the problems of enforcing intellectual property rights are greatly multiplied. For example, people may have intellectual property interests in the designs of virtual items. Taking a screenshot of the game that displays these items

Desert, offers elaborate instructions about how players can make laws for Ancient Egypt. *See* A Tale in the Desert, *at* http://www.atitd.com/man-lawmaking.html (last visited Feb. 29, 2004).

17. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 343-48 (1974) (describing when defamatory statements may subject defendants to liability consistent with the First Amendment).

makes a copy of the surface pattern and thus may violate the owner's intellectual property rights. All of the emerging conflicts between freedom of expression and intellectual property law are present in virtual worlds. In fact, because so much of virtual spaces copy and build on existing elements, and because the entire space is a set of representations, the conflicts between freedom of speech and intellectual property are further heightened; in some respects, virtual spaces constitute a perfect storm.

Defamation can also occur in virtual spaces. People can defame other people's real world identities in cyberspace, just as they can in real space. People can also defame players' in world identities, or avatars, for example, by falsely claiming that a particular character has cheated. Speech is defamatory when it harms one's reputation in one's community,[18] and in theory this should include virtual communities as well. Although leaving the virtual community for a new one or creating a new identity are technically available options, they may not be a sufficient remedy if people invest a great deal of time and energy in creating their in-world personas, and highly value their participation in the virtual community. In general, the more important that virtual worlds become to people, and the more time and effort they invest in them, the more likely the law will take seriously injuries to their in world reputation as well as their in world possessions.

What about fraud and misrepresentation? These should not be actionable if the rules of the game allow players to trick and deceive each other, although the platform owner is certainly not insulated from liability if it misrepresents the terms of the game or defrauds its customers. The problem is that not all activities are clearly specified as being within the rules. Players are quite creative in devising new ways to take advantage of each other within the parameters permitted by the code. Although in world dispute resolution may be helpful in some cases, when a great deal of money is at stake people may turn to the law where the code permits the maneuver and the EULA is silent.

18. *See* RESTATEMENT (SECOND) OF TORTS § 559 (1977) ("A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.").

It is likely that in the future virtual spaces will be used to create an entertaining space for people to shop online. That means that consumer protection laws will apply in these virtual spaces, including restrictions on false and misleading advertising. Nevertheless, the merger of collective storytelling and shopping may lead to difficult problems; is a certain maneuver or deception a form of false advertising, or is it just part of the game?

Finally, consider whether the tort of intentional infliction of emotional distress has any place in virtual worlds. Suppose one avatar rapes or tortures another, or a group of avatars gang tackle a player and make off with all of his or her virtual possessions.[19] Can the victims argue that they suffered severe emotional distress because they were treated outrageously in ways that are inconsistent with civilized society? One might reject this claim on the ground that players assume the risk of bad things that happen within the rules of the game, and that, in any case, norms and sanctions that develop within the game will serve as a sufficient deterrent and punishment for bad behavior. On the other hand, as people spend more of their lives in virtual worlds and their notions of self become increasingly bound up with these worlds, the argument for legal redress for outrageous behavior may become increasingly plausible.

Perhaps the best analogy would be to how tort and criminal law deal with injuries in contact sports. Generally speaking, football players cannot sue other players who tackle them during the game, even if the tackle results in lasting and permanent injury, and even if the tackle was ruled a foul. There is, however, a limited exception for physical injuries that stem from egregious violations of the rules.[20] When players violate the rules with deliberate intent to injure or with reckless disregard of the consequences, a few courts have allowed the victims to sue for battery. Thus, although a linebacker is not liable for a rough tackle, he is liable for hitting a

19. Julian Dibbell's famous 1993 article described a virtual rape by a character named Mr. Bungle committed in LambdaMOO, a MUD (Multi User Dimension), an earlier version of today's virtual worlds. Mr. Bungle was subjected to shunning from the other players and he was eventually eliminated or "toaded" by one of the game's designers or "wizards." *See* Julian Dibbell, *A Rape in Cyberspace: How an Evil Clown, a Haitian Trickster Spirit, Two Wizards, and a Cast of Dozens Turned a Database Into a Society*, THE VILLAGE VOICE, Dec. 23, 1993, *available at* http://www.juliandibbell.com/texts/bungle_vv.html (last visited Feb. 27, 2004).

20. *See* Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516 (10th Cir. 1979).

player on the kneecap with a pipe or taking out a pistol and shooting him.

In like fashion, we could imagine a small number of situations where suits for intentional infliction of emotional distress in virtual worlds would be appropriate, but the emotional injury would have to be severe and the behavior completely outside the bounds of the ordinary forms of mistreatment that players regularly inflict on each other in virtual worlds.[21] Most examples of what players call "griefing" will be adequately addressed either by the EULA — which usually gives the platform owner the right to sanction or exclude people who misbehave — or by the players' internal norms and practices of dispute resolution and shunning that naturally spring up inside many virtual worlds. Courts and legislatures should be particularly wary of allowing suits for intentional infliction of emotional distress except in the most extreme cases because these suits implicate the free speech concerns that underlie the right to design and the right to play in virtual worlds. Courts and legislatures should give virtual communities wide latitude to design their own rules and social norms to deal with misbehavior and leave plenty of room for the creativity of the people who design games as well as the people who play them.

IV. Real World Commodification and its Consequences

Quite apart from communications torts, there are other ways that in world behavior can have real world effects justifying state regulation. Many of these situations result from the accelerating *real world commodification* of virtual worlds, which increasingly breaches the barrier between what happens in the virtual space and what happens in the real world.

Commodification occurs when things in the virtual world are subject to purchase and exchange. However, it is crucial to distinguish *in world* commodification from *real world* commodification. Lots of virtual spaces feature in-world commodification: People can

21. Restatement (Second) of Torts § 46.1 & cmt. d. (1977) ("Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'").

barter and buy and sell things using the game world's currency, and they can earn more in world currency by performing various tasks. Real world commodification goes further: It means the ability to buy and sell things in virtual worlds using real world currency or in order to obtain real world currency. For example, people now buy and sell weapons, magical powers, and even their characters on eBay.[22] Game world currency is increasingly easy to convert into real world currency, and the Gaming Open Market now lets players buy and sell the currencies used in various popular game worlds.[23] In addition, businesses have sprung up that are entirely devoted to the sale of virtual items.[24]

Although players may highly value their identities, items, and special powers in virtual spaces, in world commodification generally presents no special problems that demand state regulation of virtual worlds, other than enforcing the contractual provisions of the EULA or Terms of Service agreement. Real world commodification, on the other hand, breaches the barrier between the virtual and real worlds and creates new and difficult problems. When virtual worlds contain items of significant value to the players that are convertible into real world property, governments will be increasingly interested in regulating what goes on in these virtual worlds. To give only one example, suppose that a virtual world contains a casino in which players can win in game currency. If the currency is freely transferable into dollars, the game offers an end-run around online gambling restrictions. In fact, virtual spaces present all of the same problems of crossing borders generally associated with the Internet. If players create and sell virtual Nazi memorabilia in the game space, this may run afoul of the laws in countries that prohibit the sale of such items.[25]

22. *See* eBay Listings, Internet Games (which includes a partial list of virtual items currently being auctioned off on the Internet), *at* http://entertainment.listings.ebay.com/Video-Games_Internet-Games_W0QQfromZR4QQsacategoryZ1654QQsocmdZListingItemList (last visited Feb. 28, 2004).

23. The Gaming Open Market, *at* http://www.gamingopenmarket.com (last visited Feb. 27, 2004).

24. *See* Internet Gaming Entertainment, About Us, (providing currency exchange services and services for the sale or exchange of virtual items), *at* http://www.ige.com/aboutus_B0.html (last visited Feb. 29, 2004).

25. *See* Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'antisemitisme, 169 F. Supp. 2d 1181 (N.D. Cal. 2001).

If platform owners encourage real world commodification of virtual worlds, encourage people in these worlds to treat virtual items like property, and allow sale and purchase of these assets as if they were property, they should not be surprised if courts, legislatures, and administrative agencies start treating virtual items as property. Indeed, the more activities in virtual worlds affect real world commerce and real world property interests, the more quickly virtual worlds will become targets of legal regulation.

Platform owners can attempt to head off this problem of real world commodification through contract. They can write the EULA to state that players should have no expectations of property rights in virtual items, that platform owners can remove or modify virtual items at will, and that players assume all risks of monetary loss when they play in the virtual world. The EULA can also state that players who attempt to sell virtual property in real space will be kicked out of the game and the virtual items destroyed. To the extent that the virtual space is designed to promote in world story telling and community formation — rather than real world commerce — the use of the EULA may be a good way to head off the problems caused by real world commodification and to safeguard the virtual world from legal regulation.[26] In addition, as I shall argue below, courts and legislatures should treat virtual worlds that resist or discourage real world commodification differently from those that encourage it.

Platform owners, however, cannot have it both ways. They cannot simultaneously encourage the purchase and sale of virtual items and then write the EULA so that all virtual items remain the property of the platform owner. The EULA may not be enforceable in all cases, especially if courts — and more importantly, legislatures and administrative agencies — think that platform owners are taking advantage of players. Legislatures and administrative agencies like the Federal Trade Commission can modify the law to recognize and protect property rights in virtual worlds if players place sufficient political pressure on them to do so. As virtual worlds become larger and inhabited by more players, as players spend more time

26. *See* Julian Dibbell, *Owned!: Intellectual Property in the Age of Dupers, Gold Farmers, eBayers, and Other Enemies of the Virtual State*, *available at* http://www.nyls.edu/docs/dibbell.pdf (last visited, Feb. 28, 2004).

and invest more of themselves in these virtual worlds, and as real world markets emerge for the sale of virtual world items and the exchange of virtual world currencies, the pressure on legislatures and administrative agencies to recognize and protect the property rights of players in virtual worlds will become irresistible. In fact, one might even imagine a scenario in which a game goes bankrupt and the players petition the bankruptcy court to keep the game running, restructure the business, and/or sell it to another party so that the players' virtual property interests are not destroyed. (These assets would be like bailments in the care and keeping of the platform owner.) The argument might be even more compelling if virtual items could be transported to another game space.

Game designers will probably be particularly disturbed by the notion of a bankruptcy court taking over a game because the one right that platform owners have always believed they possessed is the right to turn off the switch and end the simulation. Nevertheless, when game designers encourage real world commodification and propertization of their virtual worlds, they are inviting the law in, and when they do so, they will lose the degree of control over their worlds that they previously enjoyed.

Many game designers will want to create interesting spaces in which players can give free rein to their imaginations, and many players will want to inhabit those spaces and exercise their freedom to play to the fullest extent. Designers who wish to minimize legal interference with their worlds and maximize First Amendment protection must take care to structure their games to avoid or discourage real world commodification and the legal problems that it brings. There is no problem with rules that allow in world barter and in world markets as long as the platform owner takes steps in the code and in the EULA to discourage real world commodification of virtual items. The First Amendment should protect the rights of designers to create and preserve spaces that are devoted to expression and the exercise of narrative imagination. But when designers create worlds that encourage real world commodification, and that focus on commerce and the acquisition and sale of items with real world values, freedom of speech will not and should not offer them the same degree of protection from legal regulation. Treat the virtual space like a collective work of art, and it will re-

ceive artistic protection; treat the players as consumers and they will demand consumer protection.

Some real world commodification of virtual spaces is probably unavoidable, especially as virtual spaces become increasingly popular. Players will find ways to exchange virtual items for money, whether on eBay or through some other method. Platform owners may not be able to stamp out this practice entirely either through code or through enforcement of the EULA. Nevertheless, in designing legal regulation, the key issue should be the purposes of the virtual space and whether the platform owner encourages or discourages real world commodification. Not all virtual spaces are alike, and the law should not treat them as if they were all the same. The law should afford special protection to designers who devote their spaces primarily to the exercise of freedom of speech and association; this helps preserve the free speech values that support the rights to design and to play. We should avoid making these rights hostage to behind-your-back sales of virtual items by a small number of players. Conversely, virtual spaces that are designed to be shopping malls and emporia for the purchase and sale of real and virtual goods should be treated as such, and should not be able to avoid consumer protection regulation by hiding behind the First Amendment.

V. Conclusion

Virtual worlds will not remain separate jurisdictions left to themselves. The more people who live in them, and the more time, money and effort people invest in them, the more they will attract the law's attention. Intellectual property rights, consumer protection, and privacy will be three important reasons for legal regulation of virtual worlds in the years to come. Nevertheless, courts and legislatures must be careful not to lump all virtual worlds into the same category. Virtual spaces are not natural kinds: they can and will be used for many purposes in the future, including not only commerce, but education, therapy, political organization, and artistic expression. Courts and legislatures should keep these differences in mind and avoid one-size-fits-all solutions. In this way, they will help preserve the rights to design and play in virtual worlds, and ensure that there are plenty of spaces available for new forms of creativity, expression, and experimentation.