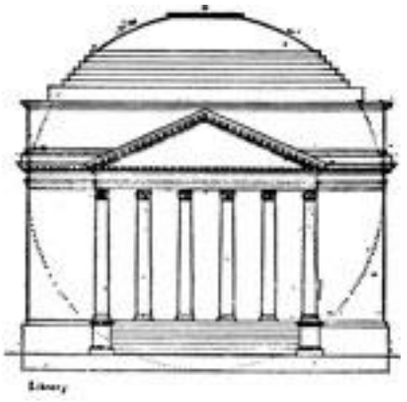

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ARTICLES

VIRTUAL LIBERTY: FREEDOM TO DESIGN AND FREEDOM TO PLAY IN VIRTUAL WORLDS

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VIRTUAL worlds are upon us. Games are now among the most lucrative parts of the entertainment industry, and an increasingly important segment of computer games are massively multiplayer online games featuring tens of thousands of players.[1] These games are far more complex than the previous generation of first-person shooter games where the object is to move around a space and fire at objects, monsters, and people. They involve entire worlds of activity, where people can take on and develop multiple identities, create virtual communities, and tell their own stories.

As multiplayer game platforms become increasingly powerful and lifelike, they will inevitably be used for more than storytelling

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[1] One recent survey estimated the market for online electronic games in 2003 was $1.9 billion, predicted to grow to $5.2 billion in 2006, and $9.8 billion by 2009. NPD Funworld Industry News, at http://www.npdfunworld.com/funServlet?nextpage=news_article.html&nwsid=3959 (last accessed Sept. 1, 2004) (on file with the Virginia Law Review Association). In parts of Asia, online games have become ubiquitous; an estimated one in four teenagers in South Korea play NCsoft's *Lineage*. See Associated Press, Online Game Craze Sweeps South Korea, May 12, 2003, at http://www.bizreport.com/article.php?art_id=4394. (on file with the Virginia Law Review Association).

and entertainment. In the future, virtual worlds platforms will be adopted for commerce, for education, for professional, military, and vocational training, for medical consultation and psychotherapy, and even for social and economic experimentation to test how social norms develop. Although most virtual worlds today are currently an outgrowth of the game industry, they will become much more than that in time.

This Article is about what freedom means in these virtual worlds, and how real-world law will be used to regulate that freedom. Professors F. Gregory Lastowka and Dan Hunter have recently argued that virtual worlds should be treated as "jurisdictions separate from our own, with their own distinctive community norms, laws, and rights."[2] The inhabitants of these virtual worlds should be given a chance to decide what internal norms will guide them. "If these attempts by cyborg communities to formulate the laws of virtual worlds go well, there may be no need for real-world courts to participate in this process."[3] This Aricle will take a different approach. Even at this early stage of technological development, people have simply invested too much time, energy, and money in virtual worlds to imagine that the law will leave these worlds alone, and allow them to develop their own norms and re-

[2] F. Gregory Lastowka & Dan Hunter, The Laws of the Virtual Worlds, 92 Cal. L. Rev. 1, 73 (2004).

[3] Id. Lastowka and Hunter acknowledge that their argument for the relative jurisdictional autonomy of virtual worlds echoes arguments made in the first generation of cyberlaw scholarship which urged courts and legislatures to treat the Internet as a separate space or series of spaces that could produce its own rule sets. Id. at 68–69. See also I. Trotter Hardy, The Proper Legal Regime for "Cyberspace," 55 U. Pitt. L. Rev. 993, 995–96, 1019–32 (1994) (advocating self-help, custom, and contract to regulate cyberspace); David R. Johnson & David G. Post, And How Shall the Net Be Governed?: A Meditation on the Relative Virtues of Decentralized, Emergent Law, *in* Coordinating the Internet 62 (Brian Kahin & James H. Keller eds., 1997) (arguing for a decentralized system of Internet governance); David R. Johnson & David Post, Law and Borders—The Rise of Law in Cyberspace, 48 Stan. L. Rev. 1367, 1395–1402 (1996) (noting possibilities of internal regulation of the Internet through competing rule sets); David G. Post, Governing Cyberspace, 43 Wayne L. Rev. 155, 161 (1996) (arguing for metaphor of cyberspace as separate space); cf. Joel R. Reidenberg, Lex Informatica: The Formulation of Information Policy Rules Through Technology, 76 Tex. L. Rev. 553, 553–56 (1998) (arguing for a "Lex Informatica" which would regulate cyberspace through technological devices).

solve their own disputes unhindered.[4] Indeed, the first lawsuits have already been filed.[5] Precisely because virtual worlds are fast becoming important parts of people's lives,[6] and because they are likely to be used for more and more purposes in the future, legal regulation of virtual worlds is inevitable. If this regulation is not developed by courts through resolving contract and property disputes, it will surely occur through legislation and administrative regulation. Lastowka and Hunter recognize this fact implicitly when they also argue that people should have property rights in items existing in virtual worlds.[7] If virtual assets are regarded as property, it is difficult to imagine that the law will not move to protect them.

Rather, the key question is how the law should preserve and defend the autonomy of virtual worlds and those who play within them, including the ability of participants in those virtual spaces to

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[4] See Julian Dibbell, The Unreal Estate Boom, Wired, Jan. 2003, at 106, available at http://www.wired.com/wired/archive/11.01/gaming.html (describing investments in virtual real estate in game worlds) (on file with the Virginia Law Review Association).

[5] For example, a company called Blacksnow Interactive came up with an ingenious way to make money off of virtual worlds. It went to Mexico and hired unskilled laborers to play *Dark Age of Camelot* around the clock, collecting virtual assets which Blacksnow then sold on eBay. After Mythic Interactive, the owners of *Dark Age of Camelot*, tried to put a stop to Blacksnow's business model on the grounds that it violated Mythic's intellectual property rights, Blacksnow sued Mythic for engaging in unfair business practices. The case never proceeded very far, since Blacksnow, a fly-by-night organization, eventually disappeared. See id. at 109; see also Julian Dibbell, Owned! Intellectual Property in the Age of Dupers, Gold Farmers, eBayers, and Other Enemies of the Virtual State, at http://www.nyls.edu/docs/dibbell.pdf (last accessed Nov. 9, 2004) (on file with the Virginia Law Review Association); Lawsuit Fires Up in Case of Vanishing Weapons, China Daily, Nov. 20, 2003, at http://www.chinadaily.com.cn/en/doc/2003–11/20/content_283094.htm (last accessed Sept. 17, 2004) (describing lawsuit in the People's Republic of China concerning theft of virtual biological weapons) (on file with the Virginia Law Review Association).

[6] See Lastowka & Hunter, supra note 2, at 5–11 (describing the growing numbers of people who inhabit virtual worlds and the importance of the virtual communities to their lives). The average *EverQuest* player spends about twenty hours a week within the virtual world. Edward Castronova, Virtual Worlds: A First-Hand Account of Market and Society on the Cyberian Frontier 10 (CESifo Working Paper No. 618, Dec. 2001), at http://papers.ssrn.com/abstract=294828 (on file with the Virginia Law Review Association); see also Nicholas Yee, The Norrathian Scrolls: A Study of *EverQuest* 12 (Version 2.5, 2001), at http://www.nickyee.com/report.pdf (reporting that the average *EverQuest* player spends an average of 21.9 hours per week playing the game) (on file with the Virginia Law Review Association).

[7] Lastowka & Hunter, supra note 2, at 49.

develop and enforce their own norms. This question is important precisely because those internal norms can be preempted or made irrelevant by law. Similarly, although technological design can also regulate virtual spaces, legal restrictions (for example, prohibitions on electronic surveillance or on the use or installation of anticircumvention devices) can dictate which uses of code are permissible and which are not. Hence, a significant amount of the regulation and the protection of virtual spaces will occur through real-world law, not outside of it: through contract, through property, and through the protection of values of freedom of speech and association.

In this Article, I will argue that the freedom to design and play in virtual worlds has constitutional significance. Much of what goes on in virtual worlds should be protected against state regulation by the First Amendment rights of freedom of expression and association. At the same time, I shall argue that First Amendment doctrine, as currently understood, will be insufficient to fully protect freedom in virtual worlds, and that legislation and administrative regulation will be necessary to vindicate important free speech values. Finally, I shall argue that still other activity in virtual worlds will not and should not be so protected from legal regulation. Some might hope that virtual worlds will be left to themselves to develop their own norms and methods of enforcement. What happens in virtual worlds, however, has real-world effects both on players and nonplayers, and governments will have important interests in regulating those real-world effects for reasons that are unrelated to the suppression of free expression.

The single most important development that will lead to legal regulation of virtual spaces is the accelerating real-world commodification of virtual worlds. Virtual worlds increasingly contain items that are freely bought and sold in real-world markets and have attained real-world value.[8] In addition, virtual worlds are full of items

[8] For a partial list of virtual items currently being auctioned off on the Internet, see eBay Listings, Internet Games, at http://entertainment.listings.ebay.com/Video-Games_Internet-Games_W0QQfromZR4QQsacategoryZ1654QQsocmdZListingItemList (last accessed Nov. 9, 2004) (on file with the Virginia Law Review Association). In his weblog "Playmoney," cyberjournalist Julian Dibbell describes his continuing attempts to earn a living from buying and selling virtual items. Julian Dibbell, Playmoney, at http://www.juliandibbell.com/playmoney/index.html (last accessed Nov. 9, 2004) (on file with the Virginia Law Review Association).

that either are or will be protected by intellectual property laws. To the extent that game owners encourage people to treat elements in those worlds like real-world property, and allow purchase of those assets in real-world markets, they will not and should not be able to use the First Amendment to insulate their business practices from government regulation. Conversely, the more that game owners endeavor to design their platforms to avoid real-world commodification and take steps to preserve their "speech-like" character, the more protection they can and should expect under the free speech principle. The other major method for game owners and players to protect their autonomy in virtual spaces will be contracts between the game owner and the players. However, as I shall argue, these contractual rights easily can be modified by legislative and administrative regulations, such as those found in consumer protection laws. In the final Part of this Article, I will consider how governments might protect free speech values in privately owned spaces by creating "interration" statutes specifically designed for virtual worlds. These statutes would allow platform owners to choose what kind of virtual world they wish to create and what corresponding duties they owe to the players. Players, in turn, could choose which virtual worlds they wish to occupy knowing in advance what their free speech rights in those worlds will be.

I. THREE KINDS OF FREEDOM IN VIRTUAL WORLDS

I begin by distinguishing three different kinds of freedom in virtual worlds. The first is the freedom of the players to participate and interact with each other in the virtual world. Generally speaking, players participate in virtual worlds through representations of themselves called avatars. Players identify with their avatars; they experience what happens to the avatars in the virtual world as happening to themselves.[9] The right to participate in the virtual world

[9] Avatars are a kind of cyborg, combining the player with a machine representation in a virtual space. See Lastowka & Hunter, supra note 2, at 63–65. For this reason, Lastowka and Hunter consider the possibility that cyborgs have rights. Id. at 68. This way of talking, however, tends to conflate two separate issues. The first issue concerns what internal norms and technological structures govern the interactions of avatars within a virtual world. For example, internal community norms often develop in virtual worlds to police certain forms of conduct. These norms are often enforced both

through one's avatar (or avatars) is the "freedom to play."[10] Because what makes virtual worlds fun and exciting is the continual interaction among the participants, Professor Yochai Benkler has also called it the freedom "to play together."[11]

The second kind of freedom is the freedom of the game designer to construct the virtual world and run it in the way that he or she sees fit. I call this the "freedom to design." For purposes of this discussion I do not make a distinction between the people who design and maintain the game and the people who own the intellectual property rights to the game platform. They may be different people, but in most cases they are the same person or they work for the same entity. Therefore in the discussion that follows I use the terms "game designer" and "platform owner" interchangeably.

The freedom to play is of particular value to the players, although the game designers and platform owners can, and often do,

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by the avatars and the platform owners, and we might consider them to be the rights of cyborgs or avatars relative to the virtual space.

The second issue—which is the focus of this Article—concerns the rights of players recognized by real-world law to play as avatars and participate in virtual worlds. The right to play concerns the rights and duties of players that are recognized by law. These rights and duties may run between the player and the state, between the player and other players in the virtual world, or between the player and third parties outside of the virtual world.

These two types of rights may often intersect and build on each other, but they are also analytically distinct. To give an example: a virtual community might have adopted an internal norm against group tackling of an avatar by a swarm of players who steal all the avatar's virtual possessions. This norm might be enforced informally by shunning players who engage in the practice, or more formally by a system of dispute resolution created and enforced by avatars in the virtual world. However, there can also be questions of real-world law: Is swarm tackling in violation of the platform owner's Terms of Service Agreement which, in turn, is enforceable in the courts? And is the practice of shunning avatars who violate the norm itself permissible under the Terms of Service Agreement? Presumably, if players violated the Terms of Service Agreement for either reason, the platform owner would have the legal right to discipline or expel the offending players.

[10] For a related formulation, see Edward Castronova, The Right to Play (Oct. 2003), at http://www.nyls.edu/docs/castronova.pdf (arguing for a right to participate in virtual spaces) (on file with the Virginia Law Review Association).

[11] Yochai Benkler, Remarks at State of Play Conference (Nov. 14, 2003), at http://www.nyls.edu/pages/1430.asp (on file with the Virginia Law Review Association). James Grimmelmann offers the related concept of a "free-as-in-speech-game," which he distinguishes from a "free-as-in-speech-game platform." James Grimmelmann, The State of Play: Free As In Gaming?, LawMeme, Dec. 4, 2003, at http://research.yale.edu/lawmeme/modules.php?name=News&file=article&sid=1290/ (on file with the Virginia Law Review Association).

play in the virtual worlds they operate. Conversely, the freedom to design is of particular value to the game designers and platform owners, although many game spaces give players considerable freedom to add new things to the game space, so that they, in effect, become subdesigners of the virtual world, albeit subject to the veto of the platform owner. For example, in *There* players create virtual clothing that they sell in virtual bazaars; and in *Second Life* players have designed and built a wide variety of landscapes, vehicles, buildings, and tools that are important parts of that virtual world.[12]

Game designers and platform owners control what goes on in the virtual world in two basic ways: through code and through contract. First, they control what can be done in the game space by writing (or rewriting) the software that sets the physics and the ontology of the game space, defines powers, and constitutes certain types of social relations. Through code they can change features of the virtual landscape, grant or deny powers to participants, and kick participants out. They can also write the code to allow them to watch surreptitiously what is going on in the game space. Because they can magically change the physics of the game space and see everything that is going on there, the platform owners are sometimes referred to as the "gods" or "wizards" of the game space.[13]

Second, game designers can control what goes on in the game through contract. In most cases, in order to participate in virtual worlds, players must agree to the platform owner's Terms of Service ("TOS") or End User License Agreement ("EULA"). The EULA covers features of proper play and decorum that cannot easily be written into the code. Game designers enforce social norms in the game space by kicking out (or threatening to kick out) people who violate the EULA.[14]

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[12] For a description of *There*, see http://www.there.com/index.html (last accessed Nov. 9, 2004); for a description of *Second Life*, see https://secondlife.com, 2004 (last accessed Nov. 9, 2004).

[13] Lastowka & Hunter, supra note 2, at 54–55; Jennifer Mnookin, Virtual(ly) Law: The Emergence of Law in LambdaMOO (1996), at http://www.ascusc.org/jcmc/vol2/issue1/lambda.html (on file with the Virginia Law Review Association).

[14] See, e.g., Terms of Service, *Second Life*, at http://secondlife.com/corporate/terms.php (last accessed Nov. 9, 2004) (on file with the Virginia Law Review Association); Rules of Conduct, *EverQuest*, at http://eqlive.station.sony.com/support/customer_service/cs_rules_of_conduct.jsp (last accessed Sept. 9, 2004) (on file with the Vir-

The designers' freedom to design and the players' freedom to play are often synergistic. The code and the EULA form, respectively, the architecture and the social contract of the virtual world that enable people to play the game and enjoy themselves. To a considerable extent the players' freedom to play is the freedom to play within the rules of the game as it has been designed. Thus the game designers create various sorts of utopias (or dystopias) and players can choose which game spaces they would like to inhabit and play in. The game space that the designer creates may be very unpleasant indeed (a prisoner of war ("P.O.W.") camp or a torture chamber, for example) but some players will be intrigued by the experience and want to play there. The nature of the freedom to play in a particular game space thus depends in large part on the nature of the game space. The person who takes on the role of a mistreated prisoner in a P.O.W. camp reenactment cannot really complain that his freedom to play has been abridged because he cannot order virtual room service there.[15]

Moreover, game designers like to keep their players happy to ensure that they stay and that even more people want to play the game. Hence designers often listen to the player community about how the game could be tweaked to make it more fun to play, or how certain loopholes or features that make the game less fun to play should be eliminated—and the designers sometimes change the code and the EULA accordingly. In these cases the platform owner's freedom to design supports and nourishes the players' freedom to play, and the designers and the player community work together to improve the game space.

These happy synergies, however, may not always occur. Platform owners and individual players may have very different desires and interests, and so the freedom to play and the freedom to design can also conflict. Game designers may run their worlds in ways that the players find oppressive or high-handed. Although players

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ginia Law Review Association); Terms of Service (TOS): Behavior Guidelines, *There*, at http://webapps.prod.there.com/login/73.xml (last accessed Nov. 9, 2004) (on file with the Virginia Law Review Association).

[15] In this context, game designer Raph Koster has spoken of the importance of "games we love to hate." Raph Koster, Current and Future Developments in Online Games, at http://www.legendmud.org/raph/gaming/futuredev.html (last accessed Nov. 9, 2004) (on file with the Virginia Law Review Association).

can choose which game spaces to play in initially, over time they invest considerable time and effort in the game world and in their identities there, and this and various other network effects of virtual worlds may make exit more difficult over time.

Conversely, some players may want to do things in the game space that game designers think is particularly offensive, gives the player an unfair advantage, dilutes the competitive spirit of the game, or makes the game less fun for all. In response, designers sometimes rewrite the code or change the EULA in ways that these players do not like, or simply kick the offending players out of the game space. When they do any of these things, players may object that their right to play has been abridged by the game designer, in part because the platform owner is being arbitrary or because the rules of the game have been changed in midplay. In response, the game designer can point out that virtual worlds are an ongoing experiment and that human interactions and human ingenuity are always broader than the game designer could have foreseen. Therefore the designer needs to make judgment calls about whether players are acting in accordance with the spirit of the game, and needs to be able to fine tune the game space as the designer learns more and more information about how people are behaving in the game space. The players, in turn, may respond that the game designers are making excuses for their own arbitrary behavior, and so on. Many of the most important controversies in game worlds revolve around the potential conflicts between assertions of the right to design and counter assertions of the right to play.

Although this Article focuses primarily on the freedom to play and the freedom to design, there can be a third kind of freedom in virtual worlds, one that combines elements of both. The platform and the rules of the game could be collectively created by the players themselves. For example, the platform could be based on open source materials; the players could collectively innovate on it and decide what the rules of the virtual space would be. In this type of virtual world, a strict division between players and designers would collapse. We might call this sort of freedom the "freedom to design together." The freedom to design together may become very important if a robust and flexible open source platform for games becomes widely available. That platform would be the equivalent for

virtual worlds what Linux is for the world of operating systems. Even within proprietary spaces, however, players often have the ability to set up and enforce virtual world norms among themselves.[16] In some cases, players have the ability to add functions and upload virtual items or software programs to the game space with the permission of the platform owners. These practices also involve the rights to play and design, and are usually subject to the final veto of the platform owner. Nevertheless, we might consider them as elements, however limited, of the right to design together.

The notions of freedom to play and freedom to design in virtual worlds are related but not identical to the constitutional values of freedom of speech, expression, and association. Indeed, in the future, I predict that both game designers and game players will repeatedly invoke freedom of speech and freedom of association as defenses against attempts by the state to regulate virtual worlds. Nevertheless, the doctrines of American free speech law, as they are currently constructed, are insufficient to give adequate protection for many features of the freedom to design and the freedom to play in virtual worlds. The most important limitation is that freedom of speech is, generally speaking, a right that runs between the state and private individuals or associations, and not between private parties. To be sure, important aspects of the freedom to design and the freedom to play are concerned with freedom from state regulation of game spaces. But protection of the freedom to play and the freedom to design often turns on the resolution of conflicts between platform owners and game players, both of whom are nominally private parties. It is true that in adjusting rights between players and platform owners the state will always be involved, and some adjustments of private rights can violate the First Amendment.[17] But it does not follow that all such adjustments implicate First Amendment rights.

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[16] See Mnookin, supra note 13 (describing the rise of community norms in the virtual space of LamdaMOO); see also *A Tale in the Desert*, Lawmaking Supplement, at http://www.atitd.com/man-lawmaking.html (last accessed Nov. 9, 2004) (offering elaborate instructions about how players of the multiplayer online game *A Tale in the Desert* can make laws for Ancient Egypt) (on file with the Virginia Law Review Association).

[17] See, e.g., New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (holding that enforcement of common law defamation rules between private parties violated the First Amendment).

II. Design and Play in Virtual Worlds as Speech

For the moment, however, I want to focus only on the relationship between the state on the one hand, and the players and designers of virtual worlds on the other. To what extent should the design and play of massively multiplayer games and virtual worlds be protected under the free speech principle? If the state regulates virtual worlds because of the ideas expressed by the players and designers, the free speech principle is surely violated. That, however, is true of most activities. The question I am concerned with is whether design and play should themselves be considered exercises of the right to speak. Courts consider a wide variety of social activities to be speech: examples are using a press to publish a newspaper, dancing, using a musical instrument to make music, painting, picketing, leafleting, charitable solicitation, and so on. We want to know whether the design and play of massively multiplayer games is speech like dance, picketing, leafleting, or charitable solicitation.

The category of speech is historically contingent. It changes over time, as conventions and technologies change. There are no necessary and sufficient conditions for something to be considered speech within the free speech principle. Rather, what counts as speech changes over time, as new media of communication evolve, and older ones change their constitutive conventions and understandings. The domain of speech protected by the free speech principle is a historical and sociological construction.

Protection of freedom of speech is protection of media for the communication of ideas.[18] I put the point in that rather abstract way because the notion of a medium of communication—like television, or dance, or leafleting—is actually a combination of various technologies, conventions, and social practices. Media require technologies of communication, ranging from the human voice to motion picture projectors, printing paper, and computer hard drives. Media of communication also involve social practices and conventions that come into being at certain points in history, and then change over time.

[18] See the discussion in Robert Post, Recuperating First Amendment Doctrine, 47 Stan. L. Rev. 1249, 1253 (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").

Motion pictures are a good example: When the Supreme Court first considered the question of whether motion pictures were protected speech, it said no. Motion pictures, the Court explained, were just a form of entertainment.[19] It was not until 1952 that the Supreme Court officially held that motion pictures were a form of protected speech.[20] Today it seems obvious to us that people communicate ideas through motion pictures and that motion pictures are an important part of public discourse and the world of art.

As conventions and technologies change, so too do the boundaries of speech. The normative question we have to ask ourselves is whether it makes sense to count a particular social activity at a particular point in time as a medium through which people communicate ideas to each other, and whether we should regard this practice as a form of life through which people participate in the exchange and communication of ideas. That normative question is based on sociological judgments, which change over time. Thus, the boundary of constitutionally protected speech is a moving target, a normative judgment influenced by an interpretation of social conventions and technological development. Our judgments about what counts as speech change, in part, because the world around us changes, and the development of new technologies is an important part of that change. The rise and adoption of a technology—like motion picture technology—changes our ideas about what art is, what communication is, what identity is, what appearing "in public" means, and so on. It does so even before courts come around to seeing the new technology as a form of protected speech.

I would argue that something similar is happening with massively multiplayer games and virtual worlds. The technologies that produce these games and worlds have evolved in a relatively short space of time. As they do so, massively multiplayer games and virtual worlds are becoming recognized as media for the communication of ideas, including every sort of representation and recreation of human interaction.

Courts already recognize the design of much simpler games—like first-person shooter games—as artistic creations protected by the

[19] Mut. Film Corp. v. Indus. Comm'n of Ohio, 236 U.S. 230, 243–45 (1915); see also Post, supra note 18, at 1252–53.

[20] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501–02 (1952).

First Amendment.[21] The arguments for massively multiplayer games and virtual worlds are even stronger. Virtual worlds are a medium of expression, a medium in which you can say things and express things. Game designers certainly understand what they are doing in this way. Indeed, the world of computer games and the world of motion pictures are quickly merging. The work of producing a new game is increasingly similar to the work of putting together an animated motion picture—and the same technologies are useful for both. Not only do the latest animation techniques move easily from motion pictures to games and back again, but games are regularly marketed and advertised as if they were motion pic-

[21] See Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954, 956–58 (8th Cir. 2003) (holding that digital video games are protected by the First Amendment); Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 577–78 (7th Cir. 2001), cert. denied, 534 U.S. 994 (2001) (same); Sanders v. Acclaim Entm't, Inc., 188 F. Supp. 2d 1264, 1279 (D. Colo. 2002) (same); see also James v. Meow Media, Inc., 300 F.3d 683, 695–96 (6th Cir. 2002) (attaching tort liability to the communicative aspect of 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.").

Note that one early district court decision that refused to consider video games as protected speech viewed them just as the Supreme Court did motion pictures in 1915. It regarded video games as a mere form of entertainment without any relevant information content, and it analogized them to mechanical entertainment devices like pinball machines and rule-based sports like baseball and hockey:

> In no sense can it be said that video games are meant to inform. Rather, a video game, like a pinball game, a game of chess, or a game of baseball, is pure entertainment with no informational element. That some of these games "talk" to the participant, play music, or have written instructions does not provide the missing element of "information." I find, therefore, that although video game programs may be copyrighted, they "contain so little in the way of particularized form of expression" that video games cannot be fairly characterized as a form of speech protected by the First Amendment. Accordingly, there is no need to draw that "elusive" line "between the informing and the entertaining" referred to in *Winters v. People of New York*.

America's Best Family Showplace v. City of New York, 536 F. Supp. 170, 174 (E.D.N.Y. 1982) (citations omitted) (quoting Stern Elec., Inc. v. Kaufman, 669 F.2d 852, 857 (2d Cir. 1982) and Winters v. People of New York, 333 U.S. 507, 510 (1948)); see also Malden Amusement Co. v. City of Malden, 582 F. Supp. 297, 299 (D. Mass. 1983) (holding that video games are unprotected by the First Amendment); Caswell v. Licensing Comm'n for Brockton, 444 N.E.2d 922, 927 (Mass. 1983) ("From the record before us, it appears that any communication or expression of ideas that occurs during the playing of a video game is purely inconsequential.").

tures. Game designers roll out new versions of games in the same way that movie studios roll out new releases.

In addition, games, particularly massively multiplayer games and virtual worlds, have creative and interactive features that, in some ways, make them even more like speech than motion pictures.[22] (Just as the ability to create games is part of the freedom to design, the ability to interact within games is part of the freedom to play.) People sometimes criticize television and motion pictures as a sterile form of mass culture, in which people watch passively and are entertained. In fact, it is much more complicated than that. People appropriate the ideas and images they find in movies and make something out of them in conversations with other people. With massively multiplayer games, it is even more obvious that what is going on is participatory. The most sophisticated multiplayer games allow you to tell your own stories and add things to the world in which you are playing. If movies are media for the communication of ideas, so too are massively multiplayer games.[23]

Multiplayer games and game universes embrace the possibility of contingent events. Unlike the simplest computer games, there is no set narrative or fixed set of possible narrative chains of events. As a result, virtual worlds have histories. They allow not only the game designer, but also the participants, to make new meanings, to have new adventures, and to express themselves in new ways. Mas-

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[22] Note, ironically, that interactivity has sometimes been offered as a possible reason why video games are not protected speech—because this makes them more akin to pinball machines. Judge Posner, however, correctly rejects this argument as spurious. See *Kendrick*, 244 F.3d at 577 ("Maybe video games are different. They are, after all, interactive. But this point is superficial, in fact erroneous. All literature (here broadly defined to include movies, television, and the other photographic media, and popular as well as highbrow literature) is interactive; the better it is, the more interactive."); see also *Wilson*, 198 F. Supp. 2d at 181 ("The nature of the interactivity set out in Wilson's complaint, however, tends to cut in favor of First Amendment protection, inasmuch as it is alleged to *enhance* everything expressive and artistic about Mortal Kombat: the battles become more realistic, the thrill and exhilaration of fighting is more pronounced.").

[23] In fact, there is already a nascent movie industry within virtual worlds called machinima, in which people "film" or make digital copies of what happens in virtual worlds and alter them for artistic effect. Of course, the fact that people are making movies about and inside virtual worlds suggests that these virtual worlds are both a kind of art and a kind of reality. They are a form of life that a certain form of art is imitating. For a description of machinima, see http://www.machinima.com/ (last accessed Nov. 9, 2004) (on file with the Virginia Law Review Association).

sively multiplayer games allow people to assume new social roles in technologically mediated narratives whose endings are contingent and unpredictable. In this sense, the player is in a very different situation than someone who operates a pinball machine. The players in virtual worlds can take on multiple personas and identities; they can create their own stories in collaboration with others; and they can build things and form communities.

Thus, multiplayer games are not like boxing or hockey, whose claims to free speech protection are tenuous. A better analogy is improvisational theater. Improvisational theater provides a useful comparison precisely because the director has control over who gets to participate in the improvisation, but does not have complete control over the scene as it develops. Similarly, the game owner can set ground rules and can even kick people out of the game world, but the owner cannot control much of the way in which the game progresses. Improvisational theater involves both constraint and freedom; it involves participation and contingency, and it is generally recognized to be a medium that enjoys First Amendment protection. Like virtual worlds, the work of an improvisatory theater troupe changes over time through the creative participation of the players, so that even if a theatrical piece starts in one way, it often ends up quite differently after the players have worked on it for some time.[24]

III. THE RIGHT(S) TO DESIGN AND PLAY

All this suggests that the First Amendment is a good candidate for protecting freedom in virtual worlds—both the freedom to create and design virtual worlds and the freedom to play in them. As virtual worlds develop, however, states will become increasingly interested in regulating what goes on in them. Both designers and players will raise First Amendment challenges to these regulations. This Part considers why the state might have legitimate grounds for regulating what goes on in virtual worlds, even granting the First

[24] Note, moreover, that although the director may have the right to hire and fire players, the players themselves have First Amendment rights to participate in improvisational theater. Thus constitutional protection of improvisational theater involves elements that resemble both what I am calling the freedom to design and the freedom to play.

Amendment status of the right to design and the right to play. We will be concerned with relations between (1) the state and the platform owner; (2) the state and the players; (3) the platform owner and the players; and (4) players and nonplayers.

A. The Right to Design and Run Games

In this Section, I consider the free speech interests of the game designer and the players as against the state. Once virtual worlds are afforded First Amendment protection, both game designers and game players will invoke First Amendment defenses regularly. Platform owners will attempt to invoke the First Amendment as a defense to all sorts of business regulations of virtual worlds, much in the same way that telecommunications companies now routinely invoke the First Amendment as a defense to regulation of the telecommunications industry.[25] Game designers will attempt to equate their practices in monitoring and regulating virtual worlds to artistic expression and argue that interference with their practices of monitoring and regulation of their virtual worlds is akin to censorship.

Not all aspects of what game designers do, however, are equally protected by the First Amendment. Game designers have clear claims to First Amendment protection for some aspects of their work. The decision to create a P.O.W. camp virtual world complete with barbed wire and a torture chamber, for example, would likely be protected. Nevertheless, the state can regulate media of expression like newspapers and motion pictures if it does so for reasons unrelated to the suppression of free expression.[26] For example, the state can require that the various messengers and assistants who work for a newspaper or a motion picture production company

[25] 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, 19–24 (2004) (arguing that telecommunications companies now regularly invoke the First Amendment to combat business regulation).

[26] See United States v. O'Brien, 391 U.S. 367, 376–77 (1968) ("[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct . . . a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").

earn the minimum wage. That may raise the costs of doing business, but it does not violate the free speech rights of newspapers or movie companies.

Thus we should distinguish two reasons why the state might want to regulate the game space. The first is that the state dislikes the ideas communicated in the game space because they are violent, offensive, or indecent. Assuming that all of the players in the game space are adults, the decisions to design and play these games are protected by the free speech principle.[27]

The second, and to my mind, far more important reason for regulating virtual spaces is that the boundaries between the game space and real space are permeable. Things that happen to people in the game space can have real-world effects both on them and on other people who are not in the game space.

The breakdown of the boundary between the game space and the real space has been accelerated by what I shall call real-world commodification of virtual spaces. One should distinguish real-world commodification from commodification wholly internal to the game space. Lots of virtual worlds have commodities that can be bought and sold within the virtual world. Even simple games can permit barter exchange, and many games feature in-world currency that can be obtained by performing various tasks. People can then spend their in-world currency to purchase things like powers and weapons for use in the virtual world.

Real-world commodification takes this a step further. One of the most important recent developments in virtual worlds has been people purchasing and selling elements of virtual worlds in the real world. People now buy and sell light sabers, weapons, powers, and even their characters and identities on eBay.[28] Many virtual worlds

[27] Children are an obvious exception to this basic rule. American free speech law permits governments to keep children away from material that is indecent as to them. FCC v. Pacifica Found., 438 U.S. 726, 749–50 (1978) (plurality opinion); Ginsberg v. New York, 390 U.S. 629, 637 (1968). For that reason, states may require that children under a certain age not be admitted to the game space, or to portions of the game space that are reserved for adults. They cannot, however, require that games be altered to protect the adults who play in them from coming in contact with indecent materials. 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").

[28] In fact, there are entire businesses devoted to the sale of virtual items, like Internet Gaming Entertainment ("IGE"), whose "primary business," its website explains, "is making markets for the buying and selling of the virtual currencies and property

have in-game currency and increasingly this currency is effectively convertible into real-world currency either through eBay or other sources. Recently, a Gaming Open Market has begun that lets players buy and sell currencies used in different game worlds.[29] Extrapolating from the sale of items on eBay, the economist Edward Castronova calculated that the GNP of Norrath, a virtual world in the game *EverQuest*, is larger than that of Bulgaria, and that the average hourly wage in Norrath is $3.42, higher than what most workers earn in India or China.[30] One assumes that this is similar to the wildly inflated estimates of capitalization in dot-com startups in the 1990s. The market values of objects in the virtual worlds are likely to be reduced as more and more people trade across worlds. Nevertheless, it is entirely possible that much, if not most, of the material created in virtual worlds now has significant market value.

It is hard to underestimate the long term importance of this breach of the boundary between the virtual and the real. The real-world commodification of virtual worlds is, to my mind, the single most important event in shaping the relationship between law and virtual worlds. I predict that it will give rise to a whole host of problems that will stimulate courts and legislatures to regulate virtual worlds and create law for them.

Once virtual worlds contain items of value easily convertible into real-world property, states will become increasingly interested in regulating what goes on in them. That is because people will use activity in virtual worlds to create real-world money, often at the expense of others. For example, many virtual worlds feature games of chance, which people use to win powers or in-game currency. Imagine a case in which the currency of a game world is freely convertible into real-world currency, and the game designer or some of the players create a casino inside the game world. People come there and place bets, and they win game-world currency, which

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used by players of multiplayer online games." IGE, About Us, at http://www.ige.com/aboutus.asp (last accessed Nov. 9, 2004) (on file with the Virginia Law Review Association).

[29] See Gaming the Open Market, at http://www.gamingopenmarket.com (last accessed Nov. 9, 2004) (on file with the Virginia Law Review Association); see also Mark Ward, Virtual Cash Exchange Goes Live, BBC News Online, Jan. 7, 2004, at http://news.bbc.co.uk/2/hi/technology/3368633.stm (on file with the Virginia Law Review Association).

[30] Castronova, supra note 6, at 33.

they can convert into real-world currency. The players have essentially done an end run around state prohibitions on gambling. Not surprisingly, states might be very interested in regulating that kind of behavior.[31]

Indeed, the same problems that we see generally with Internet gambling—that it crosses state and national boundaries—would be present in the provision of casinos in game spaces. In a massively multiplayer game, some of the players will live in states or countries where online gambling is illegal or is heavily regulated. These jurisdictions will want to prevent their citizens from gambling in virtual worlds if the currency is convertible into real-world currency. A similar problem would arise if people in countries that prohibit hate speech or the sale of Nazi memorabilia engaged in these activities in virtual worlds.[32] Not only can people sell real Nazi memorabilia in online transactions, one can easily imagine virtual representations of Nazi memorabilia created in virtual worlds and sold in the game space. After all, a lot of what people do in virtual worlds is create, buy, and sell things.

America has the most protective free speech laws, and therefore it will probably also have the most speech-protective rules for game designers and game players. Nevertheless, countries which have more stringent rules about hate speech, pornography, and so on, might worry that their citizens are violating these restrictions while playing in these virtual worlds, and will want to regulate

[31] For similar reasons, governments might also be interested in regulating sexual overtures to children, or solicitation of prostitution.

[32] This is the virtual world analogue of the well-known Yahoo! case, in which a French court ordered Yahoo! to stop selling Nazi memorabilia on its auction site as long as the site was available to French citizens. See LICRA et UEJF v. Yahoo! Inc., T.G.I. Paris, May 22, 2000, D. 2000, inf. rap. 172, Sept. 2000, 174 III-139, note C. Rojinski, available at http://www.juriscom.net/jpt/visu.php?ID=300, http://www.lapres.net/yahen.html (Daniel Lapres, trans.) (last accessed Nov. 9, 2004) (on file with the Virginia Law Review Association), *reprinted in* Lea Brilmayer & Jack Goldsmith, Conflict of Laws: Cases and Materials 851, 851–54 (5th ed. 2002); see also Brilmayer and Goldsmith, supra, at 853–54 (summarizing the case). For the final order, following the court's consultation with various experts, see LICRA et UEJF v. Yahoo! Inc., Ordonnance Refere, T.G.I. Paris, Nov. 20, 2000, J.C.P. 2000, Actu., 2219, available at http://www.juriscom.net/txt/jurisfr/cti/tgiparis20001120.pdf, http://www.lapres.net/yahen11.html (Daniel Lapres, trans.) (last accessed Nov. 9, 2004) (on file with the Virginia Law Review Association).

them accordingly. Thus, the same issues that we face in Internet speech generally will arise with speech in virtual worlds.

B. The Right to Play Games—Injuries Inside and Outside Virtual Worlds

Now consider the activities of the players. When one avatar murders another or destroys the other's property, this generally raises no legal problems, assuming that murder and mayhem are permissible within the rules of the game. Indeed, we might argue that this sort of behavior, even if violent, is speech protected from state regulation as long as it is within the rules of the game. These actions form part of what it means to participate in the medium. As Yochai Benkler has put it, no one thinks that you can sue J.K. Rowling for killing off Harry Potter in the seventh book of the Harry Potter series.[33]

Although people generally cannot sue each other for killing off their avatars or destroying their hydrofoils, that does not mean that there are no methods of social control in virtual worlds. Professor Jennifer Mnookin has described the rise of elaborate systems of formal and informal enforcement norms in *LambdaMOO*, a Multi-User Dimension ("MUD") that was an earlier version of today's virtual worlds.[34] People in the virtual space can shun or attempt to punish the person who does something they particularly dislike, and the miscreant can be regulated by the gods or wizards of the virtual world. Julian Dibbell wrote a well-known article in 1993 describing a virtual rape by a character named Mr. Bungle committed in *LambdaMOO*.[35] Mr. Bungle was able to rape other members of *LambdaMOO* because of the way the MUD's code was designed, but it was not something that the game's designers or players expected would happen. Mr. Bungle was subjected to shunning from

[33] Yochai Benkler, Remarks at the State of Play Conference (Nov. 14, 2003), at http://www.nyls.edu/pages/1430.asp (on file with the Virginia Law Review Association).

[34] See Mnookin, supra note 13, at 2.

[35] 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, at http://www.juliandibbell.com/texts/bungle_vv.html (last accessed Nov. 9, 2004) (on file with the Virginia Law Review Association).

the other players, and eventually he was "toaded," or eliminated, by one of the game's wizards.

In general, players who hack into the game to give themselves special powers, or who violate the rules or the spirit of the game, can be excluded by the platform owner for violating the EULA. The platform owner can plausibly argue that the player surrendered the relevant free speech interests by agreeing to play by the rules of the game and subject him or herself to the terms of the EULA and the reasonable supervision of the platform owner.[36] In a case like Mr. Bungle's, the player has seriously misbehaved according to the developing norms of the virtual community. There are other cases, however, in which the platform owner acts unreasonably and portions of the EULA may be unenforceable; I will return to those presently.

Although one avatar slaying another usually raises no problems, there are many different ways in which behavior in the virtual world can have harmful effects in the real world that the state may have an interest in regulating or preventing. Generally speaking, these all involve what the law calls communications torts—a category of legal causes of action in which people are harmed by speech acts of others that are not otherwise protected under the First Amendment.

Many traditional torts like battery and trespass to chattels do not generally apply in virtual worlds to the extent that murder and mayhem are permitted within the rules of the game. However, almost all of the communications torts that apply in real space also apply in virtual worlds. This is because what people do to each other in virtual spaces is communicate. Thus, when people injure each other in a virtual world in ways that the law will recognize, they are almost always committing some form of communications tort, or violating some criminal law that prohibits injurious forms of communication. These torts and crimes limit the scope of the freedom to play.

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[36] In many cases, individuals may waive their First Amendment rights by contract, and these agreements are enforceable by courts. See, e.g., Cohen v. Cowles Media Co., 501 U.S. 663, 670 (1991) (holding that enforcement of general rules of promissory estoppel do not violate the First Amendment). What is most interesting in the case of virtual worlds are not the situations in which this general principle applies, but the situations in which it does not apply or should not apply. See infra Part IV.

Probably the most important example of communications torts that apply to virtual worlds are violations of intellectual property regimes like copyright and trademark. I include these in the category of communications torts because they are civil wrongs produced through communication, although unlike most communications torts they arise out of statutory regimes. Just as intellectual property law is one of the most important regulators of cyberspace generally, we can expect that copyright and trademark violations will be the most frequently litigated communications torts in virtual worlds and cause the greatest problems for players and platform owners alike. There are countless ways that players can violate real-world intellectual property rights in virtual worlds. For example, they can upload items into the virtual world to which others hold copyrights and trademarks. They can create virtual T-shirts with the Coca-Cola emblem on them, or create posters that say "Microsoft Sucks" using the Microsoft emblem and trade dress. Given that many virtual worlds encourage the production and sale of virtual items and designs, the opportunities for trademark and copyright infringement rapidly multiply. The creators of *Second Life* recently announced that they would allow players to hold intellectual property rights in virtual items that they create for the virtual world.[37] Letting players possess copyrights in virtual items significantly increases real-world commodification of virtual worlds, and makes it all the more likely that the law will regulate what goes on in virtual worlds. By allowing players intellectual property rights in virtual items, the makers of *Second Life* are essentially inviting the law into their virtual world.[38]

And once law is invited in, a great deal can change. The possibilities for digital piracy are endless in virtual worlds, largely because almost everything created or altered in a digital world has the potential to be someone's intellectual property. For the same reason, allowing strong intellectual property rights in digital worlds allows game players endless ways to block and censor one another's activities. Strong intellectual property rights in real space

[37] See Press Release, Linden Lab, *Second Life* Residents To Own Digital Creations (Nov. 14, 2003), at http://lindenlab.com/press_story_12.php (on file with the Virginia Law Review Association).

[38] This point is well argued by James Grimmelmann. See Grimmelmann, supra note 11, at 15.

are a burden on freedom of expression, although in many cases an acceptable burden. Strong intellectual property rights in virtual worlds, however, are a positive nuisance, and they may greatly inhibit the freedom to play as well as the freedom of players to design parts of the virtual world.[39] (In response to these problems, *Second Life* allows its players to protect their works under a Creative Commons license to make it easier for the works to be shared among and used by players.[40]) Ironically, perhaps, a EULA that requires the players to surrender all rights in intellectual property in the game space may actually promote the right to play better than allowing players to hold traditional intellectual property rights in what they create in the virtual world. A complete monopoly on intellectual property rights by the platform owner prevents the players from employing intellectual property law as hold-ups that inhibit the right to play.[41] The only caveat is that the platform owner must, in turn, not use its intellectual property rights to arbitrarily limit the players' freedom of play.

Defamation is a second example of a real-world communications tort that can occur in virtual spaces. Defamation is an injury against reputation. Because virtual worlds allow people to have multiple identities, there can be multiple causes of action. For example, people in the virtual world can defame a person's real-world identity. But, equally interestingly, there can also be defamation against a person's game-space identity (or identities). For example, many people regard it as cheating or bad play to purchase special powers or weapons on eBay rather than earning them the hard way—by playing the game until one obtains them. They will shun and refuse to play with someone known to have purchased an identity, a special power, or a weapon. Suppose then, that someone starts a rumor that Skywalker39 purchased his light saber on eBay, and players begin to shun Skywalker39. The rumor holds Skywalker39 up to shame, ridicule, and shunning in a particular community—the very definition of a defamatory communication.[42] Of

[39] Benkler, supra note 33.

[40] See Press Release, supra note 37.

[41] Dibbell, supra note 5.

[42] 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.").

course, to recognize a cause of action, courts would have to recognize virtual communities as communities for purposes of defamation law, and people would have to suffer significant harm by being shunned. Nevertheless, it is not at all implausible to believe that both conditions will be satisfied in the future, as people spend increasing amounts of time in virtual worlds and invest increasing amounts of their energies there.

One might object that people have a ready remedy for defamation in virtual worlds. They can simply change their identities, or move to another virtual world and create a new character. However, in virtual worlds, like real worlds, people may invest a great deal of time and effort in building up their identity and their reputation. The creation of a new identity, or exit from the virtual world altogether, may be quite costly.[43] Ultimately, as in many of the legal issues considered in this Article, the issue will turn on how human beings make use of virtual worlds. If virtual worlds become very important to the people who inhabit them, and many people inhabit them, then the law will take seriously injuries both to reputation and to property.

Fraud is a communications tort that ordinarily should not be actionable in virtual worlds if it is within the rules of the game. (If the platform owner defrauds his customers, of course, that is another matter.) In some games, people trick and defraud each other all the time—that is how they gain an advantage. A problem arises, however, when items in games and currency in games have real-world equivalents. At that point, people may start to complain that certain forms of deceit and trickery should be out of bounds because something very valuable has been taken from them. If the rules of the game are specified in advance to permit certain forms of fraud and trickery as permissible behavior, there should be no legal complaint. But many game spaces do not have clear-cut rules about what players can and cannot do, other than the limitations of the software program itself. As the amount of real-world money in-

[43] That is one reason, although surely not the only one, why we do not ask people who have been defamed in real space to exercise self-help by changing their identities and forming links with new communities. We believe that they have a right not to be put to that sort of choice. In like fashion, the mere possibility of exit may not be a sufficient remedy if people's lives become so wrapped up in their virtual identities that it would be unjust to put them to a similar choice.

vested in these game spaces increases, people may think that they have been wrongfully defrauded in cases where the EULA is silent. In most cases, social norms and the EULA will be the enforcement mechanisms of first resort, but it is probably only a matter of time before someone brings an action for fraud in virtual worlds. It is important to recognize, however, that allowing lawsuits for virtual fraud changes the nature of the game, whether or not the EULA or the code is altered. Law is always in the background of any game, if only by allowing the game to proceed; once law regulates the actions of players in the game, law moves to the foreground of the regulatory structure of the game.

Virtual theft raises an analogous problem. Suppose that a group of avatars gang up on a helpless avatar and steal his virtual goods. Assuming that gang violence is within the rules of the game, one would think that there should be no cause of action. But the conventions of proper behavior in the virtual community may change as more and more people enter the community. Some newcomers may feel badly treated, and thus turn to the courts for protection of their virtual property. A case like this has already occurred in the People's Republic of China.[44] A player claimed that he had spent thousands of hours and considerable sums of money assembling a stockpile of virtual biological weapons, which made him invincible.[45] Not quite invincible, it seems, because another player had found out a way to steal them. The platform owner refused to identify the thief's real-world identity, and the victim sued the platform owner to reveal it so that he in turn could sue the perpetrator.[46]

Virtual spaces can also offer entertaining ways for people to shop. Therefore, it is possible, if not likely, that many virtual spaces will effectively become shopping malls for both real and virtual goods. (Much of *There*, in fact, is already organized around virtual commerce.) As a result, consumer protection laws will apply in the virtual space, including restrictions on false or misleading advertising. The difficult question will be to decide whether a certain form of deception in advertising is a sale of goods or services akin to vis-

[44] Lawsuit Fires Up in Case of Vanishing Virtual Weapons, China Daily, Nov. 20, 2003, at 1, available at http://www.chinadaily.com.cn/en/doc/2003-11/20/content_283094.htm (on file with the Virginia Law Review Association).

[45] Id.

[46] Id.

iting a real-world store, or whether it is part of the game. In the latter case, consumer protection laws should not apply, because the players are assumed to have accepted the risks of being tricked or defrauded in their play. As goods and services are increasingly sold in virtual worlds that have elaborate game spaces, it may be particularly difficult to tell the difference between shopping (where consumer protection laws should apply) and collective storytelling (where they should not).

Let us return to murder and mayhem. One might think that the tort of intentional infliction of emotional distress would put some constraint on what the players can do to each other in game spaces. Even if murder and assault are allowed by the game's coding, players might be able to argue that they suffered severe emotional distress because they were treated outrageously in ways inconsistent with civilized society.[47]

As people spend more and more time in virtual worlds, and as their senses of self become increasingly bound up with them, these sorts of arguments may become increasingly plausible. To a certain extent, though, players must be deemed to consent to the slings and arrows of outrageous fortune they meet in virtual worlds. A useful analogy is how tort law deals with real-world injuries inflicted on players in games like football or hockey. 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 egregious fouls causing physical harm that are completely outside the rules. When a player violates the rules with deliberate intent to injure or with reckless disregard, some courts have allowed a cause of action for battery. Imagine for example, that instead of tackling a running back particularly roughly, a linebacker takes out a gun and shoots the running back, or hits him across the knees with an iron pipe. At that point tort

[47] See Restatement (Second) of Torts § 46(1) (1965); see also id. cmt. d ("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!'").

law would step in to protect the running back.[48] By analogy, we might imagine a limited cause of action for intentional infliction of emotional distress in virtual worlds. Certainly the infliction of emotional distress would have to be wildly outside the pale of the ordinary forms of mistreatment that participants suffer at the hands of their fellow players. Most forms of misbehavior toward other players—collectively known as "griefing"—would not fall into this category. One reason for this is that when people misbehave in virtual worlds, they are usually policed by a combination of social norms—such as shunning by the other players—and, as a last resort, exclusion by the platform owner for violating the EULA. We can expect that most Terms of Service or EULAs will reserve the right to sanction or exclude players who act unreasonably in the game space. In addition, as noted before, platform owners will rewrite the code or update the EULA over time as they learn more about what people actually do in their virtual worlds.

There are good reasons for the law to avoid allowing suits for intentional inflection of emotional distress in all but the most egregious cases of griefing in virtual worlds. They are related to the free speech concerns that underlie the right to design and the right to play in virtual worlds. Courts should give wide latitude to virtual communities to solve problems through the development of social norms enforced by the EULA. That leaves open space for creativity for people designing games as well as for the community of players who play them.

Intentional infliction of emotional distress offers a good example to support Lastowka and Hunter's thesis that courts should leave enforcement of rights largely to the internal social norms of virtual worlds. The reason for this is not, as they suggest, that "virtual worlds are jurisdictions separate from our own,"[49] and so should generally be left to their own devices. Rather, it is because leaving this particular problem to the development of in-world norms vindicates important free speech values implicated in the rights to design and play.

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[48] See Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516, 520–21 (10th Cir. 1979) (approving a cause of action in tort for a football player injured during a game when a member of the opposing team intentionally struck him on the head).

[49] Lastowka & Hunter, supra note 2, at 73.

IV. THE COSTS OF COMMODIFICATION

I mentioned previously that the single most important reason why it is unreasonable to regard virtual worlds as separate jurisdictions untouched by real-world law is the accelerating real-world commodification of virtual worlds. When games are structured so that their effects cross over into the real world, when virtual items become convertible into real-world property and real-world currency, they will quickly become targets of legal regulation in order to protect real-world interests.

Platform owners can try to avoid many of these problems through contract. For example, they can write the EULA to state that no player should have any expectations of property rights in any virtual items or features of the game; that game owners may destroy, remove or modify virtual items at the platform owner's sole discretion; and that players assume all risks of monetary loss whenever they enter and play in the virtual world. Platform owners may even try to write the EULA to state that players who attempt to sell virtual property in real space will be kicked out of the game.

Nevertheless, such agreements may not be enforceable in all cases, especially if courts—and, more importantly, legislatures—think that people are being taken advantage of and believe that important property interests are at stake. More to the point, legislatures (and administrative agencies, such as the Federal Trade Commission) can change the law to recognize and protect property rights in virtual worlds if players place enough political pressure on them to do so. As more and more time and money is invested in virtual worlds by an increasing number of constituents, and as markets spring up for the real-world sale of virtual items so that virtual items have real-world market equivalents, the pressures on legislatures to recognize and then protect property rights in virtual worlds may become very great indeed. Moreover, as noted previously, some virtual worlds like *Second Life* have already conceded that players may possess intellectual property in their own creations in the virtual world.

It is worth considering how far real-world commodification of virtual worlds might go. It has been widely assumed in discussions about virtual worlds that the one thing that the platform owner can always do is shut the server down and turn the game off. That is what makes the platform owner a "god." But when the game is

shut off, what happens to all of the virtual property, the swords, light sabers, buildings, clothes, hydrofoils, and so on, that exist in the virtual world? They vanish. If virtual items have real-world equivalent values, though, the game designer may be destroying a considerable amount of value by turning off the game, and the more value that is destroyed, the less likely the law will stand for it. One might even see the day when a platform owner is losing money, and the players petition a bankruptcy court to take over the game and keep it going, so that the players' virtual property interests will not be destroyed. (These virtual assets might be analogized to bailments in the care and keeping of the platform owner.) Of course, it may be impossible to remove those items from the virtual space, but that, the players might say, is an additional reason to take over the game and keep it going. In the alternative, if some class of virtual worlds were interoperable, virtual items could be exported without being destroyed. One can certainly imagine that common platform standards for virtual worlds will eventually make it easier to transfer items from one virtual world to another. If so, we might even see the day when a bankruptcy trustee keeps a game going in order to dispose of the players' virtual assets.

The idea of a bankruptcy trustee taking over a game is likely to disturb game designers, who have often believed that they always hold the sovereign power to turn off the switch and end the simulation. Depending on the degree of virtual property in their worlds, however, even that right may be limited by the state. Although game designers—who are used to imagining themselves as gods and wizards—may recoil at the possibility, it is the direct result of designing the game to allow real-world commodification and propertization.

The obvious first line of defense for platform owners against the assertion of property rights by the players is the EULA. Platform owners can limit the property rights of game players in advance, and, as I shall argue later, the EULA may be the best way to avoid real-world commodification from getting started in the first place. Nevertheless, once markets and investments in virtual property proliferate, it is not clear that courts will enforce EULAs that place complete discretion in the hands of game owners to destroy investments in virtual assets by shutting down the game or otherwise seizing or eliminating these assets whenever they like. There is no

guarantee that some courts will not hold such agreements to be contracts of adhesion or otherwise contrary to public policy, especially if the games are shopping malls in all but name, or if they exist largely to promote commerce in real and virtual items. Moreover, regardless of existing property and contract law, legislatures may well chime in to regulate EULAs if enough gamers feel cheated by what platform owners do and lobby for protection. I realize that this prospect sounds horrible to many people in the gaming community, but legislatures often create and extend property rights that did not previously exist before in response to lobbying efforts. The law of intellectual property provides a good example: Paracopyright did not exist before the passage of the Digital Millennium Copyright Act. Now it does, much to the chagrin of many.

The moral of the story is that if game designers commodify virtual worlds, encourage people to treat elements in those worlds like property, and allow purchase of those assets in real-world markets as if they were property, they should not be at all surprised if courts and legislatures start treating these elements like property. In some cases, that treatment might have unfortunate consequences for platform owners and players alike. If game designers believe this to be the case, they should think twice before they go down that road in designing their games.

Many game designers are interested in creating wild and interesting spaces where players can give full rein to their imaginations. And many players will want to inhabit those spaces and make full use of the freedom to play that they offer. Designers with these values must take special care to design their virtual words to avoid the problems that real-world commodification brings to the game space. It is perfectly acceptable to allow markets and barter exchanges in the game space, as long as the platform owner takes steps both in the code and in the EULA to prevent—or at very least discourage—leakage between the game space and the real world. Freedom of speech will protect the designer's ambitions to the extent that they create and preserve play spaces that are devoted to speech and the exercise of narrative imagination. But if designers create play spaces that are focused on commerce and the acquisition of property with real-world market values, freedom of speech will—and should—offer less protection to their right to design and the players' right to play.

Game designers cannot have it both ways. The business models of some virtual worlds revolve around the sale and production of virtual goods; the virtual goods have value and people expect them to. Suppose, then, that the game's TOS state that virtual items are wholly the property of the platform owner and can be extinguished at the platform owner's discretion, or suppose that it asserts that the platform owner reserves the right to shut down the server for any reason and offer the players fifteen dollars plus the prorated portion of the player's subscription fee as compensation for any injuries. If the platform owner simultaneously encourages people to view virtual items as valuable property, courts may not enforce these terms, or legislatures may override them through consumer protection laws.

Such business models may become the victims of their own success. The more that people flock to these games, spend large amounts of time in them, become enmeshed in them, and spend considerable sums in them—as the business model hopes they will—the more people will demand that the state protect them when they are injured in ways that they think are inappropriate, whether or not the EULA or the TOS give them any remedy. So there is a tradeoff: If designers create their game spaces to be non-commodified spaces for imagination and adventure, they are more likely to receive and deserve First Amendment protection from courts when governments try to regulate what goes on in the virtual world. However, the more that the platform owner attempts to make the game space a new version of the shopping mall, the less likely the First Amendment will or should protect them when the state wants to vindicate the reliance and property interests of the players. Treat the players as artists, and the law will look on your world as a collective work of art. Treat the players as consumers, and they will demand consumer protection.

But won't all games inevitably become commodified? The market for virtual items developed as an informal market on eBay without the encouragement of platform owners. In fact, some platform owners have actively discouraged breaching the boundaries

between the game space and real-world markets.[50] But why should it make any difference what the game designer intends once items can be bought and sold on eBay, and game currencies are freely exchangeable? The answer is that the law should endeavor to protect designers who devote their game spaces primarily to the exercise of freedom of speech and association. Doing so helps preserve the free speech values that undergird the rights to design and play.

If the game designer structures the code and adopts policies that try to preserve a noncommodified game space, the law should take this into account. The degree of First Amendment protection that virtual spaces receive should depend on the nature of the space and its underlying purposes. There are no natural kinds here; we must look to the effects a particular medium produces, to the purpose of the medium, and to what it was designed to do.

It is certainly possible that legislatures will unwisely enact legislation that lumps all virtual worlds into the same category. But not all games are alike, nor should they be treated alike. Some virtual worlds are vehicles for commerce. Others are designed to allow people to express themselves through the creation of stories and adventures, and still others can allow social scientists to experiment with the evolution of norms. Virtual spaces that are "noncommodified"—not in the sense that the owners do not make money from them, but in the sense that they avoid real-world commodification—deserve different treatment from legislatures than virtual spaces that are pathways for commerce. This distinction will protect the ability of both the designers and the players to choose which kinds of worlds they want to create and inhabit.

V. FREEDOM OF DESIGN VERSUS FREEDOM TO PLAY

Next we must consider the relationship between the rights of the platform owner and the players. As I mentioned earlier, although the freedom to design and the freedom to play can be synergistic, they can also conflict. Where they conflict, current American free speech law is least helpful. As presently interpreted, First Amendment law does not protect the interests of the game players against

[50] See Bruce Rolston, eBay Bans *EverQuest* Auctions, at http://avault.com/news/displaynews.asp?story=1192001-94048 (last accessed Nov. 9, 2004) (on file with the Virginia Law Review Association).

the actions of the platform owner or game designer because the platform owner is not a state actor. If anything, American free speech law will tend to reinforce the contractual and property rights of platform owners to control the structure of the game through the TOS or EULA. In addition, the platform owner can use its intellectual property rights to control what players do in the game space. The EULA may also state that all of the objects and programs uploaded into the game become the property of the platform owner. The platform owner can use its First Amendment rights of design, along with its contract and intellectual property rights, to discipline what players do in the game space. Finally, it can also kick out players for violating the TOS or EULA.

Consider, as a recent example, the conflict between Peter Ludlow and Electronic Arts, owners of *The Sims Online*. Ludlow began a weblog called the *Alphaville Herald*,[51] in which he reported on the events that occurred in Alphaville, a virtual city in the game space of *The Sims Online*. According to Ludlow, these events included, among other things, thieves, scams, and an underage prostitution ring.[52] Ludlow alleged that the virtual characters or avatars controlled by a group of underage players would offer to engage in sexual talk with other avatars in return for some of the game currency, called "simoleans." Simoleans can be exchanged for U.S. dollars. As a result, Ludlow alleged, not only were minors engaged in indecent conversation with adults, but the adults were paying them money for it.[53]

Ludlow repeatedly attacked the platform owners of *The Sims Online*, Electronic Arts, for allowing this and other misconduct to occur. In response, he says, Electronic Arts terminated his account, erasing his virtual property (including a virtual house) and his two virtual cats. Electronic Arts argued that Ludlow had violated the game's TOS: he had included a link on his personal profile to his *Alphaville Herald* site, and that site, in turn, included a link to sites that explained how to cheat at the game. Ludlow argued that this

[51] *The Alphaville Herald* is now known as *The Second Life Herald*, at http://www.alphavilleherald.com (last accessed Nov. 9, 2004) (on file with the Virginia Law Review Association).

[52] Amy Harmon, A Real-Life Debate On Free Expression In a Cyberspace City, N.Y. Times, Jan. 15, 2004, at A1.

[53] Id.

was a pretextual enforcement of a technical violation of the TOS not regularly applied against other players.[54]

If Electronic Arts were a real state, and Alphaville a real city, Ludlow would have a colorable argument that his free speech rights had been violated—especially if he could show that the real reason for the termination was a desire to silence him. However, Electronic Arts is not a state actor, and Alphaville is a virtual community. Ludlow's right to play conflicts with Electronic Arts's right to run its game. Moreover, Electronic Arts might regard Ludlow as someone who is spreading false reports about *The Sims Online* that are bad for its business. There is some question whether the sort of virtual child prostitution he describes actually occurs, or whether it was the concoction of an unreliable seventeen-year-old player who was Ludlow's source for the story.[55] Electronic Arts would argue that it has the contractual right to refuse service to anyone who unreasonably disturbs the play of the game.

How can the right to play be protected from arbitrary decisions by the platform owner while still respecting the platform owner's right to design? One model of regulation would treat the platform owner like a company town.[56] In *Marsh v. Alabama*, the Supreme Court held that a town wholly owned by a company could not use its property rights to prevent people from distributing leaflets on its streets.[57] Because the company had assumed all of the major functions of a municipality, it had to obey First Amendment values.[58] Put in somewhat different terms, the streets of the company town formed a space in which people communicated, which the company fully controlled, and for which the company was ulti-

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[54] Id.

[55] Id.

[56] See Paul Schiff Berman, Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation, 71 U. Colo. L. Rev. 1263, 1302–06 (2000) (arguing for application of constitutional norms in debates over regulation of cyberspace); Lastowka & Hunter, supra note 2, at 60–61; cf. Peter S. Jenkins, The Virtual World as Company Town—Freedom of Speech in Massively Multiple On-Line Role Playing Games, 8 J. of Internet L. 1, 17 (July 2004) (arguing for company town analogy for virtual worlds that have public access but not for worlds that select their members).

[57] 326 U.S. 501, 508–09 (1946); see also Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 325 (1968) (extending reasoning of *Marsh v. Alabama* to protect a peaceful protest by local union against shopping mall).

[58] *Marsh*, 326 U.S. at 506.

mately responsible. The streets were important nodal points for communication and the exchange of ideas. As Justice Black explained, "Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free."[59] And as Justice Frankfurter pointed out, the central issue was not ownership of property but the "community aspects" of the company town[60]—the fact that the town operated as a community in which people exchanged ideas and opinions. When a business monopolizes control over the central modes of communication within a community, it must act as a fiduciary for the public interest, and it must allow its property to be used for the free exchange of ideas. To be sure, the U.S. Supreme Court refused to extend the reasoning of *Marsh v. Alabama* to shopping malls on the ground that, unlike company towns, they did not take over the municipal functions of a city.[61] Thus, one could argue that shopping malls lack the community aspects that Justice Frankfurter identified. Nevertheless, several state supreme courts have held that large regional shopping malls are public spaces where people have free speech rights.[62]

Virtual worlds are like company towns in that the game owner forms the community, controls all of the space inside the community, and thus controls all avenues of communication within the community. Neither the free flow of ideas nor the formation of community can occur within a virtual world unless the designer permits it. Alphaville was a virtual city controlled by *The Sims Online* through its design of code and its TOS agreement. Although Electronic Arts does not take over "the full spectrum of municipal powers"[63] in real space, it does exercise all of those functions in the virtual world. If any private entity could be regarded as

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[59] Id. at 507.

[60] Id. at 510 (Frankfurter, J., concurring).

[61] See Hudgens v. NLRB, 424 U.S. 507, 518–21 (1976) (officially overruling *Logan Valley Plaza*); Lloyd Corp. v. Tanner, 407 U.S. 551, 563–64 (1972) (distinguishing *Logan Valley Plaza* on the ground that protest was not related to mall owner's business).

[62] See, e.g., Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 347 (Cal. 1979), aff'd, 447 U.S. 74 (1980); New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757, 775 (N.J. 1994).

[63] *Lloyd Corp.*, 407 U.S. at 569.

a company town, it would be a virtual world. This is especially so because the whole point of the virtual world is to create community (or communities), and action in the virtual world occurs through the exchange of ideas.

Nevertheless, one might object that it is possible for people to speak to each other outside the virtual world. For example, *The Alphaville Herald* (and its successor, *The Second Life Herald*), have been available to anyone on the World Wide Web, and nothing prevents the people behind the avatars from sending e-mails to each other. But if we treat *The Sims Online* as a virtual community, this objection is less compelling. It is important that communication among the participants occurs within the space of the community and between the avatars. In *Marsh*, it did not matter that people could listen to radio broadcasts and send mail in and out of the company town. That was simply not the same thing as speaking and organizing within the town itself. Keeping leafletters out of the company town prevented the free exchange of ideas. The same is true of Alphaville: Although Ludlow can still report on what goes on in Alphaville, kicking him out makes it difficult for him to do so because he is no longer a member of the community.

Another objection to the company town analogy is that in *Marsh* people had to live in the company town in order to make a living. It was unfair to require them to give up their jobs in order to enjoy full free speech rights. By contrast, no one has to live in Alphaville, and if Ludlow does not like how Electronic Arts runs its world, he can go elsewhere to a virtual world that thinks more highly of virtual-world journalism. After all, one might insist, it's just a game. This objection, however, fails to take seriously the notion of virtual worlds as communities. Some players already invest enormous amounts of time in these worlds; they make friends there and form attachments. As virtual worlds become more ubiquitous, and as they are employed for more and more functions—ranging from commerce to entertainment to education—it will not seem at all strange for people to spend considerable time in these worlds and to regard membership in a virtual community as part of their (multiple) social identities. Exit from virtual worlds is always possible, but demanding exit as the price of free expression becomes less justified as people's social connections in these worlds become increasingly significant.

Another objection, I think, is far more powerful. Not all virtual worlds are alike, and they should not all be treated alike. For example, virtual worlds that are used for military simulations or for psychotherapy should not be regarded as company towns. They are created for specific sorts of uses, and treating them as open spaces for communication would defeat the purposes for which they are dedicated. But this argument, if accepted, actually strengthens the case for treating at least some virtual worlds as company towns. Military and therapeutic simulations are not designed to form communities or create channels for general public communication, and therefore they should be treated differently. That does not mean, however, that those virtual worlds which hold themselves open as general spaces for public communication and interaction should not be treated as company towns any more than Chickasaw, Alabama could defend itself on the grounds that some business entities do not form communities that take over all municipal functions.

I have just offered a number of reasons for taking seriously claims that platform owners must respect free speech rights within virtual worlds. Although courts may ultimately not extend First Amendment privileges to players in virtual worlds, legislatures may well take these claims seriously and extend free speech rights through statute in order to recognize the speech rights of both players and platform owners.[64]

Two analogies come to mind. The first is private universities, which, although they are nominally private actors, understand themselves to be spaces for the free exchange of ideas. The second analogy is telecommunications law. In American telecommunications law, owners of communications networks such as cable companies are both conduits for the speech of cable programmers and speakers in their own right. Much of telecommunications law involves balancing the speech interests of owners of communications networks and independent speakers. To this end, federal cable regulations sometimes require that cable owners respect the free speech interests of independent programmers, for example, by

[64] I take this to be the point of Paul Berman's argument for incorporating constitutional values into adjudications about private rights in cyberspace. See Berman, supra note 56, at 1302–05. I would add that it may be even more important for legislatures and administrative agencies to take these constitutional values into account.

providing public access channels. In like fashion, legislatures and administrative agencies may choose to balance the free speech interests of platform owners with those of the players.

Nevertheless, statutory protection of free speech rights by players may conflict with the platform owner's constitutional right to design. The objection is not simply based on the platform owner's property rights in the game space; rather, it is based on the platform owner's constitutional interest in creating and overseeing a collaborative work of art, somewhat like the First Amendment interests of a director of an improvisational theater.[65] We should not take this constitutional interest lightly, but the objection is stronger in some cases than in others. Everything depends on the nature of the virtual space that the platform owner has created. For example, if the game designer deliberately creates a totalitarian regime in which players are booted out for failing to conform, then the whole point of the game is that players not have free speech rights. Players may write letters and e-mails to the company asking for changes in the game, but the point of the simulation is that they will be dealt with harshly if they protest within the game space. *The Sims Online*, however, was not designed to be an artistic recreation of a totalitarian state. It was designed as a general purpose simulation of real life similar to that in the contemporary United States. If the makers of *The Sims Online* decide to rename themselves *The Gulag Online* in order to appeal to players who want to know what it is like to live in a Soviet prison camp, legislatures should not interfere with this design choice. This suggests that a one-size-fits-all solution to protecting players' rights in virtual worlds is likely to be unwise. Rather, the question is what kind of virtual space is being designed. (Equally important, many virtual spaces will correspond to neither the model of *The Sims Online* nor *The Gulag Online*, but will contain elements of both.)

There is an obvious but imperfect similarity between the way that legislatures should treat free speech rights in privately owned virtual spaces and the way that courts treat claims of access to government property for free speech activities. In American free

[65] This interest might be stronger than the interest of a shopping mall owner who does not wish to be associated with the speech of protesters on his or her property. See Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 87–88 (1980) (rejecting claim that forcing mall owner to allow access by protesters constituted compelled speech).

speech law, streets and parks are regarded as traditional public forums that must be held available for the exercise of free expression.[66] In all other cases, the right of access to government property is treated according to the intentions and practices of the government actor. If the government holds open a space for expression it has created a public forum by designation. It may also hold a forum open for a limited group of persons or a special subject matter creating a limited public forum. It may create private forums reserved for special communicative purposes, thus creating a nonpublic forum. Or a piece of government property may not be a forum at all.[67]

The question of how legislatures should balance the competing rights of players and platform owners in virtual spaces is similar in some respects to the way that courts treat government property that is not a traditional public forum. Legislatures must consider what the purposes and functions of the virtual space are. One important difference, however, is that there is no "traditional public forum" concept for virtual spaces because there are, as of yet, no traditional examples of virtual spaces that have been held open time out of mind for free expression by the public. Perhaps equally important, although the government, generally speaking, has no free speech rights of its own, designers of virtual worlds certainly do. Therefore, legislatures must take into account and protect the communicative and artistic purposes of designers when they attempt to regulate virtual worlds to protect the interests of the players. As noted before, if the purpose of the virtual world is largely the purchase and sale of goods and services, more regulation should be permitted than if the platform owner is trying to experiment with social norms or make an artistic statement.

Another way that legislatures might protect the right to play in virtual worlds is through the model of consumer protection law. Players in virtual worlds purchase a service from the platform owner, and the law should protect their reasonable expectations in the performance of that service. Consumer protection law may be a good way to protect reliance expectations in virtual property, and

[66] Hague v. CIO, 307 U.S. 496, 515–16 (1939) (Roberts, J., separate opinion).

[67] See Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677–80 (1998) (distinguishing different types of public fora); Perry Educ. Ass'n. v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–47 (1983) (same).

to keep platform owners from violating the privacy rights of players. However, because the players also have free speech interests in virtual communities, consumer protection law may sometimes be the wrong paradigm for protecting the right to play.

In virtual worlds, the relationship between platform owners and players is not simply one between producers and consumers. Rather, it is often a relationship of governors to citizens. Virtual worlds form communities that grow and develop in ways that the platform owners do not foresee and cannot fully control. Virtual worlds quickly become joint projects between platform owners and players. The correct model is thus not the protection of the players' interests solely as consumers, but a model of joint governance.

This is true even in our imaginary example of *The Gulag Online*. Although the virtual space is set up as a Soviet prison camp, things will happen in the space that the designers could not predict that will make the game either more or less interesting to play. As a result, the designers will probably encourage feedback from the players about how to improve the game. This is so even though, within the game, the avatars are treated rather ruthlessly. Of course, part of the reason why platform owners will seek feedback from players is that players are consumers and platform owners want to keep them happy and make money. But it is also because any multiplayer virtual world of sufficient complexity quickly becomes more than the creation of its designers. It becomes not so much a finished work of art or entertainment as an ongoing collective project. The players in these virtual worlds wear two hats: they are both competitors in the game, who subject themselves to its rules, whatever those rules may be, and also participants who have emotional, solidaristic, and artistic stakes in its growth and evolution over time. Similarly, platform owners wear two hats: they are both entrepreneurs providing a service to consumers and the governors and fiduciaries of a realm in which they must be responsive to the participants.

The dual roles of both players and platform owners suggest that their relations are always likely to be in flux and cannot fully be captured by the model of consumer protection. Hence although a consumer protection model surely captures part of the right to play, it does not fully exhaust it. Platform owners do not merely provide a service to be consumed; they also act as governors of a

community. Thus, the model of consumer protection must be augmented by the model of political fairness, if not democracy. One can easily imagine a situation in which suitably disgruntled players gang up on the platform owners and, treating them like old King John, effectively require the platform owner to turn the EULA into a virtual Magna Carta that protects the rights of players from high-handed treatment. Indeed, *Second Life* has already experienced a "tax revolt" in which the players persuaded the platform owner to modify its code.[68]

In short, we need to think of virtual spaces as both forms of commerce and forms of governance. Raph Koster's Declaration of the Rights of Avatars reflects the basic idea that platform owners should treat players with a certain degree of respect.[69] However, the rights at stake are not really the rights of the avatars themselves. They are the rights of the players who take on particular (and possibly multiple) identities within the virtual communities.

Here again, the right to design and the right to play are likely to conflict. It is one thing for game designers voluntarily to assume such duties of respect. It is quite another for the state to require that all virtual worlds include such guarantees. That is because different games have different purposes, and the addition of some rights for players would effectively change the nature of the game. To the extent that the right to design has constitutional dimensions, the legislature may sometimes be forbidden from altering the relation between players and platform owners.

It is entirely likely that platform owners will assert First Amendment defenses to legislative attempts to secure rights for the players. In the information age, the First Amendment has become the first line of defense against almost every variety of government regulation of media enterprises.[70] Just as telecommunications companies have repeatedly asserted First Amendment defenses to structural public interest regulations, we may expect

[68] See James Grimmelmann, The State of Play: On the *Second Life* Tax Revolt (Sept. 21, 2003), at http://research.yale.edu/lawmeme/modules.php?name=News&file=article&sid=1222 (on file with the Virginia Law Review Association).

[69] See Raph Koster, A Declaration of the Rights of Avatars, at http://www.legendmud.org/raph/gaming/playerrights.html (last accessed Nov. 9, 2004) (on file with the Virginia Law Review Association).

[70] See Balkin, supra note 25, at 24–25.

that game designers will assert First Amendment defenses to legislative attempts to protect the interests of players in virtual worlds.

Some of those First Amendment defenses should be taken seriously, but others should not. The First Amendment is misused if it allows platform owners to avoid what is essentially consumer protection regulation. In addition, because platform owners are both speakers in their own right and conduits for the speech of others, we can imagine game spaces where regulation of the space to protect the free speech interests of the players might be constitutional. But there is a great danger here: Legislatures must understand that not all game spaces should be treated alike. A game space that is essentially a virtual Hyde Park should be treated like one. A game space that has different functions should be treated quite differently.

A third model of regulation treats the virtual space as a place of public accommodation.[71] Places of public accommodation are public venues—including inns, theaters, restaurants, transportation hubs, and, more recently, private clubs—that may not discriminate against their customers even though they may be privately owned. This model makes sense to the extent that the virtual world is heavily commercialized and bears many of the characteristics of a shopping mall or a place where real-world business and commerce are conducted. (Contrast this with a noncommodified world that

[71] See Neil Weinstock Netanel, Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory, 88 Cal. L. Rev. 395, 456–60 (2000) (arguing that "[c]yberfora and networks that are generally open to the public should similarly be seen as 'places of public accommodation,' whether by statutory construction or legislative extension"); Tara E. Thompson, Locating Discrimination: Interactive Web Sites as Public Accommodations under Title II of the Civil Rights Act, 2002 U. Chi. Legal F. 409, 411 (arguing that Internet chat rooms and bulletin boards are public accommodations under Title II of the Civil Rights Act of 1964); cf. Colin Crawford, Cyber*place*: Defining a Right to Internet Access Through Public Accommodation Law, 76 Temp. L. Rev. 225, 228 (2003) (arguing that public accommodation law is best way to conceptualize rights to Internet access). But cf. Noah v. AOL Time Warner, Inc., 261 F. Supp. 2d 532, 544–45 (E.D. Va. 2004), aff'd, 2004 U.S. App. LEXIS 5495 (4th Cir.) (Mar. 24, 2004) (holding that America Online chatrooms are not public accommodations for purposes of Title II of the Civil Rights Act of 1964 because they are not physical spaces); Eugene Volokh, Freedom of Speech in Cyberspace from the Listener's Perspective: Private Speech Restrictions, Libel, State Action, Harassment, and Sex, 1996 U. Chi. Legal F. 377, 390–97 (rejecting public accommodation theory and arguing for freedom of association right of cyberdiscussion group operators to discriminate among speakers).

engages only in barter exchanges and virtual commerce.) As noted previously, virtual spaces are unlikely to remain pure games; as time goes on they will be used for any number of purposes, including education, therapy, social experimentation, and, perhaps most importantly, for the advertising and delivery of goods and services. To the extent that virtual spaces are used to conduct real-world shopping and commerce, there seems to be no reason why public accommodation laws in theory could not apply to protect the rights of players.[72]

Nevertheless, applying public accommodation laws to virtual spaces is likely to give only modest protections to the players. At most they would give players the right to join the virtual community and play according to its rules. Although the platform owner could not discriminate against, say, African-Americans who wanted to sign up for the game, the player would still be bound by the TOS or the EULA and could be excluded for breaching those agreements.[73]

The model of public accommodations law raises many complicated problems, but one distinction is particularly important. We must distinguish cases where the platform owner discriminates against players on the basis of their race, sex, religion, et cetera, regardless of how they appear in the game, from the ability of the platform owner to discriminate by requiring that people appear in the game in particular ways. Consider, for example, a game in which the platform insists that all avatars in the game be white or

[72] Although the court in *Noah*, 261 F. Supp. 2d at 541, interpreted the language of Title II of the 1964 Civil Rights Act to require that public accommodations must involve a physical space, legislation might define a class of public accommodations more broadly. Cf. Boy Scouts of Am. v. Dale, 530 U.S. 640, 656–57, (2000) (noting application of New Jersey public accommodations statute to include organizations like the Boy Scouts of America); Carparts Distribution Ctr., Inc. v. Auto. Wholesalers Ass'n. of New England, Inc., 37 F.3d 12, 18–20 (1st Cir. 1994) (holding that a trade association which administers a health insurance program, without any connection to a physical facility, can be a "place of public accommodation" under Title III of the Americans with Disabilities Act).

[73] As Professor Jerry Kang points out, cyber-communities can enforce equality norms. This is not because of public accommodation laws, however, but rather because of internal norms developed within the game space and enforced by the EULA. See Jerry Kang, Cyber-Race, 113 Harv. L. Rev. 1131, 1177–79 (2000).

Christian.[74] Although discrimination against *players* may be prohibited, discrimination against *avatars* is a different matter. Many games assign different characteristics and roles to different types of avatars. Ordinarily the rules of the game should allow discrimination among avatars as long as the player has the free choice to decide which role to assume.

Imagine a game that reenacts life on an antebellum Southern plantation. All the slave owner avatars are white, all the slave avatars are black, and players are given the choice about what kind of avatar they want to be, subject perhaps to a rule of first-come-first-served. Does the game violate public accommodation laws because it portrays the social supremacy of white avatars to black avatars, and portrays black avatars in a servile position? Clearly a play or motion picture telling the same story would be protected by the First Amendment, no matter how hateful or tasteless it might be. This might suggest that discrimination among avatars should ordinarily pose no problem for real-world antidiscrimination law. But the issue is far from clear. Imagine now a restaurant with the same Southern plantation theme, which features pictures of black slaves being whipped by their white owners prominently displayed on the walls, along with racist arguments justifying chattel slavery. Even if such a restaurant does not refuse service to blacks who walk through its doors, the decor might make blacks very likely to avoid it, and its policy might be in violation of public accommodation laws.[75] In like fashion, African-American consumers might well boycott a game that glorified the antebellum South's slaveocracy. The key question is whether the game space should be treated like a motion picture, in which case the platform owner has a First Amendment right to run the space however he or she likes, or as a place of public accommodation, in which case the platform owner may have created the equivalent of a hostile environment.[76]

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[74] This is the flip side of Kang's point that cyberspace allows individuals to obscure their racial identities or delay providing information about them. Id. at 1172–73.

[75] For this reason, Professor Eugene Volokh has argued against applying hostile environment law to public accommodations. Doing so, he believes, will likely violate free speech norms. See Eugene Volokh, Freedom of Speech, Cyberspace, Harassment Law, and the Clinton Administration, 63 Law & Contemp. Probs. 299, 318–26 (2000).

[76] Along the same lines, imagine a virtual space designed to recreate an imaginary 1950s America in which all persons are heterosexual, and where players whose avatars engage in any form of same sex affection or attachment are summarily tossed out

There can be no general answer to this question; it must depend on the nature and purposes of the game space, and its degree of commercialization. Noncommodified virtual spaces with themes that are blasphemous, racist, sexist, homophobic, or otherwise offensive should ordinarily be protected just like plays and motion pictures with similar themes. Not surprisingly, the difficult cases come when virtual spaces become like virtual shopping malls, an area for real-world commerce exercised in a virtual environment, or when they become spaces in which the players regularly attempt to make a living by trading in objects and items that have real-world values. The more the virtual world is a space for economic enterprise and the purchase and sale of goods, the more we must be concerned if the space attempts to discourage people of a certain race or religion from participating on an equal basis.[77] Similarly, universities should not be immune from antidiscrimination laws simply because they provide educational services in virtual environments. Note, however, that a university might have legitimate educational reasons for reenacting a slave plantation in a virtual environment that would be very different from those that

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of the game. Should we understand this policy as an artistic decision of the platform owner or as a method of discrimination against people who have homosexual identities in the real world or who want to express homosexual identities in the virtual space? Another way of asking the question is whether the platform owner has a First Amendment right to impose a closeting or passing policy in the virtual space he or she controls.

[77] We might draw an analogy from the law of religious freedom. Title VII includes an exemption from religious discrimination by religious institutions, which the Supreme Court upheld against an Establishment Clause challenge in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987). In justifying its result, the Court—and in particular Justice Brennan in his concurrence—remarked that a distinction between for-profit and nonprofit enterprises struck an imperfect but functional balance between vindicating Title VII's prohibition on discrimination and giving religious organizations sufficient breathing room to operate as close-knit religious communities. See id. at 339, 345–46 (Brennan, J., concurring in the judgment).

Although the issue here is freedom of association rather than free exercise of religion, similar considerations might apply to virtual worlds. If virtual worlds do not hold themselves out as enterprises for the purchase and sale of virtual or real goods, we should be more likely to regard them as collaborative works of art, as communities, or both. The line between commodified and noncommodified worlds, like the line between for-profit and nonprofit activities in *Amos*, is a prophylactic device designed to vindicate important interests in civil equality while simultaneously attempting to avoid chilling the free speech and free association interests in the development of virtual worlds.

could be plausibly offered by a restaurant. Therefore the university should receive correspondingly greater protection on grounds of academic freedom.

One thing is clear, however: application of public accommodation models to virtual spaces will inevitably lead platform owners to respond by making freedom of association claims in order to protect how they run their spaces. Once again we will see the First Amendment used to combat state attempts to regulate game spaces, although in this case the freedom asserted will be the freedom of (virtual) association in virtual worlds.

The Supreme Court has rejected freedom of association claims made by the Rotary Club and the Jaycees on the grounds that sex discrimination was peripheral to their purposes of networking and forming business contacts.[78] In *Boy Scouts of America v. Dale*, however, the Supreme Court held that the Boy Scouts were not bound by a New Jersey public accommodation law that prohibited discrimination against homosexuals.[79] The Boy Scouts successfully argued that their moral objections to homosexuality were particularly important to the values of their association.[80] If legislatures attempt to regulate virtual spaces along the model of public accommodation laws, we may well see platform owners making *Dale*-in-cyberspace claims.

One can certainly imagine virtual worlds that are created for political and religious purposes, and are reserved only for players who share a certain ideology or religious belief. These spaces are protected by *Dale*. Here again much will turn on the commercial or noncommercial nature of the virtual space.[81] For example, general purpose spaces like *The Sims Online*, *Second Life*, or *There* should

[78] Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 546–47 (1987); Roberts v. United States Jaycees, 468 U.S. 609, 627 (1984).

[79] 530 U.S. 640, 656 (2000).

[80] Id.

[81] Professor Neil Netanel, by contrast, argues that the question should turn not on the commodification of the virtual space but on the publicness of the forum. In his view, "so long as the virtual community is of sufficient permanence and openness to new members to be more than a distinctly private conversation, and so long as the attribute discrimination in question is particularly egregious in light of its historical and social context, the liberal state should act to prevent it." Netanel, supra note 71, at 460. Netanel's argument might suggest that the virtual Southern plantation simulation would be subject to antidiscrimination norms—and possibly hostile environment liability—if it held itself open to new members.

not be able to claim that they are the cyberspace equivalent of the Boy Scouts or the Knights of Columbus.

It should be obvious from these examples that virtual worlds greatly raise the stakes in the conflict between freedom of speech and association and antidiscrimination norms. Indeed, the problem seems to reappear in different guises wherever we turn. The reason is that antidiscrimination law and free speech law can live together amicably when we can easily settle on social conventions that will distinguish acts of speaking from acts of conduct, and can distinguish governmental purposes for regulation as being directed at speech or at conduct. The line between "speech" and "conduct" is a legal fiction that does not represent a natural division of the social world, but is rather largely conventional. Even so, in a wide variety of settings, the categorization of certain activities as speech or conduct, or of government purposes as attempts to regulate speech rather than conduct, can become widely accepted.

When we move to virtual worlds, however, conventional agreements about what is speech and what is conduct quickly break down, because we have not yet developed understandings about what counts as "acting" versus "speaking" in a virtual environment. As I noted previously, torts that are actionable in virtual environments are, by and large, communications torts. They are activities where one person harms another through speaking or communicating. Virtual worlds blur the conventional boundaries between speech and conduct as we currently understand them precisely because *all conduct in virtual worlds must begin as a form of speech.*

This does not mean that the distinction between speech and conduct, or between permissible and impermissible government purposes for regulation, cannot be resuscitated and retrofitted to apply in virtual worlds. It does mean that our current understandings and analogies will often run out in these environments. We will have to muddle through for a time, until it becomes clear what should count as "speaking" versus "acting" in these virtual worlds. As virtual worlds become increasingly important parts of people's lives, the need to create new conventions will become increasingly urgent. There is no doubt that new conventions will arise to solve these problems. This Article is designed to give a few suggestions about where we might start.

The most significant criterion, I believe, concerns the extent to which the virtual world is engaged in economic activity and encourages real-world commodification. One of the most important general trends in the digital age has been the use of the First Amendment to oppose economic regulation of media enterprises. Media corporations have offered the free speech principle to oppose many different forms of business regulation, while simultaneously employing intellectual property to control the speech of others.[82] This is, I think, a misuse of the free speech principle, and it is not difficult to see how media companies will employ the same legal strategies to combat the justifiable legal regulation of virtual worlds.

In dividing up the virtual world into speech and conduct (or characterizing government motivations for regulation of the same), the most important distinction may be whether the virtual space is acting like a marketplace, a nexus for transactions that have real-world values, or whether it has been deliberately designed to avoid real-world commodification. A second and crosscutting distinction is whether the virtual world is offered as a space for the free exchange of ideas, or is created to realize the artistic or ideological vision of the platform owner. Regulating the platform owner's right to design in order to protect the participants' right to play is most justifiable when the virtual world serves as a public space for commerce, and when it is held open as a public space for the exchange of ideas. These two distinctions may not be perfectly clear in all cases; but they point the way to the boundaries of permissible state regulation on the one hand, and the free speech rights of platform owners on the other.

VI. A POSSIBLE SOLUTION: STATUTES OF INTERRATION

How can legislatures navigate their way through the problems I have described while still preserving important public values of freedom of speech for players and game owners alike? One way is through creating what Professor Edward Castronova has called statutes of "interration," akin to statutes of incorporation.[83] Just as

[82] See Balkin, supra note 70, at 24.

[83] See Castronova, supra note 10, at 12. "Interration" is a pun on "incorporation" using the Latin word *terra* meaning "earth." Castronova argues that governments

business enterprises can choose between sole proprietorships, partnerships, and the corporate form, depending on their goals and on the legal rights that each form provides, governments could offer a variety of different types of legal regimes for operators of virtual worlds to choose from. These legal regimes would set different ground rules for the legal relationships between game owners and players. Platform owners could choose from among these regimes and design their virtual worlds accordingly, knowing in advance what the law expects from them. Similarly, players could choose which virtual worlds to inhabit based on the form of interration that the platform owner chose and thus would know in advance the free speech rights they will enjoy in that virtual world.

For example, a government might offer a form of interration specifically designed for large virtual spaces that permit real-world commodification. In this interration scheme the platform owner must agree to protect the property and privacy rights of players, and it must recognize (and provide) public spaces for uninhibited free expression. (Other areas of the virtual world could be devoted to special purposes, or zoned as suitable for children.) This would secure free speech rights against private ownership without invoking the doctrine of the company town. If a platform owner chooses to adopt this form of virtual space, it will probably not be able to raise freedom of association claims to defeat public accommodation provisions.

Another form of interration might be designed for smaller virtual worlds that prohibit real-world commodification. Players would not have real-world rights in virtual items and the space would be devoted purely to the development of a storyline or set of storylines. The platform owner would agree to respect the players' privacy but would have greater abilities to regulate the players' speech. This type of interration would be appropriate for worlds like our hypothetical example of *The Gulag Online*, in which the game owner wishes to maintain fairly tight control over the space. There might also be a special form of interration for noncommodified virtual worlds with strong interests in preserving their freedom of association from the requirements of public accommodations

need to recognize the existence of virtual words as fictional venues just as they recognize corporations as fictional persons.

laws. (An example might be a virtual world run by a religious institution or political organization.) Finally, governments could create still other forms of interration for worlds designed primarily for educational purposes, medical diagnosis, therapy, testing social and economic rules, or military simulations.[84]

In theory, contracts between players and platform owners could produce different bundles of rights and duties for different virtual worlds. However, fixing basic rights and duties through interration statutes has four advantages. First, it greatly reduces transaction costs between players and game owners. Second, it secures the rights of nonplayers who may not be able to contract easily with game owners. Third, it protects important reliance interests of players because it prevents basic understandings about the virtual world from being changed by the platform owner after the players have invested considerable time and formed valuable social networks there. Fourth, and perhaps most important for purposes of this Article, it protects important free speech interests that may be undervalued by market forces. Securing freedom of speech rights against private parties in virtual worlds has significant positive externalities for society. Markets will likely undervalue those rights because their full value to society cannot be captured by the platform owners and players.

The experience of players like Peter Ludlow suggests why market forces alone might not lead large commercial game owners to

[84] This account of interration differs from Castronova's in several important respects. Castronova offered the idea of interration primarily to protect virtual worlds that he calls "play spaces" from real-world commodification. These are "closed worlds" that are self-governing and where (Castronova assumes) real-world law will not apply. Id. at 12–13. In Castronova's view, interrated worlds must always maintain strict separation of their economies from the economy of the outside world in order to maintain their special legal status. If the platform owner fails to maintain the space as a "play space" separate from real-world economy, the state will revoke the game's charter of interration. By contrast, worlds without statutes of interration are "open worlds" that would be subject to real-world law. Id.

By contrast, I argue that interration is most important for worlds that feature real-world commodification and in which virtual objects are freely traded. These worlds are likely to be the most popular and in the greatest need of free speech and privacy protections against game owners. Platform owners can choose between different interration schemes, some of which permit real-world commodification and some of which prohibit it. The latter schemes are the closest to Castronova's idea of "closed worlds." Nevertheless, unlike Castronova, I begin with the assumption that real-world law applies to all virtual worlds. The only question is how the law applies.

protect the free speech rights of their players. Game owners do have incentives to keep their user base content, and censoring the players' speech might anger some of the participants. However, platform owners also have countervailing incentives to (1) censor speech critical of how the owner is running the space; (2) censor speech it thinks will offend and hence scare customers away; and (3) censor speech that it believe customers will (fairly or unfairly) associate with the game owner or blame the game owner for allowing in the space. Hence, like real-world governments, game owners will be likely to engage in too much censorship (and selective censorship) without legal guarantees of freedom of speech and association.

As with statutes of incorporation, governments can offer legal benefits and protections to platform owners to encourage them to interrate. In return for these legal benefits, game owners would have to agree to protect basic rights of players and third parties that corresponded to the particular form of interration they chose, and game owners would not be able to negate or undermine these rights either through code or through the EULA or the TOS. (Although these basic rights would be mandatory for a given form of interration, other elements of interration statutes would be default rules that could be modified through contract.[85]) Legal incentives will be particularly important to encourage interration by large virtual spaces that feature real-world commodification and virtual commerce. These are the spaces where large numbers of people will likely gather and they will want to express themselves without fear of censorship or invasion of privacy by the platform operator.

[85] Interration statutes might also permit an existing virtual world to shift from one form of interration to another. In order to protect the players' reliance interests, however, interration statutes should require some degree of consultation and approval from the player base before the basic social contract of the space can be altered. Otherwise, the platform owner might simply change the TOS or EULA unilaterally and insist that players who continue to play in the space consent to the changes in their rights. The point of interration is not to prevent modification of the basic norms of the virtual space for all time, but rather to formalize a consultation process that recognizes the interests of the player community. This is yet another way to make the point that the relationship between the game owner and the player community is one of joint governance.

Castronova has suggested that the government could offer tax breaks to encourage interration.[86] I believe there is a more important legal protection that governments could offer platform owners that would simultaneously help protect free speech values—freedom from liability for the actions of the individual players.[87]

Plaintiffs who sue players for communications torts committed in a virtual world will probably sue the platform owner as well as the player. After all, the platform owner—especially in large commercially run game spaces—is more likely than the player to be a deep pocket. The plaintiff will argue that the platform owner should have taken steps—either through the EULA or through the design of the code—to prevent the tort from occurring. The arguments will be similar to those made by plaintiffs who sue business owners for torts committed on their premises by third parties. Plaintiffs will likely argue that the platform owner had the ability to take appropriate safeguards to prevent tortious activity by the players. Indeed, plaintiffs will insist, the argument for liability is even stronger in virtual worlds because platform owners have god-like powers in virtual spaces and can, in theory, control almost everything in these spaces through contract and code.[88]

To protect themselves from these lawsuits, game owners will probably insist that players waive all rights to sue as part of the

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[86] Castronova, supra note 10, at 12–13.

[87] Note that this particular set of rights cannot be achieved by contracts between players and owners, because interration statutes also change the rights of third parties who are not parties to the EULA.

[88] The Digital Millenium Copyright Act has special provisions requiring notice and take down that probably would also apply to platform owners in cases where a player allegedly violates the copyright interest of a third party. See 17 U.S.C. § 512 (2000).

The argument that platform owners have sufficient control of their virtual worlds to be held responsible for torts by the players bears an obvious analogy to a dispute between two early precedents in the law of cyberspace, *Cubby, Inc. v. CompuServe*, 776 F. Supp. 135 (S.D.N.Y. 1991), and *Stratton Oakmont, Inc. v. Prodigy Services Co.*, No. 31063/94, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 24, 1995). In *Cubby*, the court held that because CompuServe lacked editorial control over comments published in its Journalism forum, it was not liable as a publisher of defamatory materials posted on its site. 776 F. Supp. at 140. In *Stratton Oakmont*, by contrast, the court argued that "PRODIGY's conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than CompuServe and other computer networks that make no such choice." No. 31063/94, 1995 N.Y. Misc. LEXIS 229, at *13. The conflicting results in these two cases led to the passage of § 230 of the 1996 Telecommunications Act, discussed infra.

EULA. These waivers of liability, however, may not be enforceable in all cases; and these waivers cannot bind third parties outside the game who may wish to sue for torts committed by players within the game space.

However, if the platform owner interrates and accepts certain duties and obligations (for example, protection of the players' free speech rights), the government will hold the platform owner not liable for tortious communications made by players who are not otherwise affiliated with the platform owner.[89] If a platform owner decides not to interrate, he or she will be subject to whatever liability rules courts choose to apply. We might therefore expect that uninterrated worlds will be fairly small and noncommercial, with relatively few members.

The bargain proposed here protects free speech interests in two different ways. First, platform owners who interrate will assume obligations to protect the speech of players even though the owners are not state actors. This undertaking will prove most important in the case of large commercial game spaces that are likely to be the most popular.

Second, protecting platform owners from liability also serves important free speech interests. The ability to sue owners for harmful speech by players in a virtual world creates a very significant danger of unjustified *collateral censorship*.[90] Collateral censorship is a form of private censorship that occurs when the government holds one private party *A* liable for the speech of another private party *B*, and *A* has the power to control or censor *B*'s speech. To avoid liability, *A* will likely err on the side of caution and censor too much of *B*'s speech, with insufficient re-

[89] Intellectual property will probably prove to be a special case. Given the current political configuration, it is unlikely that the copyright industry would accept liability and notice and take down rules significantly weaker than those specified by the DMCA.

[90] See J.M. Balkin, Free Speech and Hostile Environments, 99 Colum. L. Rev. 2295, 2296–2305 (1999); Michael I. Meyerson, Authors, Editors, and Uncommon Carriers: Identifying the "Speaker" Within the New Media, 71 Notre Dame L. Rev. 79, 116, 118 (1995).

gard for the value of *B*'s speech either to *B* or to society as a whole.[91]

Collateral censorship is a common problem in telecommunications regulation. Cable companies and Internet service providers regularly act as conduits for the speech of unaffiliated parties. Holding them responsible for the tortious speech of their customers would lead them to censor too much speech. Thus, in Section 230 of the Telecommunications Act of 1996, Congress extended a special privilege to Internet service providers (and other providers and users of "interactive computer service[s]") whose customers post objectionable matter in cyberspace; it declared that, as a mat-

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[91] Balkin, supra note 90, at 2298, 2302–03. *Smith v. California*, 361 U.S. 147 (1959), is the closest the Supreme Court has come to recognizing the problem of collateral censorship.

> California . . . made it a crime for bookstore owners to stock books that were later judicially determined to be obscene, even if the owner did not know of the books' contents. The Supreme Court struck down the statute, arguing that "if the bookseller is criminally liable without knowledge of the contents , . . . he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature.

Balkin, supra note 90, at 2303 (citing *Smith*, 361 U.S. at 153).

Hence, "[t]he bookseller's self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered." *Smith*, 361 U.S. at 154. What the Court calls "self-censorship" is actually collateral censorship that arises from the different incentives of the bookseller and the book author. Balkin, supra note 90, at 2303 (citing Meyerson, supra note 90, at 118 n.259).

The common law of defamation grapples with the problem of collateral censorship through the distributor's privilege. Generally speaking, a person who repeats a defamatory statement is as liable for publication as the original speaker (assuming the person also acts with the requisite degree of fault). See Restatement (Second) of Torts § 578 (1977) ("Except as to those who only deliver or transmit defamation published by a third person, one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it."). A distributor of information, such as a newsstand or a bookstore, however, is generally not held to this standard unless the distributor knows of the publication's defamatory content. The fear is that if distributors were held to be publishers, distributors might restrict the kinds of books and magazines they sold, greatly reducing the public's access to protected expression. See id. § 581 ("One who . . . delivers or transmits defamatory matter published by a third person is subject to liability if, but only if, he knows or has reason to know of its defamatory character.").

ter of law, service providers should not be considered the publishers of such material.[92]

It is likely that platform operators are "provider[s] . . . of an interactive computer service" and therefore already enjoy the Section 230 privilege. As a device for protecting free speech values in virtual worlds, however, Section 230 is defective in several respects. It offers insufficient protection from liability for game owners, and it offers insufficient protection for the free speech values of players. Interration statutes are a far better solution for two reasons.

First, Section 230 only protects game owners from tort suits asserting liability based on the game owner's publication of harmful or offensive material, and it does not apply to violations of intellectual property rights.[93] Game owners might still be held liable even if the law does not treat them as publishers; for example, plaintiffs may still argue that the game owner should have taken steps to prevent players from speaking or misbehaving. Second, Section 230 offers players no protection from private censorship by game owners. In fact, Section 230(c)(2) holds game owners harmless if they censor or block the speech of the players, regardless of whether the speech is constitutionally protected.[94]

Because Section 230 fails adequately to protect game owners from liability or the free speech interests of players, statutes of interration are a far better solution for virtual worlds. Unfortunately, Section 230(e)(3) creates an additional problem: it preempts state

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[92] 47 U.S.C. § 230(c)(1); see Blumenthal v. Drudge, 992 F. Supp. 44, 49–52 (D.D.C. 1998). Section 230(c)(1) provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." In fact, the 1996 Act gives Internet service providers more protection than the traditional distributor's privilege, because knowledge of defamatory content is not sufficient to subject them to liability. See Zeran v. Am. Online, Inc., 129 F.3d 327, 331–32 (4th Cir. 1997).

[93] See 47 U.S.C. § 230(e)(2) ("Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.").

[94] See 47 U.S.C. § 230(c)(2) ("No provider or user of an interactive computer service shall be held liable on account of—(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).").

law to the contrary.[95] If game owners do fall under the statute's protections, states might not be able to create new rights to protect players from private censorship at the hands of the game owner. As a result, the federal government will have to amend the Telecommunications Act to permit states to create interration statutes. In the alternative, it could create a federal interration statute.

In the future, virtual worlds are likely to become important spaces for innovation and free expression. Properly drafted interration statutes can help promote these values. To this end, legislatures should prominently state the public values these statutes are designed to serve in the statutes themselves as guides to interpretation by courts, and courts, in turn, should interpret these statutes liberally to promote free speech values. We should view interration statutes as applications and extensions of the central values of individual creativity and democratic participation that we associate with the First Amendment.[96] That is to say, we should view them as "First Amendment extension acts" appropriate for a digital world in which many of the most important spaces for creative expression are held in private hands.

[95] 47 U.S.C. § 230(e)(3) ("Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.").

[96] Cf. Balkin, supra note 25, at 6, 52–55 (arguing that in the digital world legislatures and administrative agencies increasingly must take on the responsibility of protecting free speech values through providing an infrastructure for free expression).