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1-1-2007

## Virtual Worlds - Real Courts

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### Recommended Citation

Kevin W. Saunders, Virtual Worlds - Real Courts, 52 Vill. L. Rev. 187 (2007).

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## VIRTUAL WORLDS—REAL COURTS

KEVIN W. SAUNDERS\*

**F**AST forward say twenty years from the present. The virtual worlds that developed in the late twentieth century have increased greatly in number and popularity.<sup>1</sup> This increase has been accompanied by two growing concerns. As more children have begun to play in virtual worlds, the old issues of exposure to sex and violence have again come to the fore. There have been calls for legislation attempting to screen those under seventeen from increasingly realistic depictions of both varieties. The effort has followed the route of earlier attempts to control access to Internet pornography<sup>2</sup> and the playing of violent video games.<sup>3</sup>

In addition to governmental attempts at speech limitations based on the games' effects on children, there have also been limitations imposed by those who control the virtual worlds. The owners of the servers on which the worlds "exist" have insisted on the right to limit the in-world speech of those who inhabit those worlds. In response, the players have asserted a legal right to be free of censorship, not only by the United States and the various states, but also by the virtual world owners, and more and more of these cases have found their way into real world courts.<sup>4</sup>

The second sort of problem, one unrelated to free expression, is a growth in litigation over issues arising in the virtual worlds.<sup>5</sup> In some virtual worlds, there are court systems to resolve disputes surrounding events in that virtual world.<sup>6</sup> In others there are no such institutions. Those em-

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\* Senior Associate Dean and Professor of Law, Michigan State University. A.B., Franklin & Marshall College; M.S., M.A., Ph.D., University of Miami; J.D., University of Michigan. The author would like to thank the organizers of and participants in the "State of Play II" conference for the opportunity not only to receive reactions to a brief presentation of thoughts on regulation of virtual worlds but also to acquire from them an understanding of the phenomenon. The conference was organized by the Institute for Law and Policy of New York Law School and the Information Society Project of Yale Law School and was held at New York Law School, October 28-30, 2004.

1. For a further discussion of virtual worlds, see *infra* notes 16-31 and accompanying text. For a further discussion of the likelihood of virtual worlds' growth, see *infra* note 32 and accompanying text.

2. For a further discussion of earlier attempts to control access to Internet pornography, see *infra* notes 147-83 and accompanying text.

3. For a further discussion of earlier attempts to control the playing of violent video games, see *infra* notes 184-211 and accompanying text.

4. For a further discussion of the legal theories that may be asserted regarding virtual worlds, see *infra* notes 80-115 and accompanying text.

5. For a further discussion of the potential for future litigation concerning virtual worlds, see *infra* notes 33-40 and accompanying text.

6. For a further discussion of the development of in-world dispute resolution, see *infra* notes 41-43 and accompanying text.

broiled in disputes in this latter sort of world, as well as those whose cause of action arose in one of the former but who wish to collect damages in a currency other than the like of simoleans,<sup>7</sup> have increasingly taken to filing actions in federal and state courts. The courts have become sufficiently bogged down and cases arising in the real world are significantly delayed.

To remedy this problem, Congress enacted a jurisdictional statute affecting the cases that may be heard in federal and state courts.<sup>8</sup> The statute provides:

The courts of the United States shall have jurisdiction in an action if and only if the action arose in a world without courts of competent jurisdiction.

The intent is that, if the dispute arose in a virtual world with courts, the case has to be resolved there; but if there are no courts in that world, jurisdiction is available in a real world court. In application, everything worked well for a while. Everyone had some court to which to appeal, and the burden on the real world courts was lessened.

The difficulty arose when the defendant in a garden-variety contract action arising in the real world United States asserted that the U.S. courts had no jurisdiction to hear the case and asked for the action to be dismissed. The defendant reasoned that, since the case arose out of a transaction in the United States, that is, in a world with courts of competent jurisdiction, the statute says that the courts of the United States do not have jurisdiction. The plaintiff responded in kind, noting that if the courts of the United States do not have jurisdiction under that statute, then the case arose in a world without courts of competent jurisdiction, so the statute provides that the U.S. courts do have jurisdiction. In its reply brief, the defendant asserted that under the plaintiff's reasoning, the U.S. courts no longer have jurisdiction.

The statute is a variety of Russell's paradox. Bertrand Russell and Alfred North Whitehead examined the set of all sets not containing themselves as an element and asked if that set should contain itself, with the same result as above.<sup>9</sup> Other examples include the Dutch mayor paradox and the librarian's paradox.<sup>10</sup> In the Dutch mayor paradox, the govern-

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7. Simoleans is the currency used in *The Sims Online*. For a further discussion of the issue of trading virtual world assets in the real world, see *infra* notes 213-22 and accompanying text.

8. For the purposes of this article, we will assume that there are no federalism issues in Congress addressing the jurisdiction of the state courts in the way suggested and no other constitutional problems regarding the jurisdiction of the federal courts.

9. See ALFRED NORTH WHITEHEAD & BERTRAND RUSSELL, 1 PRINCIPIA MATHEMATICA 60 (2d ed. 1960) (examining set of all sets not containing themselves as element to determine whether that set should contain itself).

10. The origin of these iterations of the Russell paradox is not clear, but they are well known to mathematics and philosophy students. A source for the catalog

ment of the Netherlands notes that some cities and towns have mayors who reside in the city or town, while in others, the mayor resides outside the city or town of which he or she is mayor. A law is passed setting up an enclave to be occupied by all those and only those who are mayors of cities or towns in which they do not reside. When the enclave becomes large enough to require a mayor, the question becomes whether that mayor is to reside in the enclave.

The librarian's paradox arises in a locale in which libraries maintain their lists of books in catalog books. Some of the catalog books list themselves as an item. For example, a catalog of stamp collecting books has "catalog of stamp collecting books" as an entry. Other catalogs do not list themselves. The head librarian orders a master catalog of all and only those catalogs that do not list themselves as entries. Again, the question is whether the master catalog should list itself, and the result is the same.

It is clear that the Dutch mayor rule, the librarian's edict and the hypothetical statute could be reworded to avoid the problem. Indeed, the solution to Russell-like paradoxes is to recognize differences in types or levels and just not talk about the sort of things leading to the problems.<sup>11</sup> When it comes to rules, do not mix mayors of ordinary citizens with mayors of mayors, and do not mix catalogs of books and catalogs of catalogs. And perhaps the lesson to be learned from the hypothetical is to not mix jurisdiction in real world cases with jurisdiction over issues arising in virtual worlds.

That is at least the lesson I would draw from the difficulties that exist when rules of one type of entity lapse over into the consideration of other types, particularly in a hierarchical situation. Keep the issues arising in virtual worlds out of the courts of the real world, at least to the greatest degree possible. There will certainly be real world cases that involve events in virtual worlds, but the effect on which the case is based should be a real world effect and the remedy a real world remedy.

This article will first explain virtual worlds and indicate how we could get to the situation that led to the regulation schemes and the hypothetical statute.<sup>12</sup> The effort will then turn to examining both sorts of issues. The attempts to limit access will be dealt with as the clear First Amendment issues they are.<sup>13</sup> The claims by players to be free from the censorship of the server owner also raise constitutional issues, including First

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paradox may be found in HASKELL B. CURRY, FOUNDATIONS OF MATHEMATICAL LOGIC 5 (1963), attributing the "pseudoparadox" to F. GONSETH, LES MATHÉMATIQUES ET LA RÉALITÉ: ESSAI SUR LA MÉTHODE AXIOMATIQUE 253 (1936).

11. See WHITEHEAD & RUSSELL, *supra* note 9, at 63 (suggesting solution to Russell-like paradoxes).

12. For a further discussion of virtual worlds and how we could get to the situation that led to the regulation schemes and the hypothetical statute, see *infra* notes 16-44 and accompanying text.

13. For a further discussion of the attempts to limit access within their First Amendment context, see *infra* notes 45-79 and accompanying text.

Amendment issues, and will be addressed in the same section.<sup>14</sup> I will then examine a number of different varieties of potential litigation arising in virtual worlds.<sup>15</sup> Some will be recognized as causes of action that should be heard in real world courts because of their real world effects. It will also be argued that for others the resolution of disputes should not take up real world courts' time. The examination is not intended to be exhaustive. Indeed, it would be difficult to predict all the varieties of legal disputes that might arise in the context of virtual worlds. The examination will provide examples of the sort of analysis suggested for the determination of whether certain legal actions should be heard in real world courts, and the analytic approach that may be applied to unforeseen future legal issues.

## I. VIRTUAL WORLDS

### A. *The Present*

Unnoticed by many, if not by most of those residing in this world, there has been a relatively sudden development of, and increase in, alternative worlds. While these other worlds do not have the physical concreteness of the world with which we are all familiar, many find them more interesting and more appealing places to spend their time and effort. These worlds are known as virtual worlds, worlds that provide the playing boards for massive multiplayer online role playing games.

While these games may trace their roots to the text-based multi-user dungeons first developed in 1979, the player interaction in a graphics-rich environment that characterizes current virtual worlds is more a product of the late 1990s.<sup>16</sup> In games such as *Everquest*, *Dark Age of Camelot*, *Ultima Online*, *Second Life*, *Lineage 2* and *The Sims Online*, the player subscribes to an online service provided by the likes of Sony (*Everquest*) or Entertainment Arts (*The Sims Online*). In exchange for the subscription price, the player receives access to a server that contains the virtual world. The player is personified in the virtual world by a character known as an avatar. That avatar interacts with the avatars of other players. They do so against the background provided by the owner of the server, sometimes referred to as the platform, which may range from fantasy worlds in which the laws

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14. For a further discussion of the relevant First Amendment issues, see *infra* notes 80-115 and accompanying text.

15. For a further discussion of the potential litigation arising in virtual worlds, see *infra* notes 126-250 and accompanying text.

16. See Beth Simone Noveck, *Introduction: The State of Play*, 49 N.Y.L. SCH. L. REV. 1, 6-13 (2004) (providing history of development of massive multiplayer online role playing games). Noveck's article is an introduction to a symposium growing out of the State of Play Conference on Law and Virtual Worlds in the Fall of 2003. A second and a third conference followed in the Falls of 2004 and 2005. The symposium issue is a good source for the history of and legal issues arising from virtual worlds.

of physics need not apply<sup>17</sup> to a world that more closely mirrors the real world.<sup>18</sup>

As the description indicates, virtual worlds are more than just video games. There is a multiplayer aspect that can also be present in multiplayer video games, but it is combined with more player-to-player communication. It is also more than an Internet chat room because there are play and graphics aspects not present in chat rooms. Professor Edward Castronova offers a definition of virtual worlds:

*A virtual world . . . is a computer program with three defining features:*

- (1) Interactivity: it exists in one computer but can be accessed remotely (i.e. by an internet connection) and simultaneously by a large number of people, with the command inputs of one person affecting the command results of other people.
- (2) Physicality: people access the program through an interface that simulates a first-person physical environment on their computer screen . . . .
- (3) Persistence: the program continues to run whether anyone is using it or not; it remembers the location of people and things, as well as the ownership of objects.<sup>19</sup>

This third aspect is important and goes beyond what the language may indicate. Even a simple video game may continue to run if the program is not stopped, and can store data on the status of the game during interruption in play. In a virtual world, however, the game goes on, and the world changes as a result of that play when any players are online. The player who takes a break finds a different world upon return from that break.

The number of participants in virtual worlds worldwide is in the tens of millions,<sup>20</sup> and many of the participants seem to spend more time in virtual worlds than they do working in the real world or truly engaged in their own real communities.<sup>21</sup> Some seem to view virtual worlds as more real, or at least more desirable, than the real world. According to Profes-

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17. See, e.g., Second Life, <http://www.secondlife.com> (last visited Oct. 2, 2006) (noting example of teleportation as mode of transportation).

18. See The Sims Online, <http://www.thesims.ea.com> (last visited Oct. 2, 2006) (noting example of virtual world that more closely mirrors real world).

19. Edward Castronova, *Virtual Worlds: A First-Hand Account of Market and Society on the Cyberian Frontier* 5-6, CESifo Working Paper No. 618 (2001), [http://www.cesifo-group.de/pls/guestci/download/CESifo%20Working%20Papers%202001/CESifo%20Working%20Papers%20December%202001/cesifo\\_wp618.pdf](http://www.cesifo-group.de/pls/guestci/download/CESifo%20Working%20Papers%202001/CESifo%20Working%20Papers%20December%202001/cesifo_wp618.pdf) [hereinafter Castronova, *Virtual Worlds*].

20. See Noveck, *supra* note 16, at 6-13 (noting existence of 20-30 million regular participants in virtual worlds in 2004 article and that this number is quickly growing).

21. See *id.* (noting time spent by participants in virtual worlds and their own real communities).

or Castronova's 2001 study of Norrath, the virtual world in *Everquest*, "some 20 percent of Norrath's citizens consider it their place of residence; they just commute to Earth and back."<sup>22</sup> While they may work in the real world, they live in the virtual world.

Still other players may reasonably be said to work in virtual worlds. Professor Castronova is an economist whose academic interest in virtual worlds involves both the micro and macroeconomic aspects of those worlds. He notes that "play" in virtual worlds leads to the accumulation of virtual assets, assets that may be saleable in real world markets, even if discouraged or banned by the platform owner. A player with an asset may sell that asset for real world currency to another player.<sup>23</sup> The two players' avatars then meet somewhere in the virtual world to transfer the asset. This is a way that those with the time to play more hours and develop more assets can profit from that play by transferring the assets to those who want a shortcut to virtual assets, that is, to people with more money than time to play.

Online auctions of assets, particularly of the currencies of virtual worlds,<sup>24</sup> allow the calculation of rates of exchange between real and virtual world currencies. Using those exchange rates, the values of both virtual world work (play) and virtual assets in real world terms may be calculated. Castronova's analysis revealed an effective hourly wage in Norrath of \$3.42 per hour,<sup>25</sup> more than many third world countries.<sup>26</sup> He also developed an estimate for the virtual gross national product of Norrath and found it to be about equal to that of Russia.<sup>27</sup>

Of course, wherever there is money, there are likely to be disputes and even litigation. In fact, there has already been litigation over virtual property, and in other countries, even criminal prosecution over such property.<sup>28</sup> Players have also seemed to see the acts of other players as

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22. Castronova, *Virtual Worlds*, *supra* note 19, at 3 (noting significance of virtual worlds to participants).

23. For a further discussion of virtual world assets, see *infra* notes 212-14 and accompanying text.

24. For a further discussion of online auctions, with particular reference to virtual world currencies, see *infra* notes 217-18 and accompanying text.

25. See Castronova, *Virtual Worlds*, *supra* note 19, at 35 (calculating values of both virtual world work and assets in real world terms).

26. For a further discussion of how this difference has not gone unnoticed and the labor of citizens of the third world has been used to develop virtual world assets for sale in the developed world, see *infra* notes 219-20 and accompanying text.

27. See Castronova, *Virtual Worlds*, *supra* note 19, at 33 (estimating virtual gross national product of Norrath).

28. For a further discussion of an operation in Mexico using a virtual world to make real world money and a suit filed, but later dropped, when the platform owner acted to end the profit making, see *infra* notes 219-20 and accompanying text. See also Edward Castronova, *The Right to Play*, 49 N.Y.L. SCH. L. REV. 185, 191 (2004) [hereinafter Castronova, *Right to Play*] ("The Korean police actively prosecute people who hack into games, and provide higher punishments in cases where valuable game items are destroyed or transferred.").

criminal in a surprisingly real sense. The LambdaMOO rape case is the prime example. In that incident, a player playing through the character known as “Mr. Bungle” altered the computer code for the game, gained control over two female characters and “raped” one of them.<sup>29</sup> The “rape,” in the nongraphic environment of this early game, was nothing more than a textual description of the virtual act. The player controlling the virtual “victim” was reported to have suffered emotionally, and the reaction by other members of the LambdaMOO virtual community was strong.<sup>30</sup> Eventually, the “rapist” was killed, that is, his character was eliminated from the game.<sup>31</sup>

### B. *The Future*

Virtual world play is likely to grow greatly in the foreseeable future. A projection based on revenue suggested that there would be a tripling of play between 2002 and 2006.<sup>32</sup> While such a rate of growth would eventually be slowed by market saturation, there is every reason to expect growth, even significant growth, to continue in virtual worlds. Continuing improvement in the graphics environments of the games, making the environments more “real,” is likely to make the games even more attractive alternatives to reality.<sup>33</sup>

As these games grow in popularity and in the investment of individual time, there is also likely to be a growth in litigation based on events involving virtual worlds. Professor Balkin suggests various categories of disputes involving the owners/developers of the games (platform owners), players of the game and the government.

[T]here can be disputes:

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

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29. For a brief discussion of the “rape” in LambdaMOO, see Philip Giordano, *Invoking Law as a Basis for Identity in Cyberspace*, 1998 STAN. TECH. L. REV. 1, ¶¶ 60-62. For a more extensive discussion of the “rape” and of LambdaMOO, see generally JULIAN DIBBLE, *MY TINY LIFE: CRIME AND PASSION IN A VIRTUAL WORLD* (1999).

30. See Giordano, *supra* note 29, ¶ 60 (describing virtual world rape scenario).

31. See *id.* ¶ 62 (noting sanctions for virtual world rape incident). It does appear that the player then reentered the game in another identity. See *id.* ¶ 62 n.162.

32. See Caroline Bradley & A. Michael Froomkin, *Virtual Worlds, Real Rules*, 49 N.Y.L. SCH. L. REV. 103, 126-27 (2004) (citing THEMIS GROUP, *THE THEMIS REPORT 2* (2002)) (projecting growth of virtual world play).

33. What may serve to limit this growth is the development of other communal electronic activities. Whether this negates projections is a matter of definition. For example, if these virtual worlds replace video games in popularity, it might be argued that any projections of continued video game growth were false. On the other hand, the change may be seen as simply an evolution of video games into a more advanced format, and the projections may be seen as borne out.



- (2) between the players and the state about whether players may participate in certain game spaces and what they may do inside them;
- (3) between players and platform owners about what players and platform owners may do (and not do) in the game space;
- (4) between players about whether the in-game activities of one violated the legal rights of another;
- (5) between the platform owner and third parties not playing the game who complain about activities within the game space that harm the third party legally protected interests; and
- (6) between players and third parties not playing the game who claim that the player in-game activities harmed the third party legally protected interests.<sup>34</sup>

The first two categories are most likely to raise constitutional issues. Given state concerns over the effects of any number of media types on youth, it would be a great surprise if there was not action in this arena. Since the advent of comic books, if not earlier, these concerns have been raised by each new medium.<sup>35</sup> Certain aspects of the third category also raise constitutional issues. There are arguments that the platform owners, like the government, cannot limit the expression of players.<sup>36</sup> In response, the owners can be expected to raise their own First Amendment defenses.<sup>37</sup>

Outside the constitutional arena, Balkin suggests that there may be actions brought based on, *inter alia*, copyright, defamation and intentional infliction of emotional distress, and that the continuation of a virtual world might be subject to control of a bankruptcy court.<sup>38</sup> This likelihood of legal action is increased by arguments that theories of real world property should apply to assets in virtual worlds,<sup>39</sup> and suggestions that even criminal law may have application to virtual world disputes.<sup>40</sup>

There is also the real possibility of the development of dispute resolution mechanisms within the virtual worlds. The most obvious method of

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34. Jack M. Balkin, *Law and Liberty in Virtual Worlds*, 49 N.Y.L. SCH. L. REV. 63, 67 (2004) [hereinafter Balkin, *Law and Liberty*] (suggesting categories of disputes involving platform owners, players and government).

35. For a further discussion of the concerns raised by the exposure of children to harmful media, see *infra* notes 184-86 and accompanying text.

36. For a further discussion of arguments as to why platform owners, like the government, cannot limit the expression of players, see *infra* notes 83-107 and accompanying text.

37. For a further discussion of the platform owners' First Amendment defenses, see *infra* notes 108-17 and accompanying text.

38. See Balkin, *Law and Liberty*, *supra* note 34, at 1205.

39. For a further discussion of applying real world property rules to assets in virtual worlds, see *infra* notes 212-26 and accompanying text.

40. For a further discussion of the potential for the application of criminal law to events in the virtual world arena, see *infra* notes 227-33 and accompanying text.

resolving disputes would be through actions of the platform owner. A player may be provided the opportunity to complain to the platform owner about the actions of another player. If the platform owner decides that the other player has committed a wrong, and such action taken by the platform owner is consistent with the end user license agreement accepted by the players, the owner can act to ameliorate the harm done.

There may also be informal sanctions imposed within virtual worlds. If a player does something believed by other players to be unacceptable, the other players may refuse to interact with the offender. The avatars of the players who are offended can also take action against the offending avatar. Depending on the rules of the game, the offending avatar might be killed or its assets taken or destroyed. This sort of community action occurred after the cyberspace “rape” in LambdaMOO. While the other players lacked the capability to slay the “rapist,” they raised a sufficient hue and cry that the platform owners terminated the offender’s account.<sup>41</sup>

One of the more interesting effects of the LambdaMOO “rape” was a decision by the owners of that platform to turn governance over to the players. As described in a 1998 article, the platform administrators, the “wizards,”

no longer act by fiat. They must have a mandate from the players, as expressed through a system of petitions and ballots . . . . To date players have approved forty-eight ballots. Laws have addressed freedom of speech, harassment, slander, rape, privacy, tragedies of the commons, overpopulation, homophobia, and the governance mechanism itself.<sup>42</sup>

Importantly, “[a]n early ballot instituted a virtual court as a dispute resolution mechanism, and it is used frequently.”<sup>43</sup>

It is not necessary for each virtual world to develop a court system. Some platform owners may simply decide to allow play to continue in the face of disputes. Injured parties could attempt to even the score within the confines of the game, as though in a state of nature. Other platform owners may resolve disputes themselves. On receiving a complaint, a wizard may right wrongs, and a benevolent despot may be acceptable to players.<sup>44</sup> It may also turn out that the court system first developed in LambdaMOO will become the model. A jury of players could be empaneled to hear disputes and render decisions. A wizard may be necessary to

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41. See Giordano, *supra* note 29, ¶ 62 (noting informal sanctions imposed within virtual worlds).

42. *Id.* ¶¶ 63-64. It has been suggested that the wizards still exercise more power than may have been envisioned at the time of their abdication. See F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CAL. L. REV. 1, 57-58 (2004) [hereinafter Lastowka & Hunter, *Laws*].

43. Giordano, *supra* note 29, ¶ 64.

44. Despots are, of course, not always benevolent. But if a game has a reputation of malevolent despotism, it may have difficulty attracting new players or retaining veteran players.

enforce the rulings of the court, but the legal outcomes would be determined by the players.

Given the likelihood of a growth in the number of disputes and the continuing probability that some will lead to legal action in real world courts, the crowding of real world court dockets with which this article opened may occur. If the proposed solution of banning virtual world disputes from real world courts can be implemented, an examination of the various sorts of disputes that may arise is necessary. Each potential action must be examined to determine whether there is a real world effect sufficient to justify the expenditure of real world judicial resources.

## II. FIRST AMENDMENT ISSUES

Because virtual worlds are a form of media, it would appear likely that there will be significant First Amendment questions arising in any regulatory attempts. At least some of these issues are real world issues, even if they involve real world attempts to enter virtual worlds. Others, it may be concluded, will be purely virtual, of the sort argued not to be suitable for real world courts. Where the issue is a real world issue, a real world solution will be suggested. Where the issue should be kept out of real world courts, an explanation of that conclusion will be presented.

### A. *Participation Rights*

Real world First Amendment issues will arise if there is any attempt by the government to restrict participation in virtual worlds. First Amendment rights apply here not because of any specific events in the virtual world but because of the nature of participation and the effect that participation may have on real people in the real world.

I have been unsympathetic to claims of First Amendment rights for video game play.<sup>45</sup> It should be recognized that even for video games, the program's game developer's rights are protected, as are the images the program displays on the screen. Playing the video game, however, may be seen as another matter. The player is not engaged in communication protected by the First Amendment but in activity akin to playing a pinball machine. This was the position accepted by a federal district court in responding to an attempt by St. Louis County, Missouri to limit children's access to violent video games.<sup>46</sup> The Eighth Circuit rejected the argument, although neither court drew the proper distinction between the game designer's expression and the video game play of children.<sup>47</sup>

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45. See Kevin W. Saunders, *Restricting Youth Access to Violent Video Games: Three Responses to First Amendment Concerns*, 2003 MICH. ST. L. REV. 51, 93-105 [hereinafter Saunders, *Restricting Access*].

46. See *Interactive Digital Software Ass'n v. St. Louis County* [*Interactive Digital I*], 200 F. Supp. 2d 1126 (E.D. Mo. 2002), *rev'd*, 329 F.3d 954 (8th Cir. 2003).

47. See *Interactive Digital Software Ass'n v. St. Louis County* [*Interactive Digital II*], 329 F.3d 954 (8th Cir. 2003).

There is early (relative to the development of video games) case law authority that the games are not protected by the First Amendment. In *America's Best Family Showplace Corporation v. New York*,<sup>48</sup> a restaurateur was denied the opportunity to install forty video games because of city zoning ordinances that controlled their placement.<sup>49</sup> The owner raised a First Amendment claim against the statute arguing that the fantasy presentations on the screen were similar to motion pictures and should be protected on the same grounds.<sup>50</sup> The court found no attempt to pass information or communicate any ideas in the games.<sup>51</sup> While motion pictures are protected because they may be used to convey ideas and affect public opinion, the court stated that: "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."<sup>52</sup>

*Caswell v. Licensing Commission for Brockton*<sup>53</sup> considered a similar free expression claim in reviewing the denial of a license for video games in an arcade. The court saw the games as lacking a communicative element and held that they should face the same lack of protection accorded the physical activities of roller skating and recreational dancing.<sup>54</sup> While the court saw video games as more technologically advanced than chess or pinball, "technological advancement alone . . . does not impart First Amendment status to what is an otherwise unprotected game."<sup>55</sup> Other courts soon followed in denying video games First Amendment protection,<sup>56</sup> although some courts did hold open the possibility that future games might become sufficiently expressive as to merit protection.<sup>57</sup> While it is true that modern games include stronger story lines and better artistic expression than *Pac-Man* or *Frogger*, that is not the telling distinction that the courts have suggested.<sup>58</sup>

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48. 536 F. Supp. 170 (E.D.N.Y. 1982).

49. *See id.* at 171 (providing background facts of case).

50. *See id.* at 173 (discussing plaintiff's First Amendment claim).

51. *See id.* (rejecting plaintiff's argument as unpersuasive).

52. *Id.* at 174.

53. 444 N.E.2d 922 (Mass. 1983).

54. *See id.* at 926 (rejecting arguments that playing video games contained expressive elements analogous to other physical activities).

55. *Id.* at 927.

56. *See, e.g.,* Malden Amusement Co., Inc. v. Malden, 582 F. Supp. 297 (D. Mass. 1983); Marshfield Family Skateland, Inc. v. Marshfield, 450 N.E.2d 605 (Mass. 1983); Warren v. Walker, 354 N.W.2d 312 (Mich. Ct. App. 1984); Tommy & Tina, Inc. v. Dep't of Consumer Affairs, 459 N.Y.S.2d 220 (N.Y. 1983).

57. *See Marshfield Family Skateland, Inc.*, 450 N.E.2d at 609-10; *Warren*, 354 N.W.2d at 316-17; *see also* Rothner v. Chicago, 929 F.2d 297 (7th Cir. 1991) (holding out possibility that some video games may have enough plot and art to be more than modern pinball machines and be protected, but not so ruling because regulations in question could be justified as time, place or manner regulations).

58. *See* Am. Amusement Mchs. Ass'n v. Kendrick [*Kendrick I*], 115 F. Supp. 2d 943, 952, 954 (S.D. Ind. 2000), *rev'd*, 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 534

The debate is best laid out in *Interactive Digital Software Association v. St. Louis County*.<sup>59</sup> In that case, the federal district court judge said that for there to be protection, there “must exist both an intent to convey a particularized message and a great likelihood that this message will be understood . . . . [T]here must be some element of information or some idea being communicated in order to receive First Amendment protection.”<sup>60</sup> The court reviewed a number of video games and found them to be more like sports or board games than film or television because it “found no conveyance of ideas, expression, or anything else that could possibly amount to speech.”<sup>61</sup> While a board game or sport like baseball may be accompanied by expression, the sport or game itself is not expression and does not become such even if it is the virtual baseball of a video game.

The Eighth Circuit disagreed but missed the point. When reviewing the lower court’s decision in *Interactive Digital*, the court said that if the First Amendment is versatile enough to protect music, Lewis Carroll’s stories and Jackson Pollock’s paintings,<sup>62</sup> “we see no reason why the pictures, graphic design, concept art, sounds, music, stories, and narrative present in video games are not entitled to similar protection.”<sup>63</sup> While the Eighth Circuit is correct in that the First Amendment protects all the aspects of the games mentioned, the court did not address the First Amendment protection of playing the games. If one simply put a quarter in the machine and watched the presentation, that would be protected communication from the game designer to the viewer and the parallel to film or television would be apt. But playing the game is not analogous and requires its own analysis.

It is important to note that improved story lines and art are not enough to grant modern video games First Amendment protection. *Pac-Man* and *Frogger* had story lines and art. Neither story line was great literature and the art was not sophisticated, but such quality is not required for

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U.S. 994 (2001) (concluding that at least some video games may have advanced to point of meriting First Amendment protection but holding that violent games were unprotected because they were obscene when made available to children). On appeal, the Seventh Circuit noted the position taken by the trial court, but did not offer its own analysis on this point, while reversing on the issue of obscenity. *See Am. Amusement Machs. Ass’n v. Kendrick* [*Kendrick II*], 244 F.3d 572, 574 (7th Cir. 2001). On the obscenity issue, see generally KEVIN W. SAUNDERS, *VIOLENCE AS OBSCENITY: LIMITING THE MEDIA’S FIRST AMENDMENT PROTECTION* (1996) [hereinafter SAUNDERS, *VIOLENCE AS OBSCENITY*].

59. 200 F. Supp. 2d 1126 (E.D. Mo. 2002), *rev’d*, 329 F.3d 954 (8th Cir. 2003).

60. *Id.* at 1134. *But cf.* *James v. Meow Media, Inc.*, 300 F.3d 683, 696 (6th Cir. 2002) (alleging liability in tort case based on communicative impact of message contained in game, thus, not raising issue of distinction between communication and activity); *Sanders v. Acclaim Entm’t, Inc.*, 188 F. Supp. 2d 1264 (D. Colo. 2002) (relying on *Kendrick’s* assumption that at least some games are protected with no significant further analysis); *Wilson v. Midway Games, Inc.*, 198 F. Supp. 2d 167 (D. Conn. 2002) (same).

61. *Interactive Digital I*, 200 F. Supp. 2d 1126, 1134 (E.D. Mo. 2002).

62. *See Interactive Digital II*, 329 F.3d 954, 957 (8th Cir. 2003).

63. *Id.*

First Amendment protection. The worst hack's written work is as protected as that of Nobel Prize winners, and doodles are as protected as great art, and such distinctions may sometimes be difficult to distinguish. As Judge Limbaugh, the district court judge in *Interactive Digital*, said:

This Court has difficulty accepting that some video games do contain expression while others do not, and it finds that this is a dangerous path to follow. The First Amendment does not allow us to review books, magazines, motion pictures, or music and decide that some of them are speech and some are not.<sup>64</sup>

For Judge Limbaugh it was the nature of video games as a medium rather than the complexity of story lines and the quality of art that determined its protected status or lack thereof. Judge Limbaugh's concern is valid. To allow First Amendment protection to be determined by an official view as to the complexity or worth of the story or the quality of art is to open the door to government abuse. There must be something about the medium, or at least the way in which the medium is used, that determines its protection.

The existence of scripts and art does not change the fundamental nature of video game play as just that: game play. In a paintball operation where the owners put great effort into designing the terrain and provide an opposing team taught to respond to each of the customers' particular actions, the customers' play would not be an activity protected by the First Amendment. It would still be a game, rather than an attempt to inform or otherwise communicate. While the players respond to the actions of others, the same is also true of a baseball game. But hitting the ball to the shortstop is not communicating to that player a message that he or she should catch the ball and throw it to first. It is simply an event in the game. The same is true for video games: the player does something that causes the program to respond in a certain way, but the player is not communicating with anyone.<sup>65</sup>

The sort of distinction suggested here has recently been recognized in another context. In *Willis v. Town of Marshall*,<sup>66</sup> the United States Court of Appeals for the Fourth Circuit considered the town's ban on a person

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64. *Interactive Digital I*, 200 F. Supp. 2d at 1134.

65. See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001) (recognizing that computer codes serve more than one function). Computer code may certainly be used to communicate with those who understand it. Even if a novel is written completely in code, it should be protected by the First Amendment. Code that presents graphics should also be protected. There is, however, a functional aspect to code. *Corley* concerned code that decrypted DVD films, and the court held that function to be unprotected by the First Amendment. The code through which a video game reacts to a player firing a weapon also seems functional and may be seen as unprotected. For a further discussion of this issue see Saunders, *Restricting Access*, *supra* note 45, at 102-04.

66. 426 F.3d 251 (4th Cir. 2005).

from the community center.<sup>67</sup> The town held regular dances on Friday evenings, with music provided by local bands.<sup>68</sup> The town received several complaints regarding Willis's sexually provocative dancing.<sup>69</sup> Willis claimed that the ban, based on her dancing, violated her First Amendment rights.<sup>70</sup> In its analysis, the court distinguished the activities of the band from those of the dancers on the floor.<sup>71</sup>

With regard to the band, the court recognized that music is a form of protected expression and that Willis had a First Amendment right to listen to that expression.<sup>72</sup> The court also recognized that dancing, in some contexts ranging from "ballet [to] striptease, when performed for the benefit of an audience," is protected expression.<sup>73</sup> Turning to the situation at issue, the court said:

Willis, however, was not a performer in any meaningful sense—she was simply dancing for her own enjoyment. The question, then, is whether this kind of social or recreational dancing is entitled to First Amendment protection.

This court has stated that "recreational dancing, although containing a 'kernel' of expression, is not sufficiently communicative to bring it within the protection of the First Amendment."<sup>74</sup>

This is the distinction suggested for video game play. The programmer is engaged in First Amendment protected activity, but the player is not communicating anything to anyone. Indeed the dancer seems to have a more reasonable claim to communication than the player. The complaints over her dance seem to have been over sexually provocative movements conveyed to others. The violent video game player communicates no message.

Despite there being little that should be protected in video game play, I believe that participation in virtual worlds should enjoy the full protection of the First Amendment. The difference is in the truly interactive nature of virtual worlds. While there is no one there with whom the video game player, in a game such as *Doom*, communicates, there is a great deal of communication in virtual worlds, and this communication may be of great value. While the model for the video game may be the pinball machine or, when it is player against player, baseball, the best low-tech model for virtual worlds might be puppets.

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67. *See id.* at 253-55 (reciting background facts of case).

68. *See id.* at 253-54.

69. *See id.* at 254-55.

70. *See id.* at 255.

71. *See id.* at 259-60.

72. *See id.* at 260.

73. *Id.* at 257.

74. *Id.* (quoting *D.G. Rest. Corp. v. City of Myrtle Beach*, 953 F.2d 140, 144 (4th Cir. 1991)).

Children, who may have a difficult time talking with an adult about a sensitive subject, are sometimes given the opportunity to express themselves to a hand puppet. That low-tech virtual world provides a better medium for communication than a real conversation with a therapist. While not equating participants in virtual worlds with children, there may be individuals who find they can communicate some ideas or issues better through their virtual selves than in the real world. While the direct effects of that communication will be in the virtual world, what they express to others and what responses they get from others may have an effect in the real world. Participation may then be a form of real world communication, through a virtual medium, that has all the same effects as other speech protected by the First Amendment.<sup>75</sup>

It is interactivity with others that gives virtual worlds value worthy of First Amendment protection. This is different from hitting a ball to the shortstop or firing at another player in paintball or on a virtual battlefield. It is the player's communication of ideas or feelings or the passing of information that gives it value. There is an apt similarity to the protection the First Amendment provides to anonymous communication through leaflets and other print media. People may be able to say some things when they are not directly attributable to the speaker that they would not say if they were identified. The unwillingness to identify oneself does not mean that the message lacks value.

There is no irony in the idea that it is interactivity that gives virtual worlds their First Amendment status. It is true that interactivity has been offered as a rationale for limiting video game play, but the interactivity plays different roles in the two cases. In virtual worlds, interactive communication provides value, while the argument with video games was that interactivity increases the likelihood that real world effects of media violence will be especially borne out in that more involved medium.<sup>76</sup>

Judge Posner addressed the argument that the interactivity of video games raises a particular concern over media violence causing violence in the real world more than the passive media of film or television. Judge Posner rejected the interactivity distinction between video games and the passive media:

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 other photographic media, and popular as well as high brow literature) is interactive; the better it is, the more interactive. Literature when it is successful draws the reader into the story, makes him

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75. While games that more closely mirror the real world, such as *The Sims Online*, may seem to be the best cases for this argument, games conducted in a more fantasy-based world may also have the same sort of value. There is still communication and interaction among players that may have value for real people.

76. See Saunders, *Restricting Access*, *supra* note 45, at 61-78.



identify with the characters, invites him to judge them and quarrel with them, to experience their joys and sufferings as the reader's own.<sup>77</sup>

The distinction is not superficial, and Posner's response relies on equivocation. He uses the word "interactive" in two different senses. When he says that literature is interactive, he means that the reader empathizes with a character. But the sense of "interactive" in arguments regarding the danger of video game play is that of participation in the action. The audience in a play empathizes, while the cast participates, and the interaction of the actor with others cast members is far different from the empathy the audience may feel. Training pilots rely not simply on reading flight manuals or hearing and empathizing with the experiences of veteran pilots. The value of interactivity in the participatory sense is shown by the reliance, instead, on flight simulators. The experiences are different in type and the participatory experience is more likely to lead to the proper response in actual flight.<sup>78</sup>

While the dangers of interactivity may still be present in virtual world participation,<sup>79</sup> there is an additional value to the interactivity present in virtual worlds that does not exist for video games. The two issues differ. Interactivity may give a medium value for First Amendment purposes. Interactivity may also be a source of danger arising from the medium. Virtual worlds and video games differ as to the first, while they may raise the same concerns for the second.

B. *The Rights of Designers and Platform Owners and the Freedom of Expression Within Virtual Worlds*

It is also clear that platform owners and virtual world designers have First Amendment rights. Their creations maintain the story lines, or at least the backgrounds against which story lines develop, and the artwork that defenders of video games argue provide First Amendment protections

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77. *Kendrick II*, 244 F.3d 572, 577 (7th Cir. 2001).

78. Even accepting Judge Posner's views on the interactivity of all good literature or film, violent video games may still pose particular dangers. Even if there was not a qualitative difference, there is a quantitative difference in the identification that results from participation, and that may make the experience more likely to produce aggression. Psychological studies do show that subjects who identify with a media aggressor are more likely to become aggressive, and in video games the players are the media aggressors. See, e.g., J.P. Leyens & S. Picus, *Identification with the Winner of a Fight and Name Mediation: Their Differential Effects upon Subsequent Aggressive Behavior*, 12 BRIT. J. OF SOC. & CLINICAL PSYCHOL. 374, 374 (1973) (finding "[m]ore aggression was exhibited by subjects who identified more strongly with the winner of the fight" (cited in Craig A. Anderson & Karen E. Dill, *Video Games and Aggressive Thoughts, Feelings, and Behavior in the Laboratory and in Life*, 78 J. OF PERSONALITY & SOC. PSYCHOL. 772 (2000))).

79. For a discussion of the dangers of interactivity in virtual world participation, see *infra* notes 184-211 and accompanying text.

to that medium.<sup>80</sup> Certainly this medium has sufficient content to merit protection.

The interesting issues regarding the rights of designers and platform owners are found in the conflict that may arise between those rights and the rights of players. An actual situation recounted to raise the issue is that of *The Alphaville Herald*.<sup>81</sup> The *Herald* was a weblog reporting on events in the virtual town of Alphaville in the game *The Sims Online*. The blog claimed that there was unseemly activity going on in Alphaville involving sex talk by avatars controlled by underage players. The owners of *The Sims Online* responded by ending the blogger's right to participate in the game.

If the government of a state or of the United States took punitive action against the blogger, absent some compelling interest, there would certainly be a First Amendment violation. But what about the action by the platform owner? The problem with finding such a violation is the State Action Doctrine—the principle that only the government can violate an individual's constitutional rights.<sup>82</sup> Individuals can be found to have violated each other's statutory rights, but the Constitution addresses only the government.

In response to the limitation of the State Action Doctrine, it has been suggested<sup>83</sup> that guidance can be drawn from *Marsh v. Alabama*.<sup>84</sup> *Marsh* involved the company town of Chickasaw, Alabama, a town completely owned by a ship-building company.<sup>85</sup> Workers lived in the houses and merchants rented store space on the main street.<sup>86</sup> There was not a complete divorce from government, as there was a United States Post Office and the town's law enforcement officer was deputized by the county.<sup>87</sup> *Marsh* was a Jehovah's Witness who was convicted of criminal trespass

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80. For a discussion of video games as compared to other protected and unprotected forms of media, see *supra* notes 62-63 and accompanying text.

81. See Jack Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043, 2075-76 (2004) [hereinafter Balkin, *Virtual Liberty*] (discussing events surrounding *Alphaville Herald* (citing Amy Harmon, *A Real Life Debate on Free Expression in a Cyberspace City*, N.Y. TIMES, Jan. 15, 2004, at A1)).

82. While specific wording, such as "Congress shall make no law" or "No state shall deny" makes it clear that the intention of certain provisions was to speak to government, the more general principle may be traced to the *Civil Rights Cases*, 109 U.S. 3, 26 (1883) (declaring civil rights legislation from post-Civil War era unconstitutional).

83. See, e.g., Peter S. Jenkins, *The Virtual World as a Company Town: Freedom of Speech in Massively Multiple On-Line Role Playing Games*, 8 J. INTERNET L. 1, 11-14 (2004) (comparing rationales in *Marsh*, such as need to "receive . . . all the information necessary to make informed decisions" and "accessibility of the town to members of the general public who did not reside there" to issue of freedom of expression within online role playing games).

84. 326 U.S. 501 (1946).

85. See *id.* at 502 (discussing facts of case).

86. See *id.* at 502-03 (describing "characteristics" of town).

87. See *id.* (detailing government contact with town).

based on her proselytizing on the main street.<sup>88</sup> The Supreme Court reversed her conviction, holding that this sort of company town was also subject to the strictures of the First Amendment.<sup>89</sup>

The suggested application to virtual worlds is based on perceived similarities between company towns and virtual worlds. The residents of Chickasaw spent their working, shopping and home lives in the town. If there was to be a space for free speech, it would have had to have been in the town. It does seem that there are people who spend almost as great a portion of their time in virtual worlds,<sup>90</sup> but that should not be enough to make platform owners state actors. The strength of *Marsh*, and certainly its extension to virtual spaces with no deputized law enforcement officers, is called into question by the shopping mall cases.<sup>91</sup> While the first of those cases, *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*,<sup>92</sup> seemed to signal an extension of *Marsh* to malls as the functional equivalents of downtowns, that case was later overruled by *Hudgens v. National Labor Relations Board*.<sup>93</sup> If malls, which despite any fantasy aspects do exist in the real world, are not state actors, it would seem odd for virtual malls and the virtual worlds in which they may exist to be considered agents of the state.

On top of the difficulties in applying *Marsh* to virtual worlds, there is the general reluctance of the courts to find state action in other contexts. While there was a period in which various entities were found to be so involved with the government or to be serving essential government functions that they were held to be state actors,<sup>94</sup> these claims have been re-

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88. *See id.* at 503-04 (discussing Appellant's actions and procedural history).

89. *See id.* at 509-10 ("In our view the circumstance that the property rights to the premises where the deprivation of liberty . . . took place, were held by others than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties . . .").

90. For a discussion of game players spending large amounts of time online, see *supra* notes 20-22 and accompanying text.

91. *See Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 319-25 (1968) (holding that picketers were free to exercise their First Amendment rights in front of privately owned supermarket located in shopping center because shopping center was "community business block"); *see also* *Hudgens v. NLRB*, 424 U.S. 507, 518-19 (1975) (overruling *Logan Valley* and noting "the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner of private property used nondiscriminatorily for private purposes only" (quoting *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567 (1972))).

92. 391 U.S. 308 (1968).

93. 424 U.S. 507 (1975).

94. *See, e.g.*, *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (finding state action in segregation at lunch counter in city parking structure); *Terry v. Adams*, 345 U.S. 461, 462 (1953) (addressing State Action Doctrine as applied to pre-primary endorsement election); *Smith v. Allwright*, 321 U.S. 649, 651 (1944) (addressing State Action Doctrine as applied to primary elections).

jected in recent years.<sup>95</sup> Some of this difference may be because the earlier cases were centered around racial discrimination. While the Equal Protection Clause may only apply to the states, and through the Fifth Amendment to the federal government, there was a recognition that such discrimination was wrong, whoever might be so engaged, and a willingness to stretch the ambit of the clause to reach other instances. Some of the later cases also involved racial discrimination,<sup>96</sup> however, and the Supreme Court was unwilling to continue to cast the net of the clause more widely.

Recognition that platform owners are not state actors has led to the suggestion that the State Action Doctrine should be abandoned and that the Constitution should speak to a broader variety of actors.<sup>97</sup> This is not the first time such a suggestion has been made,<sup>98</sup> and there are tenable arguments for the abandonment of the doctrine.<sup>99</sup> The balancing of rights between those asserting a constitutional violation by a perhaps private actor and the rights of that actor, and the suggestion that applying the Constitution to a wider variety of actors, however, would result in a general weakening of constitutional rights and speaks in favor of retaining the

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95. See, e.g., *NCAA v. Tarkanian*, 488 U.S. 179, 199 (1988) (holding NCAA's actions were not state action); *S.F. Arts & Athletics v. U.S. Olympic Comm.*, 483 U.S. 522, 547 (1987) (holding United States Olympic Committee was "not a governmental actor"); *Rendell-Baker v. Kohn*, 457 U.S. 830, 837-43 (1982) (holding private school was not state actor).

96. See, e.g., *Moose Lodge v. Iris*, 407 U.S. 163, 171-77 (1972) (concluding that private club's refusal to serve guest based on race did not violate Fourteenth Amendment).

97. 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, 1268 (2000) ("Instead of repeatedly trying to demonstrate that seemingly private activity is actually public, we could instead focus on the benefits we might derive as a people from using the Constitution to debate fundamental societal values, without relying so heavily on whether the activity is categorized as public or private.").

98. For a discussion of various theories regarding the scope of constitutional limitations on other than strictly governmental actors, that is, to those not employed by or working closely with the government, see, e.g., LARRY ALEXANDER & PAUL HORTON, *WHOM DOES THE CONSTITUTION COMMAND* 6 (1988) (discussing three different "models" of Constitution, dubbed "Legalist Model," "Naturalist Model" and "Governmental Model"); JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* 242-51 (1996) (discussing "public function argument" and "permission argument" for treating private business as state actor); Richard S. Kay, *The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law*, 10 CONST. COMMENT. 329, 342-49 (1993) (attempting "to show that, in spite of the conceptual barriers to maintaining the public-private distinction, it is possible to mark out a particular realm of actions to which the Constitution may be held to apply and outside of which it may not apply").

99. See, e.g., Erwin Chemerinsky, *Rethinking State Action*, 80 Nw. U. L. REV. 503, 505 (1985) ("It is time to again ask why infringements of the most basic values—speech, privacy, and equality—should be tolerated just because the violator is a private entity rather than the government.").

State Action Doctrine.<sup>100</sup> At any rate, the courts have not indicated a willingness to follow the suggestions of those who would expand the scope of the dictates of the Constitution, and there seems to be little likelihood that the State Action Doctrine will be completely abandoned.

In addition to arguments against the general rejection of the state action requirement, certain First Amendment factors speak against the extension of the limitations on government to platform owners. The purpose, or purposes, of the First Amendment speak either solely or most forcefully to the government. The greatest danger in the suppression of expression, and the one arguably motivating the First Amendment, is the possibility that the state will use it to squelch dissent and preserve itself from change that may be desired by the people.<sup>101</sup> Undoubtedly, the concentration of media power also has a private effect of limiting expression, but the Supreme Court has been unwilling to allow regulation of election related content of newspapers.<sup>102</sup> While earlier scarcity of the broadcast spectrum and the public ownership of the airwaves led to the approval of Federal Communications Commission regulations requiring coverage of issues of public interest, balance and opportunities for response to positions aired,<sup>103</sup> such measures are no longer seen as required with the emergence of cable television.<sup>104</sup> The theory seems to be that there are now enough electronic media outlets that variety is assured.<sup>105</sup> If that is the approach to media in the real world, it should seem unlikely that the Court would see a need to impose the limits of the First Amendment upon the operators of virtual worlds. Just as consumers of electronic media can choose their outlets, participants in virtual worlds can choose their worlds; the platform owners' approaches to free expression may play a role in that

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100. For a response to Chemerinsky's arguments, see William P. Marshall, *Diluting Constitutional Rights: Rethinking "Rethinking State Action"*, 80 NW. U. L. REV. 558, 559 (1985) (arguing that Chemerinsky's proposal may "[a]t best . . . dilute existing liberties [and] "at worst . . . lead to a more restrictive definition and protection of those rights").

101. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 528 (examining theory that value in freedom of expression is that it "performs in checking the abuse of official power").

102. See *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding "right of reply" statute, which forced newspapers to allow candidates to respond to newspaper attacks, unconstitutional); *Mills v. Alabama*, 384 U.S. 214, 220 (1966) (holding that "no test of reasonableness can save a state law from invalidation as a violation of the First Amendment when that law makes it a crime for a newspaper editor to do no more than urge people to vote one way or another in a publicly held election").

103. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 369 (1969) (describing broadcasting's fairness doctrine).

104. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 638-39 (1984) (explaining refusal to apply weaker standard for testing broadcasting regulation, as found in *Red Lion*, 395 U.S. at 388-90, to cable regulation).

105. See *id.* at 637-39 (explaining that "broadcast cases are inapposite in the present context because cable television does not suffer from the inherent limitations that characterize the broadcast medium").

choice. Some participants may seek worlds with strong speech protection, but parents may choose more restrictive worlds for their children.

At least one reason for the failure of the class of state actors to continue to expand was the passage of the Civil Rights Act of 1964.<sup>106</sup> Once the statute made private discrimination illegal, at least in the business arena, there was no reason to inquire into whether or not a business could be considered a state actor subject to the dictates of the Equal Protection Clause. A statute, therefore, might provide the free expression rights players want; that is, a statute could require that the platform owners allow free expression.<sup>107</sup>

The platform owners, however, would have their own constitutional, even First Amendment, defense to such a statute. Various organizations have claimed that the freedom of association shields them from the requirements of state statutes barring discrimination. Some of these organizations have been unsuccessful. The Jaycees could not claim such protection because they were too large and nonselective to be seen as an intimate association, and were not sufficiently focused on political or other expression to enjoy the freedom due an expressive association.<sup>108</sup> The Boy Scouts, on the other hand, were successful in their assertion of an association right that allowed them to exclude gays.<sup>109</sup> The Boy Scouts' position against homosexuality would be compromised by requiring them to accept gays.

While it has been suggested that the Boy Scout case could apply to virtual worlds,<sup>110</sup> the more applicable case might be *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*.<sup>111</sup> In *Hurley*, the association running the Boston Saint Patrick's Day parade, the South Boston Allied War Veterans Council, refused to allow a group of gays, lesbians and bisexuals to march under their own identifying banner.<sup>112</sup> The excluded

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106. See 42 U.S.C. §§ 2000(a)-2000(a)-6 (2000) (prohibiting "discrimination or segregation in places of public accommodation").

107. See Balkin, *Virtual Liberty*, *supra* note 81, at 2079 (finding such approach to be suggested by Berman, *supra* note 97, at 1302-05).

108. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617-29 (1984) (detailing that application of Minnesota Human Rights Act does not abridge male members' freedom of intimate association or freedom of expressive association); see also *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 544-49 (1987) (explaining how application of Unruh Act does not interfere unduly with members' freedom of private association or right of expressive association).

109. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000) (applying New Jersey's public accommodation law to require Boy Scouts to accept Dale as assistant scoutmaster violated Scout's freedom of expressive association).

110. See Balkin, *Virtual Liberty*, *supra* note 81, at 2088 ("If legislators attempt to regulate virtual spaces along the model of public accommodation laws, we may well see platform owners making *Dale*-in-cyberspace claims.").

111. 515 U.S. 557 (1995).

112. See *id.* at 560-61 (noting history of parade organization and exclusion of gay, lesbian and bisexual group). While denied the ability to participate in the 1992 parade, the group "obtained a state-court order to include its contingent, which marched 'uneventfully' among the year's 10,000 participants and 750,000

group sued under a state anti-discrimination statute and won.<sup>113</sup> The Supreme Court, however, held that the application of the statute violated the rights of the parade organizers.<sup>114</sup> The Court determined that, “[r]ather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent’s expression in the Council’s eyes comports with what merits celebration on that day.”<sup>115</sup>

While the Court’s description of the creative role of a parade organizer may have gone beyond reality, it seems to apply to the platform designer or owner. The platform establishes a virtual world, and those establishing that world have a vision for it. While the platform owner allows players to participate in the virtual world, the owner/designer’s vision may be inconsistent with some potential virtual acts by the players, or even with real world acts by players that have an effect in or on the virtual world. Under *Hurley*, it would seem that the platform owner could exclude the inconsistent acts by censoring on an act-by-act basis or simply by terminating the actor’s right to participate.

There are also interesting suggestions that, while the Constitution may not legally limit the actions of someone who is not a state actor, the Constitution should still serve as an ethical or aspirational guide.<sup>116</sup> That approach has some appeal. In fact, it may well be that the belief that the Equal Protection Clause’s prohibition against government discrimination on the basis of race should apply to non-government actors both led to the expansion of state action in that area and contributed to the idea that even individuals should not discriminate on that basis.<sup>117</sup> Similarly, the dictates of the First Amendment regarding free expression may lead to

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spectators.” *See id.* at 561 (detailing events surrounding group’s parade application).

113. *See id.* at 561-63 (addressing group’s arguments under state public accommodation laws which prohibited discrimination on basis of sexual orientation).

114. *See id.* at 566, 581 (“Disapproval of a private speaker’s statement does not legitimize use of the Commonwealth’s power to compel the speaker to alter the message by including one more acceptable to others.”).

115. *Id.* at 574 (describing right of private speaker to “shape” his or her message).

116. *See* Berman, *supra* note 97, at 1290 (examining “constitutive constitutionalism” principles). The concept of constitutive constitutionalism involves “the idea that the Constitution might appropriately be viewed as a touchstone for articulating constitutive values and for structuring public debate about fundamental social and political issues.” *Id.*

117. *See* Chemerinsky, *supra* note 99, at 537 (arguing that invocation of state action doctrine to deny relief puts courts on one side of dispute and favors rights of those who would discriminate over victim). Elimination of the State Action Doctrine would allow the courts to address the substance of the claim and the valued rights centrally at issue. *See id.* at 540 (depicting benefits of eliminating doctrine). Further, openly balancing the competing interests would lead to a better understanding of the rights at stake. *See id.* (comparing liberties of violators with those of discriminated individuals).

cries of censorship if a retail outlet refuses to sell particular magazines or video games. While the action of the store is censorship, the First Amendment does not speak to such a private decision. Nonetheless, the values embodied in the protections may have wider application, and private entities seem to be expected to give these values at least some respect and be ready to accept criticism for decisions contrary to their aspirations.

In this regard, the Constitution, specifically the First Amendment, may provide non-binding guidance. Perhaps the role that the free expression provisions should play in virtual worlds is similar to the role natural law seems to play in the real world. The willingness of the courts to find non-textual restrictions upon government actions, in cases such as *Griswold v. Connecticut*<sup>118</sup> and *Lawrence v. Texas*,<sup>119</sup> may be seen as the acceptance of natural law, a law found outside the bounds of positive law which serves as a limitation on that positive law.<sup>120</sup> Similarly, the Constitution, as it embodies strongly-held values of the American people, could be seen as a guide to, or a natural law for, the development of laws or rules internal to the operation of virtual worlds.

Lastly, there are contract provisions setting out the rights of participants in virtual worlds against the platform owners. These contracts may give the owner the right to limit the actions of players and may provide for censorship or the exclusion of a player from the virtual world. Thus real world contracts control what happens in the virtual world; if litigation arises in the virtual world, it does so over a provision in the real-world contract rather than over a virtual world dispute. Substantively, it has been argued that these contracts are adhesion contracts, and a provision might be voided on that basis.<sup>121</sup> It is true that contracts for online services generally do not permit negotiation; instead, they demand that the “accept” toggle be clicked on in order to access the web site.<sup>122</sup> Because adhesion contracts are not automatically void, however, they generally will only be nullified when courts find them to be unconscionable.<sup>123</sup> Put alternatively, “[a] court will find adhesion only when the party seeking to rescind the contract establishes that the other party used ‘high pressure tactics,’ or ‘deceptive language,’ or that the contract is unconsciona-

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118. 381 U.S. 479 (1965).

119. 539 U.S. 558 (2003).

120. For a general analysis of the role of natural law in shaping and limiting positive law, see A.P. D'ENTREVES, *NATURAL LAW: AN HISTORICAL SURVEY* (1951).

121. See Jenkins, *supra* note 83, at 5 (stating that End User Licensing Agreement (“EULA”) “is a contract of adhesion that is imposed on the player without the possibility of negotiation”).

122. See, e.g., *id.* (noting process that requires user to click “I Accept” button with regard to EULA before being able to access game).

123. See, e.g., *Hughes Training Inc. v. Cook*, 254 F.3d 588, 593 (5th Cir. 2001) (providing that contracts generally can only be voided when deemed unconscionable).



ble.”<sup>124</sup> Also relevant is whether alternatives were available to the “coerced” party.<sup>125</sup> Because of the availability of alternatives to any particular virtual world and the choice of making some other use of one’s time, it seems unlikely that the unconscionability threshold will be met. Furthermore, a demand for free speech in a virtual world is an alteration of the contract that goes beyond a request to be released from an adhesion contract.

### C. *The Application of First Amendment Exceptions*

#### 1. *Clear and Present Danger*

One exception to First Amendment protection of play in virtual worlds would be for material that meets the “clear and present danger” test.<sup>126</sup> Qualification under this exception, however, requires the danger to be a real world danger. If a particular virtual world allowed for a strong freedom of speech and were governed by the players rather than the platform owner, the possibility of insurrection in the virtual world would exist. The avatars could rise up and overthrow the virtual world’s regime. Speech directed at such an uprising, as opposed to speech directed at the encouragement of change in the virtual world through the political process allowed in the platform, would be a “clear and present danger” in the virtual world. If the virtual world employed legal standards similar to those which the First Amendment imposes on the real world of the United States, the virtual regime could suppress the speech if the speech was likely to incite imminent, serious and unlawful action. This would, of course, require the existence of either a virtual world court willing to override the will of the regime or a platform owner similarly willing to impose free speech principles on the virtual world government.

What is critical for the separation proposed here is that any virtual world insurrection must be insufficient to invoke the jurisdiction of real

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124. *Klos v. Polskie Linie Lotnicze*, 133 F.3d 164, 168 (2d Cir. 1997) (citing *Aviall, Inc. v. Ryder Sys. Inc.*, 913 F. Supp. 826, 831 (S.D.N.Y. 1996)) (recognizing contracts of adhesion).

125. *See id.* at 169 (determining whether “coerced” party was on notice of offending provision was factor to consider when deeming adhesion contract unconscionable).

126. *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (considering previously established principle that “constitutional guarantees of free speech and press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”). This may be better seen not as an exception but as a way of justifying suppression of material that falls within the ambit of the First Amendment. That is, while obscenity falls within an exception to the First Amendment, the speech subjected to the clear and present danger test may well have political content or otherwise be the sort of speech afforded the Amendment’s protection. The speech may be suppressed not because it lacks the sort of content that is the subject of the Free Expression Clauses, but because the speech poses too great a danger and may be justified by this First Amendment version of the strict scrutiny test.

world courts. No matter how totalitarian a virtual world regime may be, there are no “clear and present danger” grounds for a real world court to suppress or protect dissenting speech in a virtual world. This conclusion assumes that the state action issues already discussed are resolved as argued above. This is also not to say, however, that there cannot be a contract action based on the user agreement.<sup>127</sup>

Having ruled out virtual world insurrection as a basis for action in the courts of the United States, a virtual world could be used as an arena to plan for and inspire an insurrection in the real world. Rather than meeting in auditoria or around burning crosses in the woods, those planning an uprising against the United States government or the government of an individual state could meet in a virtual world. Assuming that the participants knew they were, and intended to be, engaged in something more serious than fantasy play, the speech of their participation could be suppressed if the speech met the “clear and present danger” test. If the speech in the virtual world was likely to lead to serious, imminent, unlawful acts in the real world, the speech should provide the justification needed for real world governments to shut the platform down and perhaps otherwise punish the participants.<sup>128</sup>

## 2. *Defamation and Intentional Infliction of Emotional Distress*

Turning to a true First Amendment exception that has been the basis for comment,<sup>129</sup> a defamation action might arise out of statements by an avatar. Again, a distinction should be drawn between a defamatory statement having an effect only in the virtual world and a statement having its effect in the real world. One avatar may say something in the virtual world that defames the character of another avatar. If, for example, an avatar falsely asserts that another avatar has found a way to produce shoddy assets that he or she is selling in the virtual world market, that could be the sort of defamation of business that would, in the real world, allow for a recovery of the profits lost because others are no longer willing to pay the full market price for the asset. Because this is defamation within the virtual world, any legal action should be left to whatever courts or conflict resolution methods that are available in the virtual world. It is an avatar who lost his or her reputation in the virtual world, so a virtual world judgment in the avatar’s favor should be the process for making him or her whole.<sup>130</sup>

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127. For a discussion of contract actions based on user agreements, see *supra* notes 121-25 and accompanying text.

128. See *Brandenburg*, 395 U.S. at 447 (describing type of advocacy that leads to real world punishment).

129. See, e.g., Balkin, *Virtual Liberty*, *supra* note 81, at 2065 (“[P]eople 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).”).

130. For a discussion of the possibility that a virtual world judgment could be turned into a real world gain by the sale of the virtual world award in real world markets, see *infra* notes 217-18 and accompanying text.

It is, however, possible to use an avatar to engage in real world defamation. An avatar can be made to utter a defamatory comment about an identified or identifiable person playing the game through another avatar or, for that matter, about an individual not even involved in the virtual world. When that happens, the person who publishes the libel through the avatar should be as liable as he or she would be if using any other medium.

The key here is the “of and concerning” requirement in a defamation action.<sup>131</sup> If the assertion is “of and concerning” the avatar, then there is no real world defamation. If, however, a comment is made regarding the person controlling avatar X, then the “of and concerning” requirement in the real world may be met—so long as the referent of “the person controlling avatar X” is known to people in the real world. If, more straightforwardly, an avatar makes a false and defamatory comment directly about an identified real world person, the “of and concerning” requirement in the real world is clearly met. To say, for example, “John Smith is embezzling from the XYZ Corporation” through an avatar in a virtual world is really no different from saying the same thing on Radio Real World. In the two situations, remedies for defamation should be equally available, while damages may vary depending on how widely the falsehood is heard.

A related issue here is the possibility of a suit for intentional infliction of emotional distress. It has been argued that because people become very emotionally invested in their avatars,<sup>132</sup> defamation of the avatar may cause emotional distress in the person who plays through that avatar. There would appear to be at least two problems with a claim of intentional infliction of emotional distress within a virtual world. The first problem addresses the issue of against whom the *intentional* infliction occurred. Defamation of the avatar may have been intended to inflict emotional distress on the avatar. But that is not a real world infliction of emotional distress and therefore suits should not be viable in real world courts. An intent to inflict emotional distress on the player controlling the avatar is real world emotional distress. Even here, however, the game nature of the virtual world should raise serious concerns.

Consider a football game in which one team is well ahead of the other and is in possession of the ball with time running out in the game. The team calls a timeout with three or four seconds left in the game in order to send in the field goal team, kicks successfully and adds three points to the

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131. See, e.g., *Saenz v. Playboy Enters., Inc.*, 653 F. Supp. 552, 560-61 (N.D. Ill. 1987) (providing that “of and concerning” requirement is also known as colloquium requirement), *aff’d*, 841 F.2d 1309 (7th Cir. 1988); *Neiman-Marcus v. Lait*, 13 F.R.D. 311, 316-17 (S.D.N.Y. 1952) (stating that “general allegation that the alleged libellous [sic] and defamatory matter was written ‘of and concerning . . . each of them’ is insufficient to satisfy” cause of action for plaintiffs).

132. See, e.g., Balkin, *Virtual Liberty*, *supra* note 81, at 2047 (“Players identify with their avatars; they experience what happens to the avatars in the virtual world as happening to themselves.”).

already significant margin of victory.<sup>133</sup> Assuming that this is not an attempt to exceed a point spread motivated by gambling, the only purpose would seem to be the intentional infliction of emotional distress upon the opposing team or coach. Yet it seems odd to suggest that the opposing team or coach in that situation should have a valid cause of action. To the extent that the action is permitted within the rules of the game, there is no formal penalty within the game; thus, there certainly should be no penalty outside the game either. If there is a violation of the rules of the game, a game-specific penalty can be imposed. The real limitations on the actions of one team's likelihood to subject another to ridicule or infliction of emotional distress are the spirit of good sportsmanship, the fear of being on the receiving end of similar treatment in a future game<sup>134</sup> and the desire to avoid providing the other team with any extra motivation for the next time the two teams play.

Intentional infliction of emotional distress should probably be handled the same way in virtual worlds. The virtual world may have a civility code that could either punish the person trying to inflict emotional distress through the avatars or even exclude the player from the world. Perhaps penalties payable in the currency of the virtual world could be imposed. Other players may choose to treat poorly or shun the person intent on inflicting emotional distress. All of these possibilities, and probably others not mentioned here, would seem to be reasonable virtual world responses. What should not be an acceptable response, however, is the filing of a suit in a real world court. No matter how invested people may be in the virtual world, it is just a game. Players in virtual worlds are typically no more invested than football players at some levels of that game and in some parts of the country. If a football team cannot go to court claiming to have been treated unkindly, then there is certainly no more reason to let the player in a virtual world sue for intentional infliction of emotional distress.

### 3. *Obscenity, Child Pornography and Fighting Words*

There is also room for real world courts to become involved in virtual worlds where obscene materials are involved. The computer screen images exist in the real world and where those images are obscene, those

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133. See Chris Fowler, *Trivial Pursuit Before 'Canes-Gators Showdown'*, ESPN, Sept. 5, 2002, [http://espn.go.com/ncf/columns/fowler\\_chris/1427550.html](http://espn.go.com/ncf/columns/fowler_chris/1427550.html) (depicting how University of Miami ran up score several years ago in game against University of Florida). While the incident may have been motivated by Florida fan behavior toward the Miami team, it more likely was payback for a specific play, occurring in the 1971 rivalry game, known as the "Florida Flop." See *id.* (providing that in 1971 game, with Florida well ahead of Miami and Florida's quarterback within few yards of breaking passing record, almost entire Florida team fell to ground as Miami snapped ball, allowing Miami to score touchdown so that Florida could get ball back before time ran out and Florida quarterback could set passing record). This author was in attendance at the "flop" game.

134. For a discussion of such reciprocal treatment, see *id.*

responsible for their display may be prosecuted. There would seem, however, to be little likelihood of a conviction for obscenity. The images are of avatars rather than people, and while there is no legal reason why an animated image cannot be obscene,<sup>135</sup> the appeal to the prurient interest required for an obscenity finding<sup>136</sup> is less likely to be met by an animated image than by other images available on the Internet.<sup>137</sup>

Until recently, it was possible that, because the obscene images were viewed on a real world computer screen, a conviction could be obtained for the inclusion in a virtual world of images of avatars representing children engaging in sexual acts. The Supreme Court recognized a First Amendment exception for non-obscene child pornography in *New York v. Ferber*,<sup>138</sup> where the Court saw a need to suppress the market of such material in order both to prevent the sexual abuse of children in the material's production and to suppress the permanent record of abuse that child pornography embodies.<sup>139</sup> Moreover, in *Osborne v. Ohio*,<sup>140</sup> the Court added another justification for the exception. There was a concern over the use of child pornography to recruit and train new victims of sexual abuse.<sup>141</sup> For example, pedophiles could use the materials both to try to convince children that sexual acts with adults are normal and to instruct the children as to how to perform the desired acts. That concern led some courts to conclude that animated or virtual child pornography was unprotected

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135. See *Mishkin v. New York*, 383 U.S. 502, 508 (1966) (concluding that when material is marketed to audience with particular sexual interest, prurience will be judged based on that group of individuals). For example, if material is marketed to an audience with bondage or sadomasochist interests, the fact that the material would not appeal to an average person does not preclude a finding of obscenity if the material appeals to the prurient interests of the target audience. See *id.* at 508-09 ("We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group."). Of relevance here is the fact that the books in question were illustrated rather than containing actual photographs. While a publication without photographs is less likely to be found obscene, the finding is not legally precluded. Similarly, an animated film is less likely to be found obscene, and in fact is extremely unlikely to be found obscene for an adult audience. But see *Ginsberg v. New York*, 390 U.S. 629, 638-43 (1968) (providing for stricter standard when children are in audience).

136. See *Miller v. California*, 413 U.S. 15, 24 (1973) (defining test for obscene material to include as one of its requirements that material at issue, under community standards and taken as whole, appeals to prurient interest).

137. For a further discussion of how children's access to such material might cause the material still to be deemed obscene, see *infra* note 147 and accompanying text.

138. 458 U.S. 747 (1982).

139. See *id.* at 756-64 (explaining why states are entitled to greater leeway in regulation of pornographic depictions of children).

140. 495 U.S. 103 (1990).

141. See *id.* at 104, 111 (stating that pornographic materials may be used by pedophiles to seduce other children).

because it too could be used for the same purpose.<sup>142</sup> The Supreme Court has recently concluded, however, that virtual child pornography does not fall outside the protection of the First Amendment.<sup>143</sup> Thus, the possibility of virtual world child pornography would seem precluded.

Lastly, the “fighting words” exception<sup>144</sup> to the First Amendment seems unlikely to apply to real world court actions stemming from actions within virtual worlds. To fall within the “fighting words” exception, speech must be directed at an individual and a reasonable speaker would have to recognize the likelihood of an immediate violent response; that is, fighting words are an invitation to immediate fisticuffs.<sup>145</sup> A comment made in a virtual world through an avatar would not seem to be such an invitation. The response, to be a real world response, would have to come from the person playing through the avatar to whom the comment is made. There is ordinarily insufficient physical proximity between the two players for any immediate physical, real world response.

While there is little to no likelihood of these First Amendment exceptions applying to real world litigation over virtual world content, the exceptions may influence the development of any internal law within the virtual worlds. Those controlling the platforms may have their own rules dealing with virtual obscenity or child pornography and may insist on civility by barring the use of what would constitute “fighting words” if uttered in the real world. If these decisions by platform owners were challenged as infringing upon the free speech rights of players, the response would be the same as previously discussed above.<sup>146</sup>

#### D. *Harm to Children*

##### 1. *Sexual Content*

The greatest motivation for the real world to regulate virtual worlds or access to virtual worlds through legislation is likely to come from any

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142. See *United States v. Acheson*, 195 F.3d 645, 650 (11th Cir. 1999) (stating that criminalizing possession of images of cyber-minors engaged in sexually explicit conduct is justified); *United States v. Hilton*, 167 F.3d 61, 76 (1st Cir. 1999) (stating that it is “well within Congress’s power to regulate virtual pornography of all minors of all ages”). Both cases, which applied the Child Pornography Protection Act, 18 U.S.C. § 2252A, in which Congress criminalized possession of pornographic images appearing to be of children, have since been effectively overruled. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244, 258 (2002) (finding statute to be overbroad and unconstitutional).

143. See *Free Speech Coal.*, 535 U.S. at 244-56 (detailing history of child pornography and First Amendment and explaining why virtual pornography is protected under First Amendment).

144. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572-74 (1942) (holding that “fighting words” are not protected under First Amendment).

145. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 409 (1989) (stating that “fighting words” are those words “likely to provoke the average person to retaliation, and thereby cause a breach of the peace” (quoting *Chaplinsky*, 315 U.S. at 574)).

146. For a discussion of freedom of expression from restriction by platform owners, see *supra* notes 81-125 and accompanying text.

perceived harm to children. For example, the level of sexual activity among avatars in a virtual world may be seen as inappropriate for real world children to be exposed to. Even if it is unlikely that the images resulting from virtual world activity would be held obscene when viewed by adults, the standard is different for children. *Ginsberg v. New York*<sup>147</sup> recognized that when material is distributed to children, the prurience required for an obscenity conviction is to be judged by the prurient interest of minors.<sup>148</sup> This far more inclusive test might be met by sufficiently seductive or sexually active avatars.

The major problem in limiting access of juveniles to sexual material is the impact such limitations may have on adults. A fairly old case, *Butler v. Michigan*,<sup>149</sup> sets the parameters.<sup>150</sup> *Butler* grew out of an attempt to protect minors from material considered harmful to them. The Michigan statute involved prohibited the possession, sale or publication of materials that were obscene or “tend[ed] to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth.”<sup>151</sup> Even though the defendant in *Butler* had not sold the material at issue to a child, but rather to a police officer, the trial court convicted Butler because it concluded that the material had a potential deleterious effect on youth.<sup>152</sup> The Supreme Court concluded that Michigan could not attempt to protect children by preventing adult access to non-obscene material.<sup>153</sup> The state could not “reduce the adult population of Michigan to reading only what is fit for children.”<sup>154</sup>

Concerns over limiting adult access have proven to be a substantial problem for attempts to shield children from sexual material on the Internet. The first such attempt was the Communications Decency Act of 1996 (CDA), passed as a part of the Telecommunications Act of 1996.<sup>155</sup> The CDA prohibited the transmission via any telecommunications service of any “image[ ] or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age.”<sup>156</sup> Also prohibited was the use of an “interactive computer service to display in a manner available” to a child under eighteen any image, or

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147. 390 U.S. 629 (1968).

148. *See id.* at 638-39 (providing that definition of obscenity as applied to minors can be adjusted).

149. 352 U.S. 380 (1957).

150. *See id.* at 383-84 (stating that legislation limiting adults to reading only that which is fit for children violated adults' freedom of liberty).

151. *Id.* at 381 (quoting MICH. PENAL CODE § 343).

152. *See id.* at 382-83 (providing trial judge's reasoning).

153. *See id.* at 383-84 (stating that legislation is “not reasonably restricted to the evil with which it is said to deal”).

154. *Id.* at 383.

155. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). The Communications Decency Act is Title V of the Telecommunications Act. It is found at Section 502, 110 Stat. at 133-35.

156. 47 U.S.C.A. § 223(a)(1)(B)(ii) (West Supp. 1997).

other communication that depicts or describes, in patently offensive terms, sexual or excretory activities or organs.<sup>157</sup> There were criminal sanctions provided for violators, but there was also a defense for anyone requiring “a verified credit card, debit account, adult access code, or adult personal identification number” for access or otherwise taking “good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors.”<sup>158</sup>

The Supreme Court held the CDA unconstitutional in *Reno v. American Civil Liberties Union*.<sup>159</sup> While there were a number of other concerns,<sup>160</sup> the major flaw in the statute was its effect on constitutionally protected adult-to-adult communication.<sup>161</sup> A ban on making the targeted material available through the Internet would clearly limit expression, and the costs of the adult identification methods that provided a defense might make it too expensive to publish.<sup>162</sup> Even the bar on sending sexual material to one known to be a minor had a negative effect on adult-to-adult communication, because conversation in a chat room known to be occupied by even one minor would have to be limited to material suitable to that young participant.<sup>163</sup>

The second attempt to shield children from sexual material on the Internet has not fared any better. The Child Online Protection Act (COPA) provided penalties for “[w]hoever knowingly and with knowledge of the character of the material, in interstate or foreign commerce by means of the World Wide Web, makes any communication for commercial purposes that is available to any minor and that includes any material that is harmful to minors.”<sup>164</sup> COPA, too, provided a defense for content prov-

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157. *See id.* § 223(d)(1)(B).

158. *Id.* § 223(e)(5).

159. 521 U.S. 844 (1997) [*Reno I*].

160. For example, the Court expressed concern over the effect of the statute on the provision by parents to their own children of material that might come within the scope of the CDA, even material parents could see as having serious value for their children. *See id.* at 878.

161. *See id.* at 874 (finding burden on adult speech to be unacceptable).

162. *See id.* at 885 (emphasizing interest in encouraging freedom of expression).

163. *See id.* at 847 (noting that most Internet forums are open to individuals of all ages).

164. *See* *ACLU v. Reno*, 31 F. Supp. 2d 473, 477 (E.D. Pa. 1999), *aff'd*, 217 F.3d 162 (2000), *rev'd*, 535 U.S. 564 (2002) [*Reno II*]. The language quoted was to be codified as 47 U.S.C. § 231. COPA defined who would be considered to be making a communication for commercial purposes, limiting it to those providing the communication as a business and with the intent of earning a profit, but did not require that the person or entity actually be making a profit. 47 U.S.C. § 231(e)(2). Material harmful to minors was also defined to be:

any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—

(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;



iders, requiring similar sorts of credit or identification means as in the CDA, or taking other reasonable and feasible measures to restrict youth access.<sup>165</sup>

The Supreme Court's initial consideration of COPA was, due to the approach taken by the lower court, limited to the issue of how to define the community in which harmfulness to minors was to be judged.<sup>166</sup> Because the Internet has no geographic boundaries, content providers could be limited by the standards of the nation's most restrictive communities. The Supreme Court was unswayed by that concern, holding that the community standards issue did not, in itself, make COPA unconstitutional.<sup>167</sup> There was no majority opinion explaining that conclusion. A plurality said there was no difference between the Internet and other federal statutes regarding the mail or telephone distribution of obscenity, concluding that "[i]f a publisher wishes for its material to be judged only by the standards of particular communities, then it need only take the simple step of utilizing a medium that enables it to target the release of its material into those communities."<sup>168</sup> This could be accomplished by publishing the material only in a way in which delivery could be controlled.<sup>169</sup> Justices O'Connor and Breyer concurred but argued that there should be a separate standard for the Internet community.<sup>170</sup>

When COPA eventually found its way back to the Supreme Court, the Court upheld an injunction against the enforcement of the Act.<sup>171</sup> This time the majority did consider the remaining provisions and found them to be too great a limitation on adult access to material adults have a right to obtain.<sup>172</sup> Again, not quarreling with the government's interest in shielding children, the Court found burdens in the expense of age verification and the potential chill of embarrassment in the identification process that would be required of users. The test was then whether the limitation was no more restrictive than necessary to serve the government

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(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

47 U.S.C. § 231(e)(6). Minors were defined as persons under seventeen years of age. *Id.*

165. *See* 47 U.S.C. § 231(c)(1).

166. *See* *ACLU v. Reno*, 535 U.S. 564, 573 (2002) [*Reno IV*] (stating issue before court); *see also* *ACLU v. Reno*, 217 F.3d 162, 181 (3d Cir. 2000) [*Reno III*] (concluding that statute is overbroad).

167. *See* *Ashcroft v. ACLU*, 535 U.S. 564, 578 (2002) [*Ashcroft I*].

168. *Id.* at 583.

169. *See id.* (stating that publisher's responsibility should not change simply by virtue of medium being used).

170. *See id.* at 586-89 (O'Connor, J., concurring).

171. *See* *Ashcroft v. ACLU*, 542 U.S. 656 (2004) [*Ashcroft II*].

172. *See id.* at 675 (emphasizing COPA's heavy burdens on Internet speech).

interest.<sup>173</sup> In answering this question, the Court stated that filtering and blocking were less restrictive, because they placed limited restrictions on the receiving end instead of universal limitations at the source.<sup>174</sup> The Court also expressed a belief that filtering and blocking could be more effective than COPA, because forty percent of pornography on the web comes from outside the United States and would be beyond the impact of the statute.<sup>175</sup> Filtering, the court noted, can also address concerns over e-mail, concerns not addressed by COPA.<sup>176</sup> Interestingly, the Court also saw a circumvention problem in COPA, in that some minors may have the credit cards necessary to pass through the age screen.<sup>177</sup> It may, however, be questionable whether minors are more likely to be able to obtain credit cards than to circumvent filters, given the often greater familiarity with computers of at least older minors than their parents. Nonetheless, the Court upheld the injunction and remanded for trial on the merits.<sup>178</sup> Given the expression of likelihood that the plaintiffs would prevail in such a trial, it would appear that COPA will never serve its intended purpose.<sup>179</sup>

The constitutional difficulties in regulating the Internet carry over to virtual worlds, because these worlds are a part of the Internet. There are, however, differences that may make access to the virtual world more easily regulable. One of the approaches to filtering content on the Internet, the

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173. *See id.* (noting possibility that protection of children might have been achieved through less restrictive means).

174. *See id.* at 666-68.

175. *See id.*

176. *See id.*

177. *See id.* at 668.

178. *See id.* at 656 (stating that Third Circuit was correct to affirm district court's decision).

179. There were four dissenting votes in the COPA case. Justice Scalia failed to find any First Amendment protection for the commercial pandering of sex. *See id.* at 676 (Scalia, J., dissenting). Justice Breyer, joined by Chief Justice Rehnquist and Justice O'Connor, argued that COPA's limitations on speech were modest. *See id.* at 676-91 (Breyer, J., dissenting). He failed to see much difference between material that is harmful to minors, as defined in the statute, and the prevailing definition for obscene material. *See id.* at 678-82 (Breyer, J., dissenting). While it is true that the COPA definition tracks the definition of obscenity, the COPA definition judges prurience, offensiveness and serious value on a scale that takes into account the age of the consumer. *See id.* at 678-84 (Breyer, J., dissenting). Justice Breyer says that material appealing to the prurience of some groups of minors will also appeal to the prurient interest of some groups of adults and, therefore, can be obscene. *See id.* at 679 (Breyer, J., dissenting). But the whole basis for "harmful to minors" statutes is that the prurient interest of minors is more easily appealed to and that material perfectly legal for an adult audience may be restricted for minors. Justice Breyer also argues, more convincingly, that there is not really a significant burden in the screening devices. *See id.* at 682-87 (Breyer, J., dissenting). The cost to content providers he saw as modest and the cost to consumers of an age verification service would be less than the cost of the filters the majority saw as potentially superior. *See id.* at 682-83 (Breyer, J., dissenting). Justice Breyer also called into question the effectiveness of filtering and did not consider a sixty percent reduction in pornography available to minors at all trivial. *See id.* at 687 (Breyer, J., dissenting).

use of blacklists or white lists, may be more successful in this context. If the totality of the web must be regulated, the task of compiling and keeping up to date the lists on which the filter is based is perhaps unfeasible. Given the regular addition of pages to the web and changes in the content of existing sites, any blacklist quickly becomes outdated. Use of a necessarily incomplete white list keeps children from accessing what may be valuable sites. But with virtual worlds, the complexity of the platforms seems likely to limit the number of such worlds, probably to the degree that filters based on blacklists or whitelists may be available to parents.

If the number of virtual worlds were to grow too large for such lists to be effective, there may still be opportunities to shield children. One such opportunity comes from the fact that players generally pay a monthly fee to play.<sup>180</sup> Paying through a credit card was seemingly in CDA and COPA accepted as a proxy for adulthood. Someone who can so pay is old enough to have a credit card, or has his or her parents' permission, or will be found out when the parents receive the next credit card bill.

If the number of virtual worlds becomes large and access is without cost, or is funded by advertising or product placement, the general Internet problems will likely carry over to this use of the medium. There is, however, a constitutional way to limit access by children to Internet sex. As argued elsewhere,<sup>181</sup> filtering can be accomplished by applying, with certain changes to software, the principles of *Ginsberg*, while avoiding the flaw of *Butler*, to the Internet. The software change is to require all software used to place material, web pages, e-mail, postings to bulletin boards, etc., to attach a signal to the material that would activate a filter parents may obtain to shield their children. The content provider would be given the opportunity to toggle off the attachment of the signal, if the provider believed the material suitable for children generally or to the child to which an e-mail is sent. If material, as defined by the CDA,<sup>182</sup> is put on the Internet with the filter toggled off and is received by a child, the provider would be subject to criminal sanction. Adult-to-adult communication is unaffected. The only chilling effect is the possibility that someone may choose to leave the filter signal attached, even when the material would actually be suitable for minors. Even then, however, only access by children is limited and then only if the child's parents have chosen to employ the filter.<sup>183</sup>

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180. See Lastowka & Hunter, *Laws*, *supra* note 42, at 8 (discussing platform owner income from subscription fees); Noveck, *supra* note 16, at 1608-09 (discussing subscription fees and numbers of subscribers).

181. See KEVIN W. SAUNDERS, SAVING OUR CHILDREN FROM THE FIRST AMENDMENT 164-78 (2003) [hereinafter SAUNDERS, SAVING OUR CHILDREN]; Kevin W. Saunders, *Electronic Indecency: Protecting Children in the Wake of the Cable and Internet Cases*, 46 DRAKE L. REV. 1, 42-47 (1997).

182. For a discussion of the Communications Decency Act, see *supra* notes 155-63 and accompanying text.

183. This suggestion also addresses the problem raised by non-United States sites that are not subject to the criminal jurisdiction of America's courts. The solu-

A potential difficulty in applying this approach to virtual worlds is that platform owners may not enjoy quite the same control of content as that possessed by web publishers. Web publishers know the content of their sites and can make a reasoned decision regarding suitability for children. The content of virtual worlds is partially the doing of the platform owner but also the result of decisions by other players in that world. While it may be possible to require that each player make the decision whether or not to make his or her contributions available to any children playing the game, there would be gaps in the play that seem more serious than the gaps filtering would leave in web pages accessible to children. The interactivity that is the hallmark of play in virtual worlds is gone, where the input of some of the players is denied other players.

If this approach to Internet filtering is to work, the decision on availability to children would probably have to be left with the platform owners. If owners want a more open environment, they may attach the filter-activating signal and make their world available only to adults (and, of course, children whose parents do not employ the filter). If they want the virtual world to be available to children, they can take steps to assure the suitability of the site. In setting the options for the appearance of avatars, they may require that they be clothed, and by not providing avatars with genitals, they can limit sexual activity. They can also employ language filters to limit the likelihood of children hearing unsuitable dialog.

## 2. *Violence*

A concern may also arise over violence in virtual worlds that would mirror earlier concerns over violence in comic books,<sup>184</sup> film, television<sup>185</sup> and video games.<sup>186</sup> Allaying this concern does not rest on a First Amendment exception or the more stringent application of that standard when children are involved, as sexual material might.<sup>187</sup> The concern in those other areas was over the possibility that violence in the media may cause real-world violence, and that concern may well carry over to the effects of

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tion is to also provide an option on a filter, that parents may or may not choose to enable, that would filter out foreign sites.

184. See, e.g., INTERIM REPORT OF THE COMM. ON THE JUDICIARY, COMIC BOOKS AND JUVENILE DELINQUENCY, S. REP. NO. 62, 84th Cong., 1st Sess. (1955).

185. For a discussion of violence and television, see *infra* notes 193-98 and accompanying text.

186. For a discussion of violence and video games, see *infra* notes 199-209 and accompanying text.

187. I have argued elsewhere that violence should be treated the same as sex, that when it is sufficiently graphic and offensive it should be considered obscene and especially that it may be obscene for an audience of children. See, e.g., SAUNDERS, VIOLENCE AS OBSCENITY, *supra* note 58. This theory was adopted by the federal district court in upholding an attempt by the city of Indianapolis to limit youth access to violent video games in arcades but was rejected by the Seventh Circuit in reversing that lower court decision. See *Kendrick I*, 115 F. Supp. 2d 943 (S.D. Ind. 2000), *rev'd*, 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001).

virtual world violence. This is a potential *real-world* effect; it is not a concern simply with the well-being of avatars.

Limiting children's access to virtual worlds depends on the limitations passing a strict scrutiny analysis;<sup>188</sup> the restrictions may stand if they are necessary to, or narrowly tailored to, a compelling governmental interest.<sup>189</sup> Courts have been willing to accept the physical and psychological well-being of youth as a compelling governmental interest,<sup>190</sup> but there has been difficulty in the necessity or narrow tailoring requirement.<sup>191</sup> Not only must causation be demonstrated, but the variety of images or actions causing the real-world effects must be identified with particularity.<sup>192</sup>

There are no studies of the effects of virtual world violence on children who play in those worlds, but there is evidence from studies of other media that is relevant. There is a great volume of social science documentation examining the effect of violence in television and film. These media are far less interactive than either video games or play in virtual worlds, but the studies are still important. The more active media include the reception of images analogously found in the passive media, so the social science on the passive media are likely to set a baseline for violent effects; that is, whatever effect passive media may have should be present in violent video games or virtual worlds, and there may perhaps be an enhancement of the effect from active participation.

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188. I argue elsewhere that strict scrutiny should not apply when restrictions limit only the expression rights of children or the rights of adults to express themselves to other peoples' children. See generally SAUNDERS, SAVING OUR CHILDREN, *supra* note 181. I will proceed with this analysis, however, under the assumption that this higher level test must be met.

189. This has been the approach taken in the video game cases where courts went on to examine the validity of the claims. See *Kendrick II*, 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001); *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051, 1078 (N.D. Ill. 2005); *Video Software Dealers Ass'n v. Schwarzenegger*, 401 F. Supp. 2d 1034, 1045-46 (N.D. Cal. 2005); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1186 (W.D. Wash. 2004); *Interactive Digital I*, 200 F. Supp. 2d 1126, 1135-36 (E.D. Mo. 2002), *rev'd*, 329 F.3d 954, 959 (8th Cir. 2003). It was also the approach of courts in earlier cases involving videos. See, e.g., *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 689 (8th Cir. 1992).

190. For a list of cases outlining the physical and psychological well-being of youth as a compelling governmental interest, see *supra* note 189.

191. The *Kendrick*, *Interactive Digital* and *Blagojevich* cases each rejected the empirical evidence as generally inadequate to establish a link between the identified concern of first person shooter video games and violence among those who play them. See *Kendrick II*, 244 F.3d at 572; *Blagojevich*, 404 F. Supp. 2d at 1052; *Interactive Digital I*, 200 F. Supp. 2d at 1126. The *Maleng* court seemed more accepting of the general evidence but the statute there addressed only games in which the player shot law enforcement officers, and the court found no evidence of a special danger in those games. *Maleng*, 325 F. Supp. 2d at 1183.

192. The *Webster* court found the statute at issue lacked narrow tailoring, because it did not identify the sort of image that was said to cause real world violence. 968 F.2d at 689. This was less of a problem for the video game cases that focused on a particular concern, such as first person shooter games.

There is a large body of social science and psychological research on violence in film and television corresponding to violence in the real world. That research has led the scientific and health communities generally to recognize the negative effects of media violence. In a joint statement issued in July 2000, the American Psychological Association, the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the American Medical Association, the American Academy of Family Physicians and the American Psychiatric Association concluded that “well over 1,000 studies . . . point overwhelmingly to a causal connection between media violence and aggressive behavior in some children.”<sup>193</sup>

An earlier policy statement from the American Academy of Pediatrics stated that “[t]he vast majority of studies conclude that there is a cause-and-effect relationship between media violence and real-life violence,”<sup>194</sup> and called the link “undeniable and uncontestable.”<sup>195</sup> A representative of the same pediatrics group also testified before the United States Senate Commerce Committee that, of the more than 3,500 studies examining the relationship between media and real world violence, “[a]ll but 18 have shown a positive correlation between media exposure and violent behavior,” and that epidemiological studies lead to the conclusion that “exposure to violent media was a factor in half of the 10,000 homicides committed in the United States in the [year studied].”<sup>196</sup> Adding to this consensus, the Surgeon General’s report entitled *Youth Violence*, while noting that ethics barred the randomized studies that are best used to determine causation, concluded that “a diverse body of research provides strong evidence that exposure to violence in the media can increase children’s aggressive behavior in the short run.”<sup>197</sup> Although less secure in asserting a causal connection to long-term violence, the report does find a “small but statistically significant impact on aggression over many years.”<sup>198</sup>

These conclusions are based on research on the passive media, but it seems likely that the same conclusions would result from research on video games. The more active involvement of those games would seem likely to enhance violence or aggression-inducing effects. At any rate, the

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193. American Academy of Pediatrics, *Joint Statement on the Impact of Entertainment Violence on Children: Congressional Public Health Summit 1* (July 26, 2000), available at [www.aap.org/advocacy/releases/jstmtvec.htm](http://www.aap.org/advocacy/releases/jstmtvec.htm).

194. Committee on Communications, *Media Violence*, 95 *Pediatrics* 949 (1995), available at [www.aap.org/policy/00830.html](http://www.aap.org/policy/00830.html).

195. *Id.*

196. *On Media Violence: Hearing Before the S. Commerce Comm.*, 105th Cong. (2002) (statement of Donald E. Cook, M.D., President of Am. Ass’n of Pediatrics), available at [www.aap.org/advocacy/releases/medioltest.htm](http://www.aap.org/advocacy/releases/medioltest.htm).

197. REPORT OF THE SURGEON GENERAL, *YOUTH VIOLENCE: SUMMARY OF MAJOR EMPIRICAL RESEARCH FINDINGS* (2001) (App’x 4B), available at [www.surgeongeneral.gov/library/youthviolence/chapter4/appendix4bsec3.html](http://www.surgeongeneral.gov/library/youthviolence/chapter4/appendix4bsec3.html).

198. *Id.*

video game player is also a viewer and, at a minimum, whatever effect violence has on viewers would carry over to video games, with the additional possibility that the more actively involved player will face an enhanced effect.

While the more recent advent of video games, especially those with extreme violence set in a rich graphics environment, has not provided as long a period for research to develop to the same degree, there is a growing body of research demonstrating that video games raise similar or greater concerns than those raised by passive media studies. A study by Professors Craig Anderson and Karen Dill included a combination of correlational/demographic data and a laboratory experiment to examine the effects of violent video games.<sup>199</sup> Anderson and Dill concluded that the combination of the results from these two different study varieties supported the conclusion that playing violent video games causes real world violence.<sup>200</sup> They also argued that violent video games are a greater concern than violent television or films because of player identification with the game's aggressor and active participation in the violence. "In a sense, violent video games provide a complete learning environment for aggression, with simultaneous exposure to modeling, reinforcement, and rehearsal of behaviors. This combination of learning strategies has been shown to be more powerful than any of those methods used singly."<sup>201</sup>

A 2001 meta-analysis of the research on violent video games and real-world violence led Professor Anderson and Professor Brad Bushman to conclude that "[v]iolent video games increased aggression in males and females, in children and adults, in experimental and nonexperimental settings."<sup>202</sup> Experimental studies in laboratory settings showed that "short term exposure to violent video games *causes* at least a temporary increase in aggression,"<sup>203</sup> and demographic studies showed that "exposure to violent video games is correlated with aggression in the real world."<sup>204</sup> A more recent update of the meta-analysis presented three conclusions the author found important:

First, as more studies of violent video games have been conducted, the significance of violent video game effects on key aggression and helping-related variables has become clearer.

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199. See generally Anderson & Dill, *supra* note 78. The studies are also discussed in Saunders, *Restricting Access*, *supra* note 45, at 72-74.

200. Anderson & Dill, *supra* note 78, at 787 ("The convergence of findings across such disparate methods lends considerable support to the main hypothesis that exposure to violent video games can increase aggressive behavior.").

201. *Id.* at 788 (citations omitted).

202. Craig A. Anderson & Brad J. Bushman, *Effects of Violent Video Games on Aggressive Behavior, Aggressive Cognition, Aggressive Affect, Psychological Arousal, and Prosocial Behavior: A Meta-Analytic Review of the Scientific Literature*, 12 *PSYCHOL. SCI.* 353, 357 (2001).

203. *Id.* (emphasis added).

204. *Id.*

Second, the claim (or worry) that poor methodological characteristics of some studies has led to a false, inflated conclusion about violent video game effects is simply wrong. Third, video game studies with better methods typically yield bigger effects, suggesting that heightened concern about the deleterious effects of exposure to violent video games is warranted.<sup>205</sup>

The conclusions regarding violence in the passive media carry over to, and may be greater for, the active medium of violent video games.

It might be argued that the only thing the experiments demonstrate is correlation, rather than causation. While all that can ever be directly observed is correlation, and causation is always an inference from correlation, constancy makes for confidence in that inference. Correlation in social science is generally less than constant, so causation may seem less assured. A lack of constancy, however, does not preclude an inference of causation in many areas including, for example, first hand or second hand smoke and lung cancer, lead exposure and cognitive effects, calcium intake and bone mass, and a number of other common scientific conclusions. Indeed, the correlation in all these cases, except that of first hand smoke and lung cancer, is less than that for media violence and real world aggression.<sup>206</sup>

Reluctance to accept causation in the media violence case, while accepting it in others, may occur because of a perceived lack of physical chain of cause and effect. Smoke irritates the lungs and makes the inference that it causes cancer explainable, while an "irritation" of the mind lacks a physical explication. Recent work in neuroscience, however, indicates how this sort of psychological causation could work.<sup>207</sup>

Previously, the scientific community thought that the brain completed physical development in early childhood, but that turns out to be true only of the brain's cognitive regions. Babies, at birth, have as many synaptic connections between the nerve cells in the cognitive regions as adults, and the connections increase in the first two years to a level that is fifty percent greater than adults. At a point in the second year, as the child develops a basic understanding and construction of the world, this over-blooming of synapses is pared to the adult level. Recently it has been shown that there is a parallel in over-blooming of synapses during puberty in the prefrontal cortex, the brain's center for judgment and inhibition. In the teen years, there is a paring similar to that of late infancy, and the synapses that survive, in both cases, are those that are reinforced through

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205. Craig A. Anderson, *An Update on the Effects of Playing Violent Video Games*, 27 J. OF ADOLESCENCE 113, 120 (2004).

206. See Anderson & Bushman, *supra* note 202, at 481 (noting effect of violent video games on aggression is comparable to effect of condom use on risk of HIV infection).

207. For a general presentation of the recent science, see BARBARA STRAUCH, *THE PRIMAL TEEN: WHAT THE NEW DISCOVERIES ABOUT THE TEENAGE BRAIN TELL US ABOUT OUR KIDS* (2003).



interaction with the environment.<sup>208</sup> It then becomes clearer, at least as clear as the cellular effects of tobacco smoke, how a heavily violent environment, even a virtual one, may have an effect on what synapses remain active to be used in exercising future judgment. While courts remain unconvinced by the evidence of a causal link between violent video games and aggressive behavior,<sup>209</sup> it is important to note that each time a litigant asserts the danger of violent video games, the science must be examined anew to determine its current state.

Returning to virtual worlds, any negative impact from the content the player experiences should be at least as great as that from the passive media. Playing involves, at a minimum, watching what occurs on the monitor and listening to any accompanying sound. To the degree that film and television negatively impact on the physical and psychological health of minors, for example through the causation of real world violence, virtual worlds should have at least that impact. The additional impact argued to exist in video games may well also be present for virtual worlds. The player participates actively and identifies particularly with one of the characters, the player's avatar. That identification heightens media impact.

If sufficient danger exists in a particular virtual world, the same issues over regulatory means remain. Again, if the platform owner established a game that is thoroughly infused with violence and is unacceptable in the danger posed to youth, the platform owner might be required to add the filter activating signal already discussed.<sup>210</sup> On the other hand, when the violence comes from the actions of other players, those players may be incapable of adding a filtering signal. The best approach may be for the platform owner to make the decision on acceptability for children based on the capabilities built into the game. If a game is designed to allow for extreme violence among avatars, particularly any game that combines a

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208. See, e.g., Peter R. Huttenlocher & Arun S. Dabholkar, *Regional Differences in Synaptogenesis in Human Cerebral Cortex*, 387 J. COMP. NEUROLOGY 167, 176-77 (1997) ("Stabilization of randomly made synapses appears to be activity dependent. Synaptic contacts that are not included in neuronal circuits are gradually eliminated . . . . Synapse elimination, in contrast to synaptogenesis, seems to be at least to some extent environmentally regulated.").

209. See *Kendrick II*, 244 F.3d 572, 579 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001) (concluding that studies of violent video games do not prove they are more harmful than other violent forms of entertainment); *Entm't Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051, 1063 (N.D. Ill. 2005) (concluding that research has not established solid causal link between violent video games and aggressive behavior); *Video Software Dealers Ass'n v. Schwarzenegger*, 401 F. Supp. 2d 1034, 1046 (N.D. Cal. 2005) (indicating agreement with court's conclusion in *Blagojevich*); *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1188 (W.D. Wash. 2004) (concluding current state of research does not support causal link between exposure to violent video games and actual violence); *Interactive Digital II*, 200 F. Supp. 2d 1126 (E.D. Mo. 2002), *rev'd*, 329 F.3d 954, 958-59 (8th Cir. 2003) (rejecting evidence that violent video games lead to more aggressive behavior).

210. For a further discussion of the filter activating signal, see *supra* notes 181-83 and accompanying text.

virtual world with first person shooter capability, the owner might be required to attach the filter activating signal.<sup>211</sup>

### III. INTERESTS BEYOND PARTICIPATION

#### A. *Property Rights in Virtual Worlds*

Players in virtual worlds may accumulate property in those worlds; indeed, progress in the game may be measured by the accumulation of goods and virtual “real” property.<sup>212</sup> In *The Sims Online*, a player may purchase land, buy walls and a roof for a house, furnish the house, and put in a pool, or a player may buy an already completed home.<sup>213</sup> The possibility of purchasing these virtual assets implies that there is someone to provide them. That someone could be the platform owner, who would provide them as a reward for reaching certain levels, just as free games were provided in pinball games and an extra life in *PacMan* or a variety of other video games. The assets might also be made available for sale by other players. In that case, there must be rules of the game that allow the transfer of property, and for that possibility to have any significance, players must have rights to their assets, at least within the context of the game.<sup>214</sup>

Property disputes could certainly arise within the game. A player might put in considerable time to build a virtual luxury house with the intent of selling it at a profit in game currency in order to acquire some other assets. The owner of a neighboring property may develop or use that property in a way that diminishes the value of the speculator’s house. That could lead to a nuisance suit or the demand for zoning, and if zoning is put in place, the owners of undeveloped properties may argue that the zoning diminished the value of their property. These issues seem to de-

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211. Some games, like *Everquest*, do not provide the possibility of virtual homicide while others allow players to choose a server that permits killing. See Bradley & Froomkin, *supra* note 32, at 128-29 (explaining limitations and options for including/excluding killing in some virtual games).

212. See Lastowka & Hunter, *Laws, supra* note 42, at 29-51 (providing general overview of property in virtual worlds).

213. See *id.* at 30 (discussing some options in building or purchasing virtual home in *The Sims Online*). The currency necessary to purchase assets in *The Sims Online*, simoleans, may be amassed by having other players visit you, which requires the player to be online more regularly to have his or her house open or to have roommates to share the efforts at hospitality. See *id.* at 31.

214. If assets simply disappear or are taken away randomly, any effort to accumulate property would not seem to be worthwhile. Of course, if there are predictable ways in which property is lost or even an expected degree of randomness, the loss becomes part of the game. This would seem to be an opportunity for virtual insurance agents. If the rules allow for property to be taken by force, again that becomes part of the game and might be prevented through the accumulation of sufficient force on the part of the virtual property owner. The game loses its appeal when property, even when accumulated through effort, is nothing more than some fleeting possession in which the “owner” has no more expectation of possession than any other player.

mand legal resolution, but as earlier suggested, these issues should not be the subject matter of suit in real world courts.<sup>215</sup>

There are real world, at least hypothetical, analogies that also suggest that real world courts should avoid these issues. Suppose you play in an amateur basketball league and have a great outside shot. The league has had a three point rule for longer distance shots that adds to your total scoring, your enjoyment of the game and your team's likelihood of winning. The league, for some reason (having to include a gym without the three point circle, finding they can provide only one official per game whom they want to concentrate on other issues, etc.) decides to eliminate the three point shot. You enjoy it less, your scoring drops and your team does not make the playoffs. Yet, you should not be able to take this internal to the game dispute to an external court. In the same way, a player in a virtual world should have to live with the rules of the game, even if those rules change.

Consider another example. Suppose that an American League baseball team, before the adoption of the designated hitter, spent a great deal of money to acquire a pitching staff of players who were both good pitchers and good hitters. The hitting ability of those pitchers would have increased the acquisition price. Once the league adopted the designated hitter rule, the value of the pitchers on the staff dropped.<sup>216</sup> Yet, it seems unlikely that baseball team owners would be allowed to argue outside the game before a real world court. The dispute is internal to the game and needs to be resolved through baseball's own rulemaking and adjudication mechanisms. A real world court should not decide what the best rules are for baseball. If, on the other hand, the dispute is over the agreement the owners of baseball teams adopted in forming a league, then that is a real world agreement and should be subject to real world court adjudication. Thus, if some original agreement made the rules sacrosanct and not subject to later change by the Commissioner or owners, an owner negatively affected as suggested should have recourse to the real world courts.

The baseball example may seem an inapt analogy in that it implicated real world assets—the money in dollars expended in purchasing the pitchers—while the disputes suggested in the virtual world are purely game-related. That does not destroy the analogy, however, because it should be an even stronger argument; that is, if a rule change in baseball may not be contested in real world courts despite the real money involved, then disputes in virtual world, where virtual money is involved, should be even less suitable fodder for real world courts.

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215. For a discussion of the utility of real world courts in settling virtual world disputes, see *supra* notes 5-15 and accompanying text and *infra* notes 215-39 and accompanying text.

216. While the club owner might try to trade the pitchers to National League clubs, the teams on the demand side of the supply-demand equation have been cut in half, so the value should still drop.

An even more interesting response is that the dispute in the virtual world may, in fact, impact financial interests in the real world. There is an interaction between real world and virtual world economies that is surprising to non-players. Assets in virtual worlds are not simply traded or bought and sold using the currencies of the virtual worlds. They are bought and sold using real world currency.

Foreign exchanges in currency and direct investment operate constantly between the virtual worlds or Britannia, Rubi-Ka, Blazing Falls, and Norrath, on the one hand, and real-world bank accounts in the United States, Canada, Australia, and Korea on the other. The mechanisms of it are simple. Possessing some valuable asset in the virtual world . . . , I list it for sale in the section of eBay devoted to such auctions. The auction winner uses eBay payment mechanisms . . . to transfer the agreed price in the real world. I then agree with the auction winner on a meeting place in the virtual world, and when we meet there I hand over the in-world property.<sup>217</sup>

Indeed, a search of eBay's Internet Games section for "Blazing Falls," the town in *The Sims Online*, turns up property ranging from real estate to exotic animals to more common pets, all virtual, for sale for real world dollars.

Perhaps more interestingly, a search of the eBay Internet Games section for "simoleans," the currency of Blazing Falls, yields hundreds of offerings. Thus, gamers who do not want to take the time to build up currency by playing the game can use income from a real world job to advance their virtual world income. With such an active market, exchange rates may develop between the real world and virtual world markets. Using a market exchange rate between the currency of the virtual world of Norrath and the real world, it has been estimated that the economy of Norrath is larger than that of Bulgaria and that the effective hourly wage for playing in Norrath and accumulating capital convertible to dollars is \$3.42 per hour, higher than many third world wage scales.<sup>218</sup>

This disparity between the worth of work in virtual worlds compared to the third world led one group of "entrepreneurs" to hire real world workers to toil in virtual world mines to produce real world assets. An entity named Blacksnow Interactive reportedly set up a sweatshop in Tijuana in which Mexican laborers, rather than making shirts or auto parts, spent their days sitting at computer screens using a mouse to point and click in ways that accumulated assets. Blacksnow then sold the assets for real world currency.<sup>219</sup> The platform owner for the game in which the

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217. Lastowka & Hunter, *Laws*, *supra* note 42, at 38 (footnotes omitted).

218. *See id.* at 39 (citing economic studies contained in Castronova, *Virtual Worlds*, *supra* note 19, at 33).

219. *See id.* (explaining history of Blacksnow).

laborers toiled eventually cracked down on the operation, and Blacksnow sued the owner.<sup>220</sup> While the suit was later dropped, this indicates how actions seemingly limited to a computer game can have real world monetary consequences and can potentially lead to civil actions in real world courts.

The Blacksnow situation illustrates that a game can become more than just a game and suggests real world courts may encounter difficulty in avoiding cases arising in virtual worlds. There are clearly some cases where an exchange involving a virtual world asset merits consideration by a real world court. Consider a case in which a person purports to offer a "Blazing Falls" asset for sale on eBay. A player of *The Sims Online* offers the top bid and is named the auction winner. The buyer agrees to send payment to the seller and does so in a way that cannot be cancelled.<sup>221</sup> The buyer and seller agree to have their avatars meet at some location in the virtual world to transfer the asset, but instead, the seller's avatar never shows up, may not actually own the asset or the seller may not even play in that world. Here a cause of action by the buyer should be available. Note though that the real issue here is not the ownership of property in the virtual world. The issue is fraud in the real world, and the remedy should be in the real world. The case is really no different from any action over a failure to perform an act for which there is a contractual obligation. The act is virtual, but if a singer's failure to perform at an event is actionable, failure to show up and turn over the virtual asset would seem to merit similar treatment. In both cases the hallmark of the action is payment for the service in real world currency followed by the failure to perform.<sup>222</sup>

The more interesting cases occur when the purchased asset is handed over in the virtual world, but something happens to reduce the value of the asset. Such a case is similar to the Blacksnow example. The player amassed assets, either through working in the virtual world or by purchasing them in the real world and receiving them in the virtual world, and the platform owner then does something that lessens the value of the assets. While this may again be part of the game, in that the platform owner—through the end user license agreement—may have the right to make the change, it may be argued not only to affect the play of the game, but also to have a real world effect on the saleable value of assets held in the virtual

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220. *See id.* (describing backdrop to Blacksnow civil suit).

221. While this may be unwise, it could happen. eBay sellers and buyers accumulate feedback from transactions with each other. A smart purchaser would only send a certified check to someone with a good bit of positive feedback. Thus unscrupulous sellers will not last long before their feedback limits their sales. They may change their screen names, but then they operate with no feedback, diminishing the likelihood of someone sending cash or a certified check.

222. Misrepresentation of the asset would seem to merit similar treatment. Again the action is based on the payment of real world currency induced by real world statements about the characteristic of an asset. The fact that the asset is a virtual world asset should not change the fundamental nature of the cause of action.

world. Consequently, the virtual world holder of the assets brings suit against the platform owner.

Again, a real world example may cast some light on the amenability of the dispute to court action. Suppose the United States Post Office produces a stamp with a misprint, such as an air mail stamp with a plane printed upside down. That stamp quickly becomes a collector's item and its price in the hands of private owners soars. Suppose further that the Post Office, in an effort to stem what it sees as undesirable speculation based on its errors, tries to eliminate the stamp's value. It may not be able to recall all its stamp sales once the stamp is in private hands. It can certainly recall those that haven't been sold, but that would just increase the value of those stamps already in private hands. The most effective strategy might well be to print thousands of stamps with the same image. Flooding the market will reduce the value of the stamps already printed and will have the further effect of dampening the market for any future misprints, which would be presumed by collectors to likely suffer the same treatment.

If a collector paid what now seems an inflated price, should there be a cause of action against the Post Office? If the Post Office violated some real world rules regarding the issuance of stamps, then perhaps yes. But, if the only "violation" is the failure to follow an assumed practice in what might be thought of as the virtual world *Philatelist*, then an action against the Post Office would seem unfounded. So too in the online virtual worlds. A violation of the end user licensing agreement, like a violation of the Post Office's own rules, might be a basis for real world court action. A simple "violation" of the player's assumptions should merit no hearing in the real world's courts.

Another issue may arise where a player purchased an asset in the real world and transferred it in the virtual world, but the seller knows how, within the context of the game, to reclaim the asset or does something within the rules of the game to devalue the asset. If there was fraud in the original, real world dealings—for example, claims about the stability and permanence of the asset—again there may be real world litigation. But absent such fraud, the situation is similar to a virtual world encounter with no real world dealing—for example, a situation in which one avatar simply converts the virtual world property of another avatar. If that does not constitute real world theft, there should be no real world legal proceedings, and the issue should be left to resolution within the confines of the game.

There are those who reject this distinction between real world and virtual world crime and would presumably allow a real world conversion action or even a criminal charge, based on the virtual world theft of virtual property. Professors Lastowka and Hunter apply a number of philosophical theories of property to virtual property and conclude that the reasons for recognizing property rights in the real world apply with equal vigor to

property rights in virtual worlds.<sup>223</sup> If these rights have equal status, then it would seem that the law should recognize and enforce virtual property rights. Indeed, Professor Castronova notes that the Korean government prosecuted people who hacked into games and punished offenders more harshly when the person destroyed or transferred valuable game items.<sup>224</sup>

One last argument for protecting rights in virtual property should be addressed. Society's willingness to protect property is at least a major part of what gives property value. If property owners cannot be confident that their rights to that property will be recognized and enforced by society, the value attached to that property and the willingness to acquire or develop the property will decrease. But for this argument to dictate action, it must be determined whether the development and acquisition of property in a virtual world is a societal good.

Development of virtual property does make for a richer virtual world. That would seem to be good for the inhabitants (players) in the virtual world, and it would be good for the platform owner, who should then be able to attract more players. Thus, there may be some incentive for the virtual world itself, through the players or the platform owners, to protect property interests. That is, of course, only true if a world richer in property is the goal. If the players or owners want a virtual world in which "property" is treated more like goods in a state of nature, or a communist society for that matter, there will be no recognition of property rights.

Turning to the real world, it may be argued that there is not sufficient reason to protect virtual property. Yochai Benkler argued that the real answer to the question of who owned a virtual spoon is: *There is no spoon*.<sup>225</sup> It is true that there is no spoon, but there is computer code that causes there to appear to be a spoon. The code is in the real world, and intellectual property law protecting that code should be recognized in the same way intellectual property law may recognize rights to code in other situations, but the spoon is only in the virtual world. Intellectual property law may be justified by its role in making the real world richer by providing protection, and incentive, for the labor of creativity; however, the interest in protecting the product of that code in a virtual world is a different, and may be a weaker, interest. It may be the difference in society's protection against copying the text of a novel and society's concern about the internal workings of the novel. We protect novels because the world is a better

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223. See Lastowka & Hunter, *Laws*, *supra* note 42, at 43-50 (applying property theories to virtual property).

224. See Castronova, *Right to Play*, *supra* note 28, at 191 (discussing Korean government's response to theft or destruction of virtual property). Professor Castronova also makes the interesting point that, if virtual assets are seen as having sufficient value as to merit real world protection, real world governments may also see reason to tax them. See *id.* at 195-96.

225. See Yochai Benkler, *There Is No Spoon 1*, available at [www.yale.edu/law-web/jbalkin/telecom/yochaibenkerthereisnospoon.pdf](http://www.yale.edu/law-web/jbalkin/telecom/yochaibenkerthereisnospoon.pdf). Benkler's example is a dispute between a virtual world provider and a user, but the answer may nonetheless be correct independent of the disputants.

place with novels. While the world might in some sense be better with particular plot twists in a novel, society does nothing to require or prohibit story lines.<sup>226</sup>

Once again, the suggestion is that real world courts should be limited to real world issues. If code is appropriated, that code is in the real world, and intellectual property law should apply. If the function of the code is to cause a spoon to appear and be useable in a virtual world, what happens in that world should be outside the interest of real world courts. If, within the functioning of the platform, the spoon may be stolen in the virtual world, any remedy should be a virtual world remedy. If, on the other hand, the appropriation of the spoon occurs through hacking into the platform server, that should be treated the same as any other real world hacking into a server. The injury is not really to the property interest in a virtual spoon, it is to the property interest in the security of the server.

This answer may be seen as less than certain. Maybe the real world would be a better place with virtual world property protected than it would be with no such protection for virtual property. All the argument shows is that the willingness to protect real world property, to the degree that it is based on improving the real world, does not necessarily carry over to the protection of virtual property. Whatever gain may come from the protection of virtual world property must be balanced against the real world efforts and costs associated with that protection. I am simply suggesting that the balance should be struck in favor of letting virtual worlds protect their own property and leave real courts to the protection of real world property, including real world appropriation of code.

#### B. *Virtual World Crime*

Professors Lastowka and Hunter, in another one of their insightful pieces on virtual worlds, examined the application of criminal law to events in and touching on virtual worlds.<sup>227</sup> They come to a conclusion similar to that which I would accept, while perhaps treating the possibility of criminal actions for purely in-game activity more seriously than I would. They focus on the appropriation or destruction of virtual property and conclude that these acts generally should not lead to criminal liability, but that where there is exploitation of the game's software for financial gain, there may be room for criminal liability.<sup>228</sup>

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226. While society may choose to prohibit obscene material and the First Amendment allows that limitation on expression, *Kingsley International Pictures v. Regents of the University of the State of New York*, 360 U.S. 684 (1959), demonstrates that the story line cannot be the basis for a ban. *Id.* at 695 (finding unconstitutional prohibition on films portraying acts of sexual immorality as "desirable, acceptable or proper patterns of behavior").

227. See F. Gregory Lastowka & Dan Hunter, *Virtual Crimes*, 49 N.Y.L. SCH. L. REV. 293 (2004) [hereinafter Lastowka & Hunter, *Virtual Crimes*] (examining criminal law as applied to virtual world).

228. See *id.* at 294 (summarizing article's conclusion).



As a basis for discussion of the issue, Lastowka and Hunter use a situation that arose in *Ultima Online's* world Britannia.<sup>229</sup> A person playing the game managed to make off with a "Bone Crusher mace," seemingly a valuable asset within the game. Another person then offered to purchase the mace for real world money and the "thief" agreed. The question presented is then whether the "thief" is guilty of the real crime of selling stolen property. This is a subtly different and more interesting question than whether or not the original "theft" is subject to criminal liability. The original appropriation was entirely within the virtual world, and application of the machinery of real world criminal prosecution is more easily rejected. By addressing the sale there becomes a real world issue whether the mace is stolen property. I would still argue that it is not stolen property in any real world sense because, as Lastowka and Hunter agree, the Bone Crusher mace is not a real mace.<sup>230</sup> In a sense, there is no property to have been stolen. There is again code, but there is no suggestion of a violation of intellectual property law, no stealing of code and subsequent sale.

Lastowka and Hunter suggest that the best defense to the charge of selling stolen goods is not that there was no property to be stolen, but that within the rules of *Ultima Online*, Bone Crusher maces are made to be stolen. That is, the rules of the game allow this virtual theft, and just as no one would consider criminal liability for the defense stealing the ball in a basketball game, we should not consider the appropriation of the mace a real criminal act. As they explain: "The norms of game play supersede the standard rules of society, and the magic circle will only be broken if a player violates the game rules. A violation of game rules will result in a stoppage of play and a penalty of some sort . . . ."<sup>231</sup> The conclusion seems to be that, if the rules allow theft, then theft should not be addressed outside of the game.

The most interesting cases for the imposition of out-of-game penalties in other contexts is the case where a physical injury to a player results. There are cases in which players are injured, without any violation of the rules. A football player may suffer an injured knee from a perfectly legal tackle. Certainly, there should not be any out-of-game penalty imposed for legal play. There are also fouls that should not lead to criminal sanctions. If a soccer player tackles an opponent about to break away for a goal scoring opportunity, that is a foul sometimes known as a professional foul. It is against the rules but, if outside the penalty area, results only in the other team having an opportunity to put the ball in play with a free kick. The foul is considered a part of the game, and given that expectation, no outside penalties would be reasonable.

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229. See *id.* at 299-300 (discussing situation in *Ultima Online* where player traded virtual currency and chattels for U.S. dollars).

230. See *id.* at 302-03 (analyzing theft of virtual mace).

231. *Id.* at 305 (footnotes omitted).

Lastowka and Hunter seem to get beyond the rules of the game limitations on criminality and address the issue of acts that are not within the rules but are accepted or contemplated.

If stealing Bone Crusher maces is indeed a permissible activity pursuant to both the software and the contractual provisions in Ultima Online, it would seem that the theft of a Bone Crusher mace could not possibly constitute an unlawful conversion. Likewise, even though there is no common law doctrine that exempts in-game property thefts from the scope of criminal law, it seems highly unlikely that virtual property “crimes” which are entirely consistent with software and contractual game rules would be criminally prosecuted.<sup>232</sup>

If the requirement for non-prosecutability is that the “theft” be within the rules of the game, I would view that as too strong. If the theft is possible completely within the games and did not involve any real world fraud,<sup>233</sup> there should be no criminal action.

Lastowska and Hunter do point to an interesting case in which the Supreme Court was willing to look at the rules of a game. In *PGA Tour, Inc. v. Martin*,<sup>234</sup> the Supreme Court considered whether the rules of professional golf that prohibit golf carts were a violation of the Americans with Disabilities Act, when applied to a golfer with motor difficulties.<sup>235</sup> Lastowska and Hunter found some suggestion in that case that courts might impose real world rules on game play, even for virtual worlds.

There is some theoretical potential for the legal recognition of player entitlement to virtual property and to the legal prohibition of virtual property crimes . . . . [T]he PGA was essentially a game owner and it had expressly promulgated the rules of a competition that forbid Casey Martin to use a golf cart. Yet, the Supreme Court did not defer to the PGA’s rules of golf when they conflicted with the needs of a disabled player.<sup>236</sup>

It is true that the Court examined the rules of golf to determine the essentialness of the requirement that players walk, because that essentialness is a factor in applying the statute. The key here though is that the legal claim was that a real person was being discriminated against, and that discrimination is illegal unless an accommodation would change the essential nature of the game of professional golf. The real lesson to be drawn here is that, as with golf, the law should apply to platform owners who somehow discriminate against those who would like to play the game.

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232. *Id.* at 310 (footnotes omitted).

233. For a discussion of virtual world fraud, see *supra* notes 221-22 and accompanying text.

234. 532 U.S. 661 (2001).

235. *See id.* at 664 (describing issues presented in case).

236. Lastowka & Hunter, *Virtual Crimes*, *supra* note 227, at 310-11.

But that does not mean that a real world court should consider a claim that a world in which some variety of avatar, as opposed to some class of player, suffers a disability violates the law of the United States.<sup>237</sup>

There are other cases in which outside penalties seem justified. These cases result not just from a garden variety violation of the rules or even an intentional professional foul. Somewhere between a hockey player interfering with an opponent about to receive a pass and break away on goal and a player hitting another in the head with a hard swing of a hockey stick, some line must be drawn. Drawing that line may be difficult,<sup>238</sup> but one limitation would seem clear: without physical injury, or an attempt to cause serious injury, to a real person, real world criminal penalties are unjustified. A rape that occurs in the real world is essentially different from a rape that occurs in LambdaMOO.<sup>239</sup> And, if the killing of an avatar were to constitute real world criminality, efforts to prevent children from playing violent video games would have met with far more success than they thus far have.

### C. *The Rights of Avatars*

Raph Koster, in 2000, wrote *A Declaration of the Rights of Avatars*,<sup>240</sup> drawing guidance from the Bill of Rights and the French Declaration of the Rights of Man and of the Citizen. He asserted that “[a]vatars are created free and equal in rights,” that avatars have, among other rights, “the right to be treated as people and not as disembodied, meaningless, soulless puppets . . . [with rights to] liberty, property, security, and resistance to oppression.”<sup>241</sup> Koster included comments from those to whom the declaration was first sent. The most telling is: “Rights of avatars? Why not of ‘chess pieces’? Maybe the players have rights, but avatars are just representations.”<sup>242</sup> That pretty much sums up the conceptual difficulty in assigning rights to avatars. There is nothing to an avatar other than code or magnetic memory in a server. There is nothing that would be considered

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237. For a discussion of virtual worlds as places of public accommodation, see *infra* notes 246-47 and accompanying text.

238. See Jeff Yates & William Gillespie, *The Problem of Sports Violence and the Criminal Prosecution Solution*, 12 CORNELL J.L. & PUB. POL’Y 145, 146 (2002) (noting that “society remains unable to find a way to effectively extricate unnecessary violence from . . . sports”).

239. *But see* Castronova, *Right to Play*, *supra* note 28, at 192 (“[T]he victims seem to have truly suffered. Who then is to say that there is a difference between real rape and synthetic rape?”) (footnotes omitted).

240. Raph Koster, *A Declaration of the Rights of Avatars*, <http://www.raphkoster.com/gaming/playerrights.shtml> (last visited Sept. 29, 2006).

241. *Id.*

242. *Id.* (explaining administrator’s comments on original declaration of avatar rights).

a person capable of holding whatever rights might be recognized for such entities.<sup>243</sup>

The refusal to multiply entities may clear up any confusion underlying the issue of what rights may obtain in the context of virtual worlds. For example, as far as freedom of speech may be enforced by real world courts, it is as a right of the players, rather than of avatars. As indicated earlier, players' freedom of expression has force against government interference.<sup>244</sup> Players may also assert a freedom of expression against interference by platform owners, but this will be a matter of the contract between player and owner.<sup>245</sup> Where the assertion becomes almost metaphorical is in the assertion that the avatars themselves have expression rights against the wizards of the platform owner. Again, there is nothing there as a repository of rights.

Koster's assertion that avatars are equal seems an assertion of rights like those guaranteed by the Equal Protection Clause. Here, too, if the real world governments of the states treat real people who wish to play in virtual worlds differently, there are equal protection implications. A more likely application of law would be in the case of a platform owner who decided to treat people wishing to play differently. Assuming that platforms could be argued to be a public accommodation, various statutes barring discrimination could apply.<sup>246</sup> It seems likely that a platform owner who decided that certain racial or ethnic minorities would not be allowed to participate, or did the same on the basis of sex, would run afoul of federal or state antidiscrimination statutes. If, on the other hand, the game treated certain types of avatars differently, then that would seem an inapt subject for real world courts. If a game allowed players to experience virtually the Civil Rights era in the American South, those whose avatars were African-American would not have a real world court action contesting the refusal of virtual world registrars of voters to register them.

Similar analysis should apply to discrimination on the basis of handicap. Perhaps platform owners might be required to accommodate those real world players who wish to participate in the virtual world. But, that would be due to the Americans with Disabilities Act's<sup>247</sup> application to a

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243. Although mental states may be thought of as electro-chemical states and persons may be nothing but a collection of strings, which are themselves nothing but energy, we still do not consider all electro-magnetic states as persons. Whatever it may take to be considered a person, my microwave is not included.

244. For a discussion of players' freedom of expression, see *supra* notes 45-78 and accompanying text.

245. For a discussion of this contract matter, see *supra* notes 81-125 and accompanying text.

246. If the Junior Chamber of Commerce and the Boy Scouts could be held by state courts to be places of public accommodation for purposes of antidiscrimination laws, the idea of a platform containing a virtual world being similarly treated does not seem too far fetched. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984).

247. 42 U.S.C. §§ 12101-213 (2006).

real world situation. That is a far different situation from an internal claim to be free from discrimination on the basis of, or a demand for accommodation to address, the disability of an avatar. If an avatar has certain disabilities, perhaps ones that may be overcome or cured through play of the game and the attainment of powers, it seems odd to assert that other avatars are not allowed to discriminate against and must provide accommodation to the disabled avatar.

There is an interesting response to player complaints over the rules in a virtual world. In real world political theory, consent is an important issue. If those subject to the laws of a jurisdiction can be said to have consented to be governed in the manner used in that jurisdiction, the laws gain legitimacy, and refusal to adhere to the law may be seen as illegitimate. In the real world, consent may be difficult to establish. In most or all societies, finding an actual consent by the citizens is problematic. Most people are simply born into a state and cannot be said to have consented to anything. The naturalized citizen has had a moment of consent and the player in virtual worlds may be seen as making the same commitment. The naturalized citizen's oath may find its equivalent in the player's accepting the end user licensing agreement. Both are moments at which there is agreement to be bound by the laws or rules of real world states or virtual world regimes.

There can also be arguments for consent of those who were born into a real world state.<sup>248</sup> By accepting the benefits of the society, one may be argued to be bound by the laws of that society. By failing to leave the country in which one found himself or herself born, one might be argued to have tacitly consented to be governed by the laws and political process of that country. These arguments are not compelling, however. It may be difficult to avoid accepting the benefits of society. Indeed, accepting benefits such as education may be mandatory. It is also difficult to leave the country of one's birth, and remaining may not legitimately be taken to constitute tacit consent. Leaving would require disengagement with one's family and friends. It also requires a country that will accept the emigrant and allow him or her to earn a living.

Tacit consent, in addition to the explicit consent already discussed, may be more easily established for players in virtual worlds. One does not, speaking from the point of view of the player rather than the avatar, simply find oneself born into a world. Rather the player chooses to participate in the virtual world. If it was not a wise choice, the player can terminate play in that world and move to another virtual world. It is true that, after playing some time in one world, a player may have amassed assets or powers that would be lost in leaving that world, so a parallel might be seen to the difficulties in leaving a country in the real world. For example, the player might lose contact with other player's avatars that remain in the

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248. For a discussion of the difficulty of establishing such tacit consent, see PHILIP SOPER, *A THEORY OF LAW* 65-67 (1984).

original world. There are, however, differences. Finding another platform owner willing to accept your monthly subscription fee is certain to be easier than finding a country willing to accept your immigration. Furthermore, to the degree that a real world market has developed for virtual world assets, there is a way to transfer at least some of the time and “work” spent in one virtual world to another. While persons moving from one country to another will no longer be licensed to teach or practice medicine or law, one may sell a Bone Crusher mace if leaving Britannia and have real world money to purchase an asset in the virtual world to which one is moving.

This ability to move and dispose of assets also provides market-based mechanisms to make virtual worlds conform to the desires of the players. A world that is losing players to a world more attentive to the wishes of players will see income drop. Those worlds that players find more acceptable will see the platform owner’s income grow. There is also likely to be an effect on the real world market value of virtual world assets. As more people leave a virtual world, there will be an increase in the market supply of assets in that world and a concomitant drop in the prices for those assets. As more people move to another virtual world, there will be an increase in demand for those assets and a rise in the prices of those assets.

These economic aspects could also be the mechanism through which any demands for democracy find force. In the real world, revolution is a dangerous thing for both revolutionary and ruler. Revolutionaries may find themselves imprisoned or executed, and rulers may find themselves not only deposed, but dead. In virtual worlds, players may find themselves suspended or their playing rights terminated, but there seems little that may be done to the wizards of the platform owners without the consent of the owners themselves. The only leverage against the platform owner is economic. A world that is not attractive to players will produce less income to the owner. If democracy is a factor in increasing attraction, that will be an incentive toward allowing democratic aspects, even if those incentives must be balanced against other interests of the platform owner.

There is also an interesting reliance among some writers on the United States Constitution as a source of rights for avatars or players. As the discussion on free speech indicates,<sup>249</sup> there is no direct application of the Constitution to platform owners because they are not state actors. There may still, however, be a role for constitutional values in discussing the relations between platform owner and player/avatar. Just as natural law concepts may serve as a source of values that courts may adopt as limits on the powers of the legislature, the Constitution may serve as a touchstone for arguments over the relationship between owner and player/avatar. Neither has real force, until brought within the law of the world at

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249. For a discussion of free speech in virtual worlds, see *supra* notes 45-78, 81-125 and accompanying text.

issue. Natural law may lead to state or national law, and constitutional values may guide the development of rules in virtual worlds.<sup>250</sup>

#### IV. CONCLUSION

Real world courts should be reluctant to take on disputes arising in or out of virtual worlds. Issues of access to virtual worlds are real world issues, and courts should certainly entertain First Amendment challenges where access is restricted. Issues growing out of the contracts involved, or end user license agreements, are also real world issues. The same is true for allegations of violations of intellectual property rights or of computer hacking laws. For other claims, there should be a real world right or interest at stake and even then there should be some reluctance. In cases where there is a financial impact within the real world, the basis for the complaint should be something that occurred in the real world, not a virtual act that consequently impacted the real world because of markets that have allowed a secondary effect outside the virtual worlds. There may well be disagreement with some of the specific conclusions suggested herein, and the surety of the conclusions reached may be disputed. It is hoped, however, that the caution suggested in real world courts addressing virtual world complaints is persuasive, and that the sort of analysis undertaken is adopted, whatever specific conclusion is reached on particular issues.

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250. See Berman, *supra* note 97, at 1289-1305 (analyzing constitutional values in virtual worlds).