User-Generated Content and Virtual Worlds

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ABSTRACT

Many legal commentators have claimed that virtual worlds owe their popularity to their focus on user-generated content and user creativity. While this is true in part and authorial freedom may draw consumers to virtual worlds, user-generated content can also pose risks to virtual world business from both an aesthetic and legal perspective. A significant tension exists between permitting participants to create content freely and building a successful virtual environment. In some instances, user-generated content can overwhelm virtual worlds. The future of user-generated content in virtual worlds is not clear, given the significant practical and legal problems that accompany user-generated content.

TABLE OF CONTENTS

I would like to thank the editors of this Symposium for inviting me to speak about user-generated content and virtual worlds. The two phenomena can be and have become closely related.[1] Yet, it is the tension between virtual worlds and user-generated content, and not the commonalities between them, that I would like to focus on in this short article.

While every virtual world entails something that might be called user-generated content, virtual worlds vary in the extent to which they facilitate user creativity. Participants in virtual worlds often desire and delight in authorial freedoms, so one might think that more user-generated content in virtual worlds is always a better thing. But in fact, the freedom of participants to create content as they wish can be difficult to harmonize with the business of building compelling virtual environments. While user-generated content, defined broadly, may be the key ingredient that makes virtual worlds appealing, it is an ingredient that can overwhelm virtual worlds as well.

I begin this short article in Part I with some efforts at definition, given that both "user-generated content" and "virtual worlds" are terms of recent origin. In Part II, I explore some of the issues raised when user-generated content is made a central part of a virtual world, focusing on the difference between *Second Life* and *World of Warcraft*.

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1. Cory Ondrejka, former CTO of Linden Lab, has long been an eloquent proponent of the union of user-generated content and virtual worlds. *See, e.g.,* Cory Ondrejka, *Escaping the Gilded Cage: User Created Content and Building the Metaverse,* 49 N.Y.L. SCH. L. REV. 81 (2004). For his further writing, see Papers by Cory Ondrejka, Social Science Research Network, http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=374671 (last visited Mar. 27, 2008). For more recent investigations focused on intellectual property issues, see Erez Reuveni, *Authorship in the Age of the Conducer,* 54 J. COPYRIGHT SOC'Y U.S.A. 285 (2007) [hereinafter Reuveni, *Authorship*], and Todd David Marcus, Note, *Fostering Creativity in Virtual Worlds: Easing the Restrictiveness of Copyright for User-Created Content,* 52 N.Y.L. SCH. L. REV. 67 (2007) (focusing on copyright issues in *Second Life*).

I. DEFINITIONS

A. "Content"

Generally speaking, the word "content" is used, in the broadcast and entertainment industry, as a term to describe a particular form of information that can be presented to an audience. It is generally synonymous with some form of creative work. Content is understood to include things such as movies, music, and books.

If we use this framework, user-generated content must be a subspecies of traditional content. User-generated content is videos posted on YouTube,[2] photos uploaded on Flickr,[3] book reviews posted on Amazon.com,[4] and personal narratives posted on discussion boards. This is all creatively produced "authorial" content and it is therefore protected by copyright law.

Still employing this framework, in the case of virtual worlds, we might look for signs of user-generated content by asking what authorial efforts of participants might be protected by the laws of copyright. This is a useful way to think of these issues and it raises some interesting problems both in terms of copyright law and in terms of ownership rights.[5] But defining user-generated content this narrowly in the case of virtual worlds might be a mistake, for there is a larger account of user-generated value that this description misses.

Virtual worlds are appealing primarily because they are social spaces. Yet the value at issue here—social presence—is generally not within the scope of any existing intellectual property laws. From a market perspective, the mere presence of individuals online tends to produce valuable information for virtual world owners as well, and this information might also be seen as a form of content generated by users. For instance, when people use online media, they often generate valuable information as a byproduct of their activities.

People visiting chat rooms make those rooms valuable simply by virtue of their presence as speakers and listeners. Those using

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2.   YouTube, http://youtube.com/ (last visited Mar. 27, 2008).

3.   Flickr, http://flickr.com/ (last visited Mar. 27, 2008).

4.   *See, e.g.,* Amazon.com, Customer Reviews of THE LONG TAIL, WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE, http://www.amazon.com/review/product/ 1401302378/ref=dp_top_cm_cr_acr_txt?%5Fencoding=UTF8&showViewpoints=1   (last visited Mar. 27, 2008) (providing 169 customer reviews of Chris Anderson's book, *The Long Tail: Why the Future of Business is Selling Less of More*, discussed *infra* note 15).

5.   For one careful investigation of the question, see Erez Reuveni, *On Virtual Worlds: Copyright and Contract Law at the Dawn of the Virtual Age*, 82 IND. L.J. 261 (2007) [herinafter Reuveni, *On Virtual Worlds*].

search engines automatically generate data consisting of queries and link selection patterns. Those who visit e-commerce sites generate Web-surfing histories and purchasing patterns. All of this data can have significant commercial value and, therefore, might be understood as a form of content generated by users.

This new content is largely a byproduct of the new capacity and efficiency of information recording and processing technologies. If we contrast the act of reading offline with reading online, we can see how things have changed. Take the example of a person today that goes to a drug store, purchases a newspaper (with cash), and then spends a couple hours reading it. The newspaper is clearly content. The acts of traveling, purchasing, and reading the paper are not content. Yet when analogous activities occur online, the information picture is different.

As Professor James Boyle observed a decade ago, the Web reads and writes us.[6] Though information is free, this "freedom" entails "an intensification of the mechanisms of surveillance, public and private, to which we are currently subjected."[7] The surveillance can be understood as content (data about collective and individual behavior patterns) which is in turn appropriated and monetized by those who own the technologies that capture and contain the data.

We might ask how authorial content relates to this kind of non-authorial yet valuable information.[8] One key difference is in legal ownership. Non-authorial content, such as behavioral data, is generally understood as the property of the person who records the information, not the property of the persons being recorded. If the persons being recorded have any right to object to the monetization of this data, it is via a right of privacy, not property. Consider the recent objections to Facebook's Beacon project, which displayed data about Facebook user product and service purchases to other users as a

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6. James Boyle, *Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors*, 66 U. CIN. L. REV. 177 (1997); *see also* Tal Z. Zarsky, *Information Privacy in Virtual Worlds: Identifying Unique Concerns Beyond the Online and Offline Worlds*, 49 N.Y.L. SCH. L. REV. 231, 235 (2004) ("Technological changes that directly affect the privacy discourse proceed beyond surveillance applications, and include advances in the ability to store and retrieve information."). Professor Zarsky's article examines how traditional approaches to privacy apply differently in virtual worlds. *See* Zarsky, *supra*.

7. Boyle, *supra* note 6, at 204.

8. For some early and interesting thoughts on this subject, see Pamela Samuelson, *Privacy as Intellectual Property?*, 52 STAN. L. REV. 1125 (2000).

means of generating advertising revenues.[9] The outcry over Beacon was over user privacy, not user property.[10]

This privacy/property divide caused by new data recording technologies has raised issues for copyright law as well. Over a hundred years ago, the United States Supreme Court decided that photographers, not their subjects, were the owners of the property rights in photographic images.[11] Oscar Wilde certainly generated the content of his photograph in some sense, but his photographer was granted the right to exploit the copyright in Wilde's photographic image.[12]

This Supreme Court ruling, whatever its deep wisdom, did not ultimately sit well with society. In some ways, the failure of the photographic subject to gain an interest in the photograph gave birth to the right of privacy and its subsequent statutory codification.[13] The right of privacy eventually gave birth to the modern right of publicity, which might have been asserted by Oscar Wilde if he were alive and the subject of a photograph today. So, we can see that the valuable information made possible by the technology of photography ultimately created two strands of rights: the copyright interest of the photographer and the privacy and publicity interests of the subject. And we might ask whether those users who are generating new forms of value today might also seek to claim ownership over the new form of content (behavioral data) they are generating on the Internet.

B. *"User"*

The term "user" adds a technological dimension to questions of authorship and ownership. It asks not just "who owns what," but how legal ownership is mediated by technological things. The term "user" implies a dichotomy between those who make these things and those who use them. In order to have a user, there must be a thing (a technology) that is being used and a class of persons who produce that technology. There also needs to be a class of persons using that

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9.   Louise Story & Brad Stone, *Facebook Retreats on Online Tracking*, N.Y. TIMES, Nov. 30, 2007, at C1.
10.   *Id.* ("Two privacy groups said . . . that they were preparing to file privacy complaints about the system with the Federal Trade Commission.").
11.   Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60-61 (1884).
12.   *Id.* at 60.
13.   *See generally* 2 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:4 (2d ed. Thomson/West 2007) (1987) (tracing the evolution of the right of privacy); Woodrow Barfield, *Intellectual Property Rights in Virtual Environments: Considering the Rights of Owners, Programmers and Virtual Avatars*, 39 AKRON L. REV. 649, 676 (2006) (noting that states protect rights of publicity with common law and statutory mechanisms).

technology to generate content. Thus, the term user-generated content implies at least two parties (makers and users), as well as at least two things (tools and content). If we take the example of the photograph discussed above, we can locate two social classes of camera-producers and photographers and two artifact classes of cameras and photographs.

Looking at today's "users," we often understand this term as closely aligned with a variety of other terms, such as consumers, readers, purchasers, and audiences.[14] When the term "user-generated content" is employed by the media, it often carries all of these connotations. Generally, the class of users is understood to be broad enough to encompass the public at large. For many media commentators, user-generated content is often described as both a new form of business and a type of grassroots cultural revolution.[15] The claim seems to be that, whereas professionals generated content in the past, business models today are centered on distributing tools and allowing former "consumers" to produce their own content.

Yet the true novelty of the situation is debatable. Artists have, for quite a long time, been users of technologies. Historically, most artists and authors have purchased creative implements, such as cameras, musical instruments, or typewriters. The question we might ask is: why do technologies matter more now? Why would we today use the term "user," rather than the traditional terms "artist" or "writer"?

There are at least two answers. The first has to do with professionalism. The title of "artist" might be restricted to those who are in the professional business of selling their work. If that is so, not everyone can be an "artist," but everyone can be a "user." The other answer has more to do with the distributive capacities of computer networks. Dan Hunter and I have observed how information networks are radically decentralizing the various traditional stages of copyright creation, selection, and distribution.[16] The contemporary interest in "users" may be not so much about the use of tools, but about how those

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14. Professor Dan Hunter and I have, in our writings in this area, preferred the term "amateurs" to describe these individuals. *See* Dan Hunter & F. Gregory Lastowka, *Amateur-to-Amateur*, 46 WM. & MARY L. REV. 951, 956 n.11 (2004). Professor Julie Cohen has suggested that the term actually fragments into at least three divergent narratives about the relationships between groups and technologies. *See* Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347, 348 (2005).

15. *See* CHRIS ANDERSON, THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE (2006).

16. *See* Hunter & Lastowka, *supra* note 14.

who own and profit from user-generated content employ the Internet as a distribution platform.

The Web has given amateur content creators (who have always existed) the newfound ability to produce work more cheaply, connect across great distances, and entertain one another by sharing their work. This change in our information landscape is novel and noteworthy, and should lead us to revisit and revise our laws of intellectual property. But, from a critical vantage, is user-generated content a good thing for society? The amateur-to-amateur information landscape is clearly part of our modern environment, provided by Web sites such as YouTube,[17] Flickr,[18] and Wikipedia.[19] Yet, people have divergent views of the desirability of this change.

The most ardent supporters of user-generated content usually frame it as a new form of popular empowerment. In media studies, the most well-known proponent of this view is Henry Jenkins of the Massachusetts Institute of Technology, who has written popular and perceptive works about participatory fan cultures.[20] Jenkins generally praises what he sees as the trend toward increased collaboration between audiences and the entertainment industry. According to Jenkins, user-generated content allows the collective mind of the audience to criticize and personalize popular narratives.[21] As a result, entertainment industries are being forced into closer working relationships with their consumers.

In the legal arena, perhaps the most optimistic appraiser of user-generated content is Harvard Law Professor Yochai Benkler, who praises the potential of "peer production" in his recent book, *The Wealth of Networks*.[22] Benkler is enthusiastic about the democratic and transformative potential of user-generated content. He argues that when the broader public possesses the tools to create and share their information, they have the capacity to free themselves, in their patterns of consumption and production, from traditional corporate

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17.   YouTube, *supra* note 2.

18.   Flickr, *supra* note 3.

19.   Wikipedia, http://wikipedia.org/ (last visited Mar. 27, 2008).

20.   *See* HENRY JENKINS, CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE (2006) [hereinafter JENKINS, CONVERGENCE CULTURE]; HENRY JENKINS, TEXTUAL POACHERS: TELEVISION FANS AND PARTICIPATORY CULTURE (1992) [hereinafter JENKINS, TEXTUAL POACHERS].

21.   *See generally* JENKINS, CONVERGENCE CULTURE, *supra* note 20 (describing the different authorial dynamics of new media).

22.   *See* YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 126-27 (2006) ("Consumers are changing into users—more active and productive than the consumers of the industrial information economy.").

domination of the media.[23]   So, from the standpoint of liberal democracy, user-generated (or "peer produced") content offers an improvement over the past hierarchical models of information production and distribution.

However, there is a counter-story about the user-generated content revolution. The most well-known criticism of this type of content, which has been made at least since the dawn of the Web, is that when amateurs command the limelight, the public loses sight of the cultural high ground. If content is free, the thinking goes, it must also be worthless.[24]   I want to move quickly past this argument because it seems to me quite obviously wrong. Even if there is really nothing worthy to be found on YouTube, Flickr, or Wikipedia, simply consider the fact that the Linux operating system powers the servers of Google search engines. It is hard to deny that *much* of what is free is of low value, but *some* is not; and some of what is professionally produced is often not worth our time.[25]

Prejudice against amateur creation is hard to extinguish. Andrew Keen delivered the keynote address to this Symposium with a fairly familiar "free must be junk" argument.[26]   For such a myth to persist so long in the face of so much contrary evidence, it seems explicable primarily through ideology. For some, artistic and cultural value always requires a price tag. Somewhere, surely, there must be an encyclopedia salesman finding comfort in this.

There is a better critique, however, to be made about user-generated content. The gist of it is this: even when people are willing to give away good things for free, profit-oriented firms will attempt to find ways to monetize that process. Investors and entrepreneurs in Silicon Valley are by now well aware that peer production can be profitable, and this knowledge has spurred a generation of Web 2.0 (or is it 3.0 now?) would-be moguls. Web 2.0 start-ups borrow liberally from rhetoric of collaboration, community, and empowerment, but the driver here is money.

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23.   *Id.*
24.   *See, e.g.,* ANDREW KEEN, THE CULT OF THE AMATEUR: HOW TODAY'S INTERNET IS KILLING OUR CULTURE (2007) (arguing that amateur user-generated content lacks real value, and that the increase in such content is causing a reduction in the quality of previously "valuable" content).
25.   *See generally* JESSICA LITMAN, DIGITAL COPYRIGHT 101-05 (2001) (explaining that monetary incentives are not always required to generate quality content in the digital environment).
26.   Andrew Keen, Keynote Address at the Vanderbilt Journal of Entertainment and Technology Law Symposium: User-Generated Confusion: The Legal and Business Implications of Web 2.0 (Nov. 2, 2007), *available at* http://law.vanderbilt.edu/publications/ journal-entertainment-technology-law/index.aspx.

Perhaps the most obvious way to profit from user-generated content is simply to acquire, or find a way to otherwise monetize, the intellectual property rights in the content that users generate. Many Web 2.0 companies are designed to allow tool generators to monetize user-created value. Technology and contract facilitate these business models. In order to use most online services, users generally must indicate that they assent to multi-page terms of service. If one reads those terms, they often require that the user provide the platform owner with a license to use all content generated during the use of the service.[27] Another standard contract term allows those who host the content to exclude the user from access at any time, thereby potentially denying the user access to the content that has been generated.[28]

If these licensing terms are enforceable, they essentially set up these online services as walled gardens, where users are invited in to create content for the benefit of the owners. The users, however, can be evicted from the garden at any time, though their content remains in the hands of the company.[29] Viewed from this perspective, the business dynamics found in much of Web 2.0 are hardly about popular empowerment at all. Nicholas Carr puts the counter-story succinctly:

> Web 2.0's economic system has turned out to be, in effect if not intent, a system of exploitation rather than a system of emancipation. By putting the means of production into the hands of the masses but withholding from those same masses

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27. For instance, in relation to user-generated content posted on Facebook, the site's Terms of Use provide:

> By posting User Content to any part of the Site, you automatically grant, and you represent and warrant that you have the right to grant, to [Facebook] an irrevocable, perpetual, non-exclusive, transferable, fully paid, worldwide license (with the right to sublicense) to use, copy, publicly perform, publicly display, reformat, translate, excerpt (in whole or in part) and distribute such User Content for any purpose, commercial, advertising, or otherwise, on or in connection with the Site or the promotion thereof, to prepare derivative works of, or incorporate into other works, such User Content, and to grant and authorize sublicenses of the foregoing.

Facebook, Terms of Use, http://www.facebook.com/terms.php (last visited Mar. 27, 2008).

28. Again, Facebook's Terms of Use provides a good example of these termination rights:

> [Facebook] may terminate your membership, delete your profile and any content or information that you have posted on the Site or through any Platform Application and/or prohibit you from using or accessing the Service or the Site or any Platform Application (or any portion, aspect or feature of the Service or the Site or any Platform Application) for any reason, or no reason, at any time in its sole discretion, with or without notice . . . ."

Id.

29. Maria Aspan, *Quitting Facebook Gets Easier*, N.Y. TIMES, Feb. 13, 2008, at C1 (quoting a Facebook user as saying: "'I honestly did NOT know they kept your data after you deactivated your account.'"). The Aspan article suggests that Facebook may be responding to public opinion by making it easier for users to delete their information. *Id.*

any ownership over the product of their work, Web 2.0 provides an incredibly efficient mechanism to harvest the economic value of the free labor provided by the very, very many and concentrate it into the hands of the very, very few.[30]

Carr's "very, very few" in this case are likely companies like Google (which monetizes peer production of Web content and links),[31] Yahoo's Flickr (which monetizes peer production of photography),[32] Facebook (which monetizes peer production of social networking maps online),[33] and Google's YouTube (which monetizes user-generated videos).[34]

This might make one skeptical of claims about the normative superiority of peer production. If the Web 2.0 economy is generating profits that are not shared with the multitudes doing the sharing, is this system so superior to the "non-sharing" system? Professor Lawrence Lessig says:

> [T]here's an important distinction developing among "user generated content" sites — the distinction between sites that permit "true sharing" and those that permit only what I'll call "fake sharing."
>
> A "true sharing" site doesn't try to exercise ultimate control over the content it serves. It permits, in other words, content to move as users choose.
>
> A "fake sharing" site, by contrast, gives you tools to make [it] *seem* as if there's sharing, but in fact, all the tools drive traffic and control back to a single site.[35]

Perhaps non-profit institutions like Wikipedia and the Free Software Foundation provide good examples of Lessig's "true sharing."[36] These organizations encourage participation in peer production strategies and, at the same time, espouse communitarian goals. But they are only part of the Web 2.0 landscape. User-generated content can take different paths, some of which may offer society a mixed return.

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30.   Web   2.0ier   Than   Thou,   http://www.roughtype.com/archives/2006/10/web_20ier_than.php (Oct. 23, 2006, 00:01).

31.   Google, http://www.google.com/ (last visited Mar. 27, 2008).

32.   Flickr, *supra* note 3.

33.   Facebook, http://www.facebook.com (last visited Mar. 27, 2008).

34.   YouTube, *supra* note 2.

35.   The Ethics of Web 2.0: YouTube vs. Flickr, Revver, Eyespot, Blip.tv, and Even Google, http://lessig.org/blog/archives/003570.shtml (Oct. 20, 2006, 05:12); *see also* Stuck in the 20th Century (Or the Latest to Effectively Call Me a Communist, While Technically Calling Me a Communalist), http://lessig.org/blog/2006/10/stuck_in_the_20th_century_or_t.html (Oct. 23, 2006, 02:55) (responding to Nick Carr's comments).

36.   *See* Free Software Foundation, http://www.fsf.org/ (last visited Mar. 27, 2008); Wikipedia, *supra* note 19.

2008] USER-GENERATED CONTENT 903

C. "Virtual Worlds"

Virtual worlds have been the subject of much legal writing during the past few years,[37] yet they are still largely on the fringe of

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37.   *See, e.g.,* Jason A. Archinaco, *Virtual Worlds, Real Damages: The Odd Case of American Hero, the Greatest Horse that May Have Lived,* 11 GAMING L. REV. 21 (2007) (discussing the value of goods, namely a race horse, in a virtual world); Jack M. Balkin, *Virtual Liberty: Freedom To Design and Freedom To Play in Virtual Worlds,* 90 VA. L. REV. 2043 (2004) (discussing the real-world commoditization of virtual worlds, and the First Amendment repercussions); Mark Bartholomew, *Advertising in the Garden of Eden,* 55 BUFF. L. REV. 737 (2007) (discussing advertising in virtual worlds); Caroline Bradley & A. Michael Froomkin, *Virtual Worlds, Real Rules,* 49 N.Y.L. SCH. L. REV. 103 (2004) (considering the extent to which virtual worlds might be designed to allow the testing of legal rules); Bryan T. Camp, *The Play's the Thing: A Theory of Taxing Virtual Worlds,* 59 HASTINGS L.J. 1 (2007) (considering the potential tax issues that surround virtual worlds); Joshua A.T. Fairfield, *Virtual Property,* 85 B.U. L. REV. 1047 (2005) (exploring the notion of "virtual property," and concluding that traditional property laws can act to limit the costs of the Internet anticommons); Eric Goldman, *Speech Showdowns at the Virtual Corral,* 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 845 (2005) (considering the tension between free speech rights and private property/contract rights in a virtual world); James Grimmelmann, *Virtual Worlds as Comparative Law,* 49 N.Y.L. SCH. L. REV. 147 (2004) (considering the law *in* virtual worlds, rather than the law *of* virtual worlds); Andrew Jankowich, *EULaw: The Complex Web of Corporate Rule-Making in Virtual Worlds,* 8 TUL. J. TECH. & INTELL. PROP. 1 (2006) (noting that the rules of conduct that govern virtual worlds are products of a centralized process of lawmaking that is non-negotiated, modifiable, and proprietor-friendly); Andrew E. Jankowich, *Property and Democracy in Virtual Worlds,* 11 B.U. J. SCI. & TECH. L. 173 (2005) (exploring the issues of governance, property rights, and citizenship in virtual worlds); 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 (2004), *available at* http://ssrn.com/abstract=565181 (discussing the role of the First Amendment in virtual worlds); Ethan Katsh, *Bringing Online Dispute Resolution to Virtual Worlds: Creating Processes Through Code,* 49 N.Y.L. SCH. L. REV. 271 (2004) (discussing dispute resolution in virtual worlds); F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds,* 92 CAL. L. REV. 1 (2004) (providing a history of virtual worlds, and discussing the property and governance issues that arise within them); F. Gregory Lastowka & Dan Hunter, *Virtual Crimes,* 49 N.Y.L. SCH. L. REV. 293 (2004) (considering the issues of non-consensual appropriation and destruction of virtual properties); Leandra Lederman, *"Stranger Than Fiction": Taxing Virtual Worlds,* 82 N.Y.U. L. REV. 1620 (2007) (discussing the federal income tax issues that surround virtual worlds); Viktor Mayer-Schönberger & John Crowley, *Napster's Second Life?: The Regulatory Challenges of Virtual Worlds,* 100 NW. U. L. REV. 1775 (2006) (applying law and economics to predict how the real-world legal system will interact with virtual worlds); Michael Meehan, *Virtual Property: Protecting Bits in Context,* 13 RICH. J.L. & TECH. 7 (2006) (proposing a legal solution to deal with virtual property); Reuveni, *On Virtual Worlds, supra* note 5 (arguing that copyright law can and should apply to artistic and literary creations occurring entirely in a virtual world); Reuveni, *Authorship, supra* note 1 (concluding that many of the rationales underlying the Copyright Act of 1976 must be reevaluated and reformulated in the age of virtual worlds); Kevin W. Saunders, *Virtual Worlds—Real Courts,* 52 VILL. L. REV. 187 (2007) (examining the variety of potential litigation that can arise in virtual worlds, and analyzing whether such claims should be heard in real-world courts); Andrew D. Schwarz & Robert Bullis, *Rivalrous Consumption and the Boundaries of Copyright Law: Intellectual Property Lessons from Online Games,* 10 INTELL. PROP. L. BULL. 13 (2005) (analyzing the boundary between intellectual and

mainstream culture and, therefore, a brief overview might be warranted. Generally, the term "virtual world" is used to describe a software platform that provides users with access to a simulated three-dimensional space. Within this simulated space, individual users are represented by "avatars." Avatars are software-rendered and somewhat customizable representations of humans or humanoids.[38] They serve as the vantage point from which the user sees the simulated world and produces effects within it.[39] They also serve as the visible form of the user that is presented to other users of the virtual world. Generally, there is no requirement that an avatar bear any relation to the user. For instance, it is not infrequent that users of virtual worlds "gender-bend" by using a female avatar if they are male, or vice-versa.

At the technological level, individual avatars are rendered by the software pursuant to specific configurations of data present on the servers owned by the game company. Access and control of avatars is protected in much the same way that other online accounts are

physical property laws in a virtual world); Zarsky, *supra* note 6 (analyzing how informational privacy concerns are implicated by the recent expansion of virtual worlds); John Baldrica, Note, *Mod as Heck: Frameworks for Examining Ownership Rights in User-Contributed Content to Videogames, and a More Principled Evaluation of Expressive Appropriation in User-Modified Videogame Projects*, 8 MINN. J. L. SCI. & TECH. 681 (2007) (examining various legal issues, specifically ownership rights, posed by virtual worlds); Charles Blazer, Note, *The Five Indicia of Virtual Property*, 5 PIERCE L. REV. 137 (2006) (defining virtual property, and discussing the degree of legal protection that should be afforded to such property); Bettina M. Chin, Note, *Regulating Your Second Life: Defamation in Virtual Worlds*, 72 BROOK. L. REV. 1303 (2007) (arguing that claims based on pecuniary losses in virtual worlds, specifically online speech-based actions, should be recognized in real-world legal systems); Bobby Glushko, Note, *Tales of the (Virtual) City: Governing Property Disputes in Virtual Worlds*, 22 BERKELEY TECH. L.J. 507 (2007) (examining virtual property disputes and suggesting that the current agreements governing virtual worlds are inadequate); Jamie J. Kayser, Comment, *The New New-World: Virtual Property and the End User License Agreement*, 27 LOY. L.A. ENT. L. REV. 59 (2006) (emphasizing the need for a legal presence in virtual worlds); Marcus, *supra* note 1 (discussing user-generated content in virtual worlds, specifically *Second Life*); David P. Sheldon, Comment, *Claiming Ownership, but Getting Owned: Contractual Limitations on Asserting Property Interests in Virtual Goods*, 54 UCLA L. REV. 751 (2007) (exploring the various legal constructs that might help protect virtual world participants and encourage growth of these online communities); Theodore J. Westbrook, Comment, *Owned: Finding a Place for Virtual World Property Rights*, 2006 MICH. ST. L. REV. 779 (discussing the need for virtual property rights as a result of people spending more time in virtual worlds).

38.   *See* Merriam-Webster's Online Dictionary, http://www.merriam-webster.com/dictionary/avatar (last visited Apr. 7, 2008) (defining an avatar as "an electronic image that represents and is manipulated by a computer user (as in a computer game)"); *see also* Lastowka & Hunter, *The Laws of the Virtual Worlds*, *supra* note 37, at 6 (discussing the origin of the term "avatar").

39.   By this, I mean that the representation of the virtual world is generally keyed to the location of the user's avatar. The player is generally not able to "see" places within the simulated space where the player's avatar is not present according to the software.

protected today, and the servers of most virtual worlds are reasonably secure.[40] The owner of an avatar has a unique identifying name and a unique password that must be used to access the account.[41]

Avatars generally change through use. The avatar (which again, practically consists of the data in the account) is subject to modification by player actions using the software interface. In other words, within the simulation of the virtual world, simulated actions taken at the direction of the user can lead to the simulated acquisition of digital artifacts, often described as virtual property.[42] So, for instance, an avatar may pick up a virtual flower from the ground and the flower object will then be "present" in the account of the player.[43] In effect, the player's account will be able to use that artifact to affect other objects and avatars in the world, and others will be able to see that the player has that artifact if it is displayed. Often, just as in life, virtual artifacts can be consumed (or deleted) in the process of avatar use.

Because the accounts of the player are generally left intact as long as the game's subscription is paid, both avatar accounts and the virtual property within them are often described as "persistent."[44] Also, because the software interface allows for digital artifacts to be transferred from one user's account to another (e.g., player A makes a gift of currency to player B), virtual worlds usually generate complex economies where artifacts are acquired, exchanged, and consumed. Furthermore, as Professor Edward Castronova has described, because the exchange of digital artifacts is sometimes made in exchange for real currency, the economies of virtual worlds are quite "real."[45]

There are perhaps a hundred or more other virtual worlds in operation today. Many are based on fantasy themes, like *World of*

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40.   *See, e.g.,* Protect that Password!, http://secondlife.com/policy/security/password.php (last visited Mar. 27, 2008) (stressing the importance of protecting oneself in a virtual world by safeguarding one's specific user-name and password).

41.   *See, e.g.,* Second Life Registration: Basic Details, http://secondlife.com/ (follow "Get Started!" hyperlink, then click "just take me to Linden Lab's Orientation Island" hyperlink) (last visited Mar. 27, 2008) (requiring all users to create a unique "Second Life name" and password).

42.   *See, e.g.,* What is Second Life?, http://secondlife.com/whatis/ (last visited Mar. 27, 2008) (describing the various activities that avatars can participate in, including the acquisition of virtual property, once they are "residents" of the *Second Life* virtual world).

43.   Given that computer simulations need not follow the laws of physics dutifully, avatars often possess far more virtual property on their "persons" than any real person could carry.

44.   Persistent World, http://en.wikipedia.org/wiki/Persistent_world (last visited Mar. 27, 2008).

45.   EDWARD CASTRONOVA, SYNTHETIC WORLDS: THE BUSINESS AND CULTURE OF ONLINE GAMES 147-60 (2005) [hereinafter CASTRONOVA, SYNTHETIC WORLDS].

906   *VANDERBILT J. OF ENTERTAINMENT AND TECH. LAW*   [Vol. 10:4:893

Warcraft[46] or *Lord of the Rings Online.*[47] Others are based on science fiction, like *Eve Online*[48] and *Tabula Rasa.*[49] Some are marketed to children, like Disney's *Toontown Online*[50] and *Club Penguin.*[51] And, there are some with no particularly dominant game or theme, like *There*[52] and *Second Life.*[53] Spurred by the financial success of many of today's virtual worlds, it seems likely that the number of virtual worlds will be increasing.

Like Web 2.0, virtual worlds have their admirers and detractors. Enthusiasts of virtual worlds come in many different stripes. Some futurists and technophiles promote virtual worlds as glimpses at a world free from the constraints of physical scarcity, personal appearance, and even the laws of physics. Professor Castronova, the original economist of virtual worlds, argues that virtual worlds can provide a needed fantasy haven for those who seek to emigrate from the physical world.[54] Other proponents see virtual worlds as powerful educational tools. For instance, the Center for Public Diplomacy at the University of Southern California is investing in projects in virtual worlds as part of an effort to foster international understanding.[55]

Critics of virtual worlds, like critics of Web 2.0, are often rather pessimistic of the entire phenomenon for reasons having to do with personal taste and aesthetics. As a typical example of this mindset, an advice columnist in the *Washington Post* recently suggested the following to a correspondent whose son was "addicted" to an online game (perhaps *World of Warcraft*): "The time your son spends on the

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46.   World of Warcraft, http://www.worldofwarcraft.com/index.xml (last visited Mar. 27, 2008).
47.   Lord of the Rings Online, http://www.thelordoftheringsonline.com/ (last visited Mar. 27, 2008).
48.   Eve Online, http://www.eve-online.com/ (last visited Mar. 27, 2008).
49.   Richard Garriott's Tabula Rasa, http://www.rgtr.com/index.html (last visited Mar. 27, 2008).
50.   Disney's Toontown Online, http://www.toontown.com (last visited Mar. 27, 2008).
51.   Club Penguin, http://www.clubpenguin.com/ (last visited Mar. 27, 2008).
52.   There, http://www.there.com/ (last visited Mar. 27, 2008).
53.   Second Life, http://secondlife.com/ (last visited Mar. 27, 2008).
54.   *See* EDWARD CASTRONOVA, EXODUS TO THE VIRTUAL WORLD: HOW ONLINE FUN IS CHANGING REALITY (2007).
55.   *See* USC Center on Public Diplomacy, Public Diplomacy and Virtual Worlds Project, http://uscpublicdiplomacy.com/index.php/virtualworlds/about_cpd_vw (last visited Mar. 27, 2008) ("With these opportunities to create, foster and sustain intercultural dialogue through real-time interactions between people around the world, virtual worlds can be used effectively to help create better understanding between people of different cultures and nationalities.").

computer is time that he's not reading a book, not creating an original idea, not jogging in the park, not interacting with people and not improving his social skills. He is putting life on hold."[56] For many, this is the fundamental problem with virtual worlds: they are, in essence, a waste of potentially productive time in an online fantasy.

Julian Dibbell found similar criticism over a decade ago, when he grew obsessed with a textual virtual world called LambdaMOO.[57] Dibbell explained that onlookers who were only dimly aware of the nature of LamdbaMOO would often complain to participants: "You people need to get a life!"[58]

Yet comparatively, virtual worlds would seem to provide a much more social and creative form of media engagement (and life) than the regular and passive consumption of television programming that is the staple of many American media diets. Players cooperating to complete a challenge in *World of Warcraft* must actively plan and execute group activities in a virtual environment where they each play a leading role. The same cannot be said for the spectators of a sporting event, sitcom, or "reality television" show.

As Constance Steinkuehler and Dmitri Williams point out, virtual worlds operate as "third places" that can produce what is termed "social capital"—the social networks and relationships that facilitate coordinated and socially beneficial actions.[59] Recent studies have examined how group play and complex social organization is common in *World of Warcraft*.[60] And this was quite true in Dibbell's LambdaMOO as well.[61]

While I think it is not necessary here to either defend or criticize the social value of virtual worlds, I think it is important to see how their highly interactive nature (which is found in video games

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56.   Marguerite Kelly, *Time To Pull the Plug on Son's Gaming Habit*, WASH. POST, Nov. 30, 2007, at C11.

57.   *See* LambdaMOO (with LambdaMOO Map)—An Introduction, http://www.lambdamoo.info/ (last visited Mar. 28, 2008) [hereinafter LambdaMOO].

58.   JULIAN DIBBELL, MY TINY LIFE: CRIME AND PASSION IN A VIRTUAL WORLD 302 (1998).

59.   *See* Constance Steinkuehler & Dmitri Williams, *Where Everybody Knows Your (Screen) Name: Online Games as "Third Places,"* 11 J. COMPUTER-MEDIATED COMM. 4 (2006), *available at* http://jcmc.indiana.edu/vol11/issue4/steinkuehler.html. Steinkuehler and Williams borrow their concept of social capital from Robert Putnam (rather than Pierre Bourdieu). *See* Robert D. Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY 65 (1995), *available at* http://xroads.virginia.edu/~hyper/DETOC/assoc/bowling.html; *see also* PIERRE BOURDIEU, DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE (Richard Nice trans., 1984).

60.   *See* Dmitri Williams et al., *From Tree House to Barracks: The Social Life of Guilds in World of Warcraft*, 1 GAMES & CULTURE 338 (2006).

61.   DIBBELL, *supra* note 58, at 303-04 (discussing a popular vote on a petition); *see* LambdaMOO, *supra* note 57.

generally) relates to the debates over user-generated content. Unlike other forms of media, virtual worlds must be actively and socially "used" in order to be consumed. How one feels about the value of online social interactivity in fantasy environments versus the largely passive consumption of "high-quality" media may be indicative of one's broader opinions about the value of user-generated content.

Now that I have explained (or at least tried to explain) the key terms in play, I will consider how they relate to one another.

II. USER-GENERATED CONTENT IN *WORLD OF WARCRAFT* AND *SECOND LIFE*

In his recent book, *The Wealth of Networks*, Yochai Benkler describes virtual worlds in this way:

> [T]he role of the [virtual world] provider is to build tools with which users collaborate to tell a story. . . . The point to understand about [virtual worlds] is that they produce a discrete element of "content" that was in the past dominated by centralized professional production. . . . In [virtual worlds], this function is produced by using the appropriate software platform to allow the story to be written by the many users as they experience it. . . . [Users] are spending real economic goods . . . on a form of entertainment that uses a platform for active coproduction of a story line to displace what was once passive reception of a finished, commercially and professionally manufactured good.[62]

If Benkler's description were factually accurate, the connection between virtual worlds and user-generated content would be immediately apparent. However, at present, with some limited exceptions, it is not clear that what occurs in most virtual worlds is the collaborative co-production of a story line that serves as a substitute for past commercial production. The state of virtual worlds today, and the nature of their appeal to consumers, is much more complex than that. Currently, in most virtual worlds, user-generated content—at least as that term is traditionally understood—actually does not play a central role.

However, whether user-generated content will play a greater role in the future is an open question. The future of user-generated content and virtual worlds hinges on business models, investments, and consumer behaviors because the major virtual worlds today are built in pursuit of profit. In order to understand the business issues of user-generated content models for virtual worlds, we might compare two of the most well-known virtual worlds in existence today. *World of Warcraft* is the largest and most profitable virtual world today, and

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62.   BENKLER, *supra* note 22, at 74.

it largely avoids user-generated content (narrowly defined).[63] *Second Life* is probably the most celebrated virtual world in academic circles, and it embraces user-generated content.[64]

A. World of Warcraft *and* Second Life

World of Warcraft is based on a line of successful *Warcraft* fantasy games.[65] Its owners claim to be generating over $1 billion in revenue a year and hosting over 9 million paying subscribers.[66] References to *World of Warcraft* have shown up in some popular television programs and commercials.[67] The game is rumored to have incurred development costs of over $60 million.

Much of the traditional "content" that players experience in *World of Warcraft*, including art, music, and text, was produced by virtue of those development costs and production means that are the antithesis of what Yochai Benkler describes.[68] Content in *World of Warcraft* is largely professionally produced by employees of the company. By contrast, the ability of the players in *World of Warcraft* to generate traditional works of authorship within the game is fairly limited.[69] Even the player avatars are limited in their potential appearances.

If one broadens the notion of user-generated content to include social interactions, there is certainly some sense in which players provide meaningful content in *World of Warcraft*.[70] Much of the value

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63.   *See* World of Warcraft, *supra* note 46.

64.   *See* Second Life, *supra* note 53.

65.   *See* World of Warcraft, *supra* note 46.

66.   *See* Press Release, Blizzard Entertainment, World of Warcraft® Surpasses 9 Million Subscribers Worldwide (July 24, 2007), *available at* http://www.blizzard.com/press/070724.shtml.

67.   For instance, *World of Warcraft* was the subject of a *South Park* episode in 2006. *See* Make Love, Not Warcraft, http://en.wikipedia.org/wiki/Make_Love,_Not_Warcraft (last visited Mar. 27, 2008). In 2007, Toyota aired a truck commercial that was loosely based on a popular fan video from the game. *See* World of Warcraft, http://en.wikipedia.org/wiki/World_of_Warcraft#cite_note-Crave-85 (last visited Mar. 27, 2008).

68.   *See* BENKLER, *supra* note 22.

69.   The most significant player authorial activity within *World of Warcraft* is probably machinima, or the recording and editing of video footage generated within game. Searching for "world of warcraft" on YouTube returns many thousands of these videos. *See* YouTube, *supra* note 2 (search "Videos" for "world of warcraft"). However, these videos cannot be viewed within the context of the game.

70.   As I explain in a forthcoming essay on the virtual world *Everquest*, the game elements of virtual worlds are often hard to disentangle from the texts in which they are situated. *See* Greg Lastowka, *The Planes of Power* (Rutgers Sch. of Law—Camden Working Paper Series, 2008), *available at* http://ssrn.com/abstract=826505.

and appeal of virtual worlds seems to come from the social interactions they enable between players.[71] Yet this is true, to some degree, of traditional media as well, where communities of readers and fans have always enjoyed the process of collectively reading, interpreting, and actively participating in fictional universes.[72] While fans of *Star Trek* may sometimes create derivative fictions based on the series, it would be hard to argue that these efforts replace the market for the original.

The world that seems to map most closely with Professor Benkler's vision is Linden Lab's *Second Life*, which has gathered a substantial amount of media attention in recent years.[73] *Second Life* bills itself as being "imagined and created entirely by its Residents."[74] It is essentially a platform and a set of software tools for creating and hosting user-generated content. Unlike *World of Warcraft*, *Second Life* is, therefore, highly dependent upon, and interested in publicly promoting, the extent to which its users create original content.

Some news reports have stated that *Second Life* has over 13 million "residents" as compared to the nine million "subscribers" of *World of Warcraft*.[75] Yet the numbers here are misleading. As *Second Life* notes on its home page, less than 500,000 accounts in the service are active in a given week, suggesting that most "residents" are actually individuals who once signed up for *Second Life* account but later abandoned the service.[76] In terms of active users, *Second Life* seems to be no more than one-twentieth the size of *World of Warcraft*.

In addition, the majority of users of *Second Life* never pay any subscription fee to Linden Lab. The lack of subscription revenues makes the company's business model more complex. While it has had several infusions of venture capital, it is not clear that *Second Life* has ever been profitable.[77] In recent months, the total number of user-hours spent in the environment appears to have reached a plateau.[78]

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71. *See, e.g.,* T. L. TAYLOR, PLAY BETWEEN WORLDS: EXPLORING ONLINE GAME CULTURE (2006) (providing an ethnographic account of the community in Sony's *Everquest*).

72. *See* JENKINS, CONVERGENCE CULTURE, *supra* note 20; JENKINS, TEXTUAL POACHERS, *supra* note 20; Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651 (1997).

73. BENKLER, *supra* note 22, at 136.

74. Second Life, *supra* note 53.

75. Second Life, FAQ, http://secondlife.com/whatis/faq.php (last visited Mar. 27, 2008).

76. Second Life, Economic Statistics, http://secondlife.com/whatis/economy_stats.php (last visited Mar. 27, 2008).

77. Daniel Terdiman, *"Second Life" Scores $11 Million in Funding*, CNETNEWS.COM, Mar. 28, 2006, http://www.news.com/2100-1043_3-6054598.html ("For

Yet some *Second Life* users have profited handsomely from the content they have generated, making *Second Life* a poster child for user-generated content in virtual worlds.[79] *Second Life* has its own proprietary currency, the Linden dollars, which can be bought and sold via the company Web site (the Linden Dollar Exchange) in exchange for real dollars. The company encourages users to buy and sell custom-crafted virtual objects and structures within their virtual economy. It reports that over 100 people are making the equivalent of over $60,000 a year by selling virtual objects.[80]

This type of virtual business model is fascinating. It does merit our attention. Yet it is by no means clear that it is the wave of the future. Thus far, *Second Life* has not attracted many imitators. Indeed, due to its chosen model, *Second Life* seems to be facing certain practical challenges that *World of Warcraft* does not. Below, I will consider some of the ways that user-generated content can pose significant practical challenges for virtual worlds.

B. Difficulties with the User-Generated Content Models

1. The Good, the Bad . . .

While tastes may vary, user-generated content inevitably varies in quality, and certain content will be more popular than other content. Any business that pursues a user-generated content model will be faced with a problem: how does it channel users toward the best content? If businesses want to please users, the best content should be the content that users experience first.

Many popular user-generated content sites, such as YouTube and Flickr, attempt to promote the most popular forms of content

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now, the company isn't profitable, and it's not clear when it will be, said Catherine Smith, Linden Lab's director of marketing.").

78.   *See* Second Life, Economic Statistics: Graphs, http://secondlife.com/whatis/ economy-graphs.php (last visited Mar. 27, 2008).

79.   Second Life, Terms of Service, *available at* http://secondlife.com/corporate/ tos.php (last visited Mar. 27, 2008) (describing LindeX, an exchange offered by Second Life for the trading of Linden Dollars).

80.   *See* Economic Statistics, *supra* note 76; *see also* William Marra, *Want To Make Money in Second Life? It's Harder than You Think*, ABCNEWS.COM, Aug. 27, 2007, *available at* http://abcnews.go.com/Technology/story?id=3527537&page=1 ("Only 145 people made more than $5,000 as 'Second Life' entrepreneurs in July . . . ."); Alan Sipress, *Where Real Money Meets Virtual Reality, the Jury Is Still Out*, WASH. POST, Dec. 26, 2006, at A01 (reporting that one player in Second Life expected to earn $60,000 during 2006 from the sale of virtual clothing).

available on their sites.[81] They further attempt to enable users to comb their content with basic and advanced search tools.[82] They also feature complex systems of content categories, group keyword tagging, and pools of community favorites.[83]

All of these are features that assist individual users in their efforts to separate the wheat from the chaff. Virtual worlds can implement some of these features, but their spatially situated graphical content increases the logistical problems posed by using automation to sift through content and match viewers with what they want.

In some virtual worlds, like *Second Life*, spaces may be limited in the amount of simultaneous-use traffic they can reasonably accommodate. If public spaces cannot accommodate more than fifty avatars simultaneously in a single location, this can place practical limits on the ability of the best content to reach a large audience. Likewise, vast virtual spaces may sound appealing, but they can be problematic. If a virtual world allows each participant to own a space the size of a parking lot, the end result may seem like a patchwork of uninhabited, uninspired, and stylistically clashing lots that sprawl onward forever.

The problem of promoting the best and obscuring the worst of user-generated content is not impossible to solve. Yet it is clearly a problem that designer-made virtual worlds will not face.

2. . . . and the Ugly

Another associated problem, by no means peculiar to *Second Life*, is that some of the content generated by users is not merely of poor quality, but is offensive and/or illegal. When users have the freedom to upload content, they sometimes upload material that offends community sensibilities (such as pornography) or that violates the copyrights of other parties. Offensive material can alienate users and lead to lost subscriptions, while infringing material can pose risks of legal liability. All user-generated content sites, including virtual worlds, must set policies and adopt strategies to deal with these inevitable situations.

The greater the degree to which virtual worlds rely on user-generated content, the larger these problems loom and the greater the resources that must be spent responding to complaints. In some

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81. *See* Flickr, *supra* note 3; YouTube, *supra* note 2.
82. *See id.*
83. *See id.*

cases, offensive content may lead to scandals.[84] In other cases, infringing content may lead to litigation. For instance, copyright or trademark holders may complain that the hosting company has failed to police user-generated content sufficiently.

The recent lawsuit by Viacom against YouTube provides an example of the type of legal challenge that threatens a user-generated content business model.[85] Even though YouTube complied with the requirements of the Digital Millennium Copyright Act, Viacom sued. Given the vague standards governing contributory liability for intellectual property infringements, Viacom's claims may not be altogether frivolous. The unstable legal environment both preceding and following the Supreme Court's *Grokster* decision has cast a shadow over all user-generated content businesses.[86]

An example of the risks posed to virtual worlds can be found in the litigation over NCSoft's *City of Heroes*.[87] *City of Heroes* is a virtual world where players design and role-play their own superheroes.[88] One of the most impressive pieces of software in *City of Heroes* is the game's "character generation engine," which allows players to choose between hundreds of body, color, and costume options for their avatars. Player-organized contests are arranged in the game, with prizes going to the best costume designs.

In November 2004, Marvel Enterprises, owner of the intellectual property rights for many of the most well-known superheroes, brought suit against the creators of *City of Heroes*, alleging that they had, inter alia, facilitated the infringement of Marvel's copyrights and trademarks by allowing players to generate copies of characters like Spider Man, the Incredible Hulk, and Wolverine.[89] Though the suit was ultimately settled, the case

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84. *See, e.g.,* Julian Dibbell, *Mutilated Furries, Flying Phalluses: Put the Blame on Griefers, the Sociopaths of the Virtual World,* WIRED.COM, Jan. 18 2008, *available at* http://www.wired.com/gaming/virtualworlds/magazine/16-02/mf_goons (describing the many "griefers" in *Second Life* who create content purely in hope of disturbing and shocking other participants).

85. *See* Complaint, Viacom Int'l Inc. v. YouTube, Inc., No. 1:07-cv-02103 (LLS) (FM) (S.D.N.Y. Mar. 13, 2007); *see also* Jeremy W. Peters, *Viacom Sues Google Over YouTube Video Clips,* N.Y. TIMES, Mar. 14, 2007, *available at* http://www.nytimes.com/2007/03/14/business/14viacom.web.html.

86. *See* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).

87. For further description of the lawsuit, *see* Britton Payne, Note, *Super-Grokster: Untangling Secondary Liability, Comic Book Heroes and the DMCA, and a Filtering Solution for Infringing Digital Creations,* 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 939 (2006).

88. *See* City of Heroes, Game Info: Game Synopsis, http://www.cityofheroes.com/gameinfo/synopsis.html (last visited Mar. 27, 2008).

89. Complaint, Marvel Enters., Inc. v. NCSoft Corp., 2004 WL 3770845 (C.D. Cal. Nov. 10, 2004) (No. 04-CV-9253); *see* Alex Veiga, *Marvel Sues Two Companies Over Role-*

survived a motion to dismiss, with the district court judge allowing Marvel's contributory copyright infringement claims to go forward.[90]

Like the problem of promoting the best content, the problem of avoiding secondary liability under intellectual property laws and other statues is a problem for virtual world creators that can be handled. Yet again, it will be an ongoing problem for any world that is dependent on user-generated content.

3. Galleries Versus Games

A third problem with the combination of user-generated content and virtual worlds is that, unlike the Web sites YouTube, Flickr, and Wikipedia, most popular virtual worlds are not simply sites where certain types of content (e.g., videos, photos, or articles) are collected and catalogued. Most virtual worlds are structured as social play spaces, not galleries of content. And, there is a good reason for this: Web sites offer a much more efficient means of browsing and enjoying gallery-type content than an avatar-mediated three-dimensional space.

Most virtual worlds are structured instead as virtual game spaces. Games are generally social activities structured by rules that encourage certain player behaviors and forbid others.[91] They are not so much about the consumption of any particular content, but about purposive action in a pleasant environment. Virtual worlds generally offer new content (e.g., landscapes, music, and artwork) as a reward for accomplishing game objectives. A new player of *World of Warcraft, Eve Online,* or *City of Heroes* is coaxed into play through artfully designed stories, interaction, instructions, and rewards. The process of play channels participants from area to area within the world, where each new conquest opens up a new, unexplored, and more difficult terrain.[92]

Virtual worlds that abandon game structures can actually be problematic, since the new user may not understand for what the technology should be used. Ultimately, if a virtual world is not a game, it is a tool, and the user must endeavor to find a purpose for

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Playing Game, USA TODAY.COM, Nov. 11, 2004, http://www.usatoday.com/tech/news/2004-11-11-marvel-sues-over-avatars_x.htm?loc=interstitialskip.

90.   Marvel Enter,. Inc. v. NCSoft Corp., No. CV 04-9253-RGK (PLAx), 2005 WL 878090 (C.D. Cal. Mar. 9, 2005). For various case documents and news stories, see Electronic Frontier Foundation, Marvel v. NCSoft, http://www.eff.org/cases/marvel-v-ncsoft (last visited Mar. 27, 2008).

91.   *See generally* JOHAN HUIZINGA, HOMO LUDENS: A STUDY OF THE PLAY ELEMENT IN CULTURE (Karl Manheim ed., Routledge & Kegan Paul Ltd. 1949) (1938).

92.   *See* CASTRONOVA, SYNTHETIC WORLDS, *supra* note 45, at 110-12.

that tool. In virtual worlds that lack game objectives, it seems that many participants ultimately gravitate toward playing with each other. They converse, flirt, debate, scam virtual currency from each other, gamble, and even engage in virtual sex. In essence, even if virtual worlds are not designed as games, they eventually seem to be treated as games; yet, the game played becomes unclear and, therefore, potentially less compelling to new users.

Some virtual worlds that are games have found ways to incorporate forms of user-generated content while minimizing the risks posed by offensive, infringing, or low-quality content. For instance, the character costumes in *City of Heroes* allow individual users to express themselves in ways they find pleasing. Other players probably see this as adding value as well. Yet, the costume designs are not completely free-form, which insures that the game's aesthetic remains consistent. Other games have offered similar ways for limited forms of creative authorship, such as the construction of houses that are built from components that are harmonious with the environment.[93] Facilitating these kinds of limited authorial powers while not allowing players too much control over the game environment can require a delicate balance. While it would seem likely that future virtual worlds will pursue these types of user-generated content, combining user freedom and overall design consistency can be a difficult challenge.

4. Ownership Issues

Finally, we might consider how user-generated content in virtual worlds confirms or avoids the criticisms levied at Web 2.0 business models. Generally speaking, the pointed criticisms of the economic dynamics of the Web 2.0 economy are equally, if not more, true in the case of virtual worlds.

Almost all virtual worlds, including *Second Life*, are hosted on privately owned servers.[94] The terms of use of these virtual worlds are generally extremely favorable to the companies that host them. For instance, the terms of use of *World of Warcraft* are written so that Blizzard, the private owner, claims ownership of all player accounts, game play, chat, etc., and also retains the right to terminate accounts

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93. *See* Julian Dibbel, *The Unreal Estate Boom*, WIRED.COM, Jan. 2003, at 3, *available at* http://www.wired.com/wired/archive/11.01/gaming.html.

94. *See* Second Life, Terms of Service, *supra* note 79.

and delete all data present on the accounts for "ANY REASON OR NO REASON."[95]

With respect to content created by users in virtual worlds, it is clear that the value being generated is effectively locked into that virtual world. While a photo or video might be kept on one's computer independently from a Web hosting site, it is practically impossible to export original creations in virtual worlds from their environments. And, in any case, divorcing them from their environments would significantly reduce their utility. Virtual worlds are very much walled gardens, and "user" investments in them can usually not be easily recouped.

Second Life, of course, stands in opposition to that general proposition. By allowing residents to build businesses within their environment and extract real returns from their virtual labor, *Second Life* provides a more porous border for investments. Yet this innovation is not without its costs. By encouraging others to seek real profits in its environments, *Second Life* has opened the door wider to litigation, both between itself and its users, as well as between competing businesses that use its platform. The widely publicized *Bragg* lawsuit, where a resident of *Second Life* sued Linden Lab for confiscation of his virtual property, is one instance of this kind of litigation.[96] When people have real stakes in virtual worlds, they tend to act consistently with their investment-backed expectations.

We might therefore do well to ask which type of virtual world we prefer. Do we need to create true intellectual property incentives in order for virtual play spaces to flourish? Or, does the creation of individual property rights in virtual worlds threaten simply to inaugurate a digital anti-commons?[97] Where will the inheritors of *Second Life* and *World of Warcraft* be ten years from now? Where would we want them to be?

III. CONCLUSION

I would like to thank the Symposium editors again for inviting me to consider the relationship between user-generated content and virtual worlds, two phenomena that are currently the subject of

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95.   *See* World of Warcraft®, Terms of Use Agreement, http://www.worldofwarcraft.com/legal/termsofuse.html (last visited Mar. 7, 2008). For a criticism of this state of affairs, see Reuveni, *On Virtual Worlds, supra* note 5.

96.   Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593 (E.D. Pa. 2007).

97.   *See* Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 439 (2003).

considerable media attention, financial investment, and revolutionary rhetoric.

Personally, I do hope that some of the more optimistic rhetoric about the future of both virtual worlds and user-generated content has an element of truth. It can be a wonderful experience to participate in vibrant, creative, and compelling online communities, as the World Wide Web has demonstrated during the past decade. Popular authorial freedoms, the ability to talk back to the media, and new forms of online social capital could benefit society in significant ways, and a combination of virtual worlds and user-generated content could provide these things.

But, as I hope I have explained in the pages above, the shape of the technology and the business models that characterize user-generated content in virtual worlds today are not uniformly positive. There are significant problems and tensions. The answers are not clear. So, while I hope we can maintain our optimism about the potential social benefits to be found in virtual worlds that feature user-generated content, we should be aware that these are two separate phenomena, both of which have been criticized under separate rationales. For many reasons, legal and otherwise, the future of this promising partnership is fraught with uncertainty.

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