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Digital Media, Video Games, and the Law Introductory Essay

INTRODUCTORY ESSAY: DIGITAL MEDIA, VIDEO GAMES, AND THE LAW

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> The universe (which others call the Library) is composed of an indefinite and perhaps infinite number of hexagonal galleries, with vast air shafts between, surrounded by very low railings. From any of the hexagons one can see, interminably, the upper and lower floors. The distribution of the galleries is invariable. Twenty shelves, five long shelves per side, cover all the sides except two; their height, which is the distance from floor to ceiling, scarcely exceeds that of a normal bookcase. One of the free sides leads to a narrow hallway which opens onto another gallery, identical to the first and to all the rest. . . . Also through here passes a spiral stairway, which sinks abysmally and soars upwards to remote distances. In the hallway there is a mirror which faithfully duplicates all appearances. Men usually infer from this mirror that the Library is not infinite (if it were, why this illusory duplication?); I prefer to dream that its polished surfaces represent and promise the infinite ... Light is provided by some spherical fruit which bear the name of lamps. There are two, transversally placed, in each hexagon. The light they emit is insufficient, incessant.
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> Like all men of the Library, I have traveled in my youth; I have wandered in search of a book, perhaps the catalogue of catalogues; now that my eyes can hardly decipher what I write, I am preparing to die just a few leagues from the hexagon in which I was born.
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> Jorge Luis Borges – The Library of Babel[1]

From today's perspective, Borges's Library can be understood as a metaphor for what has become our digital existence—an enigmatic

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[1] Jorge Luis Borges, *The Library of Babel*, translated by Andrew Hurley (Jaffrey, New Hampshire: David R Godine, 2000) (Originally published in 1941).

representation of deep, seemingly endless data points and beautiful, frightening symmetries.[2] In the Library, we will die not far from where our journey begins. Today, this can be updated to the possibility that for all of our endless digital wanderings, we may neither wander far nor learn much.[3] In the "Library of Babel", knowledge becomes its own trap.

The situation is a bit better when it comes to the evolving legal constraints and the rights and freedoms emergent from the worlds of video gaming and digital creativity. We see contours of possible futures and little else. But we do see some questions. This Special Issue of the *UBC Law Review* is largely dedicated to these questions: What are the ethics of judicial engagement in digital worlds? Under what circumstances should courts interfere in digital worlds? How might the concepts of "transformative use" as well as "fair use/fair dealing" be best understood so as to apply correctly to digital worlds? Are "moral rights" a vastly underrated tool for creators in adapting to the changing landscapes of digital worlds? How should End User License Agreements (EULAs) deal with children and the creations of children in digital worlds? Finally, how might doctrines of search-and-seizure law be redefined in the context of digital spaces?

I. SCIENCE FRICTION

The digital revolution is hardly news. Digital connectivity and interactivity allows us to create, communicate, and play in new ways with additional dimensions. In opening up worlds of virtual digital space, however, we must also seek to more fully understand the new landscapes. Legal dialectics continue to be a useful technique for assimilating the

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[2] See generally Noam Cohen, "Borges and the Forseeable Future", *The New York Times* (6 January 2008), online: <http://www.nytimes.com/2008/01/06/books/06cohenintro.html?_r=0>.

[3] See Ethan Zuckerman, *Rewire: Digital Cosmopolitans in the Age of Connection* (New York: WW Norton & Company Inc, 2013) (where Mr. Zuckerman makes the case that we may not be using the net to its real potential).

unknown and rendering it comprehensible. Early notions from the 1990s[4] that intellectual-property (IP) law could not keep up with the progress of the digital age, though prescient in many respects, underestimated the tenacity and motives of lawyers and legal structures (not to mention the levels of business engagement and profits the industries of digital creativity would eventually generate).

Our legal systems continue to grapple with overcoming the tensions and contradictions inherent in the digital revolution. The adversarial method accomplishes this with caution, intention, and purpose, but within traditional constraints and formalities. It is in this context that video-game law serves a particularly helpful purpose in the semiotics of the digital world.

The particulars of video gaming bring some advantages that are not obvious at first blush. Video games have often achieved more sustainable financial success over longer periods of time than many other forms of digital creativity. Perhaps for these reasons, video games were often able to manifest technical breakthroughs of the digital realm for mass audiences before other forms of content. Examples include the realms of connectivity ("multiplayer"), voice-over IP ("chat"), media/living-room integration (game consoles), control mechanisms (feedback devices, voice-control, motion-control), and display (3D, wearable headsets), not to mention advancements in computer graphics and unprecedented levels of immersion and digital storytelling.[5]

With the combination of technological advancements and a profitable entertainment form came the inevitable challenges and conflicts that emerge in new and open business territories. Accordingly, it should be no surprise that, for better or worse, many of the legal conundrums of the digital world received their first answers in court decisions related to video games. With the continuing growth of gaming through mobile and tablet

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4 See e.g. John Perry Barlow "The Economy of Ideas: A framework for patents and copyrights in the Digital Age" Wired 2.03 (March 1994), online: <http://www.wired.com/wired/archive/2.03/economy.ideas.html>.

5 For a most useful overall perspective see Greg Lastowka, "Copyright Law and Video Games: A Brief History of an Interactive Medium" [unpublished draft book chapter], online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2321424>.

devices, and growing demographic strength among women and children, it seems that video-game law will continue to be the neutron star: occupying the far horizon of the digital-media legal firmament and visible long before the issues in the rest of the digital world come into view.[6]

Legal tensions involving digital media and video games have historically encompassed the areas of free expression/speech, copyright, and contracts. More recently, privacy and surveillance issues have come strikingly to the fore. The papers in this Special Issue encompass all of these subjects. But what is missing from this collection bears explanation. Despite tragedy and its now reliable accompanying echo of blaming media industries, and in particular, violent video games, the questions in this area seem to have been visited so often in the past that, perhaps surprisingly, there appears to be little to say legally that is truly new. The original commitment to create this issue was made just a few weeks before the tragic events in Newtown, Connecticut.[7] But fears that the submissions received for this issue would overwhelmingly deal with legal analyses of violence in games did not even remotely manifest. In the wake of the US Supreme Court decision in *Brown v Entertainment Merchants Association*[8] perhaps this should not have been a surprise. It may also be fair to suggest that growing acceptance of the art form of video games could finally have quieted the objection to their perceived violence. In other words, the depiction of some violence has become an accepted part of the creative package represented by video games.

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6 It seems likely to the writer that the next digi-law frontier will involve the consequences arising from combining digital and real worlds. Though gaming will be represented in this trend (e.g., Google's "Ingress" perhaps being a pioneer), wearable computing and the "internet of things" equally pose privacy and IP issues with potentially broader consumer use.

7 See also "The NRA's Absolutely Unhinged Response to Newtown Condemns Video Games as a 'Shadow Industry' that 'Sows Violence Against Its Own People'" *Kotaku* (21 December 2012), online: <http://kotaku.com/5970484/the-nras-absolutely-unhinged-response-to-newtown-blames-a-10+year-old-flash-game>.

8 546 US (2011) (where a 7-2 majority of the Supreme Court of the United States found that censorship of violent videogames in California was an unconstitutional breach of the First Amendment).

Put another way the novelty and attendant shock value of digital violence in the video-game genre may be wearing off. It is not uncommon for calls of media censorship to diminish with the familiarity and acceptance generated by the effluxion of time. Whether it is "Lady Chatterley's Lover", Elvis's appearance on *The Ed Sullivan Show*, Rap music, or Miley Cyrus's recent appearance on the 2013 VMAs,[9] the pattern is mostly the same: shock, horror, criticism, calls for censorship, and, with time, grudging acceptance.

One critically important exception to this trend may be the role of women in games. This subject is not only attracting considerable substantive attention (cutting to the quick of an inbred and prevalent sexism that is being systematically revealed in the video-game industry) but shows no sign of going away. Truly an important subject for further comment and academic analysis.[10]

Another possible factor at play in the relative calm around violent depictions in video games[11] is a less visible one: direct consumer impact. The vast number of consumers who purchase games and digital entertainment very rarely feel the effects of violent video games in any obvious form. From a consumer's perspective, it may actually be the restraints on purchasing entertainment products that increasingly feel anachronistic and misplaced amidst the prevalence of limitless choice in goods and services. On the flip side of the same coin, privacy and surveillance issues can be felt directly by every consumer. It is for this

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9 See e.g. Sean Michaels, "Miley Cyrus criticised for raunchy MTV Video Music Awards performance", *The Guardian* (27 August 2013), online: <http://www.theguardian.com>.

10 See as a base point the work of Anna Sarkeesian, online: Feminist Frequency <http://www.feministfrequency.com>. Although it is likely only a curiosity, but still a curiosity worth mentioning, in seven years of teaching Video Game Law at UBC Law, the overwhelming majority of students who took the class were male, yet the only articles in this collection authored by graduates of the course were authored by women.

11 In comparison, for example, to the relative hysteria around the "Hot Coffee" mod to *Grand Theft Auto: San Andreas* in 2004.

reason that emergent issues of government surveillance through digital networks, enabled by vendors of software, networks, and communication devices, may well bear the brunt of ever-greater academic, policy, and popular-press focus.

II. JUDGING THE DIGITAL LANDSCAPE

The papers in this collection are united by the issue of digital media's direct impact on users. To begin, Dean Lorne Sossin and Meredith Bacal analyze the readiness of the legal community to fully appreciate the connections between the judiciary as users of digital media, and the role of "Judge". Their paper "Judicial Ethics in a Digital Age" examines the traditional norms encouraging adherence to high thresholds of personal privacy in the context of digital/social media. The underlying tensions of the digital revolution, where we can all be creator, editor, and network, cannot be more plainly evidenced. Is minimal-engagement in social media positively related to fairness in judicial pronouncements? Or, in the world of pervasive media in which we live, is it more appropriate to encourage judges to seize the opportunity to personally engage in the shifting communication modalities upon which much of our society is increasingly coming to rest?

This issue of "private judges" in an increasingly "public world" illustrates how digital interconnectivity can so easily undermine even historical assumptions of right and wrong that have served us well, and even turn them on their head. Such power is derived in part from the radical redefinition of "openness" that has become an apotheosis of the digital age. This is particularly important when we remind ourselves that ignorance of the law is no excuse. The public must have every opportunity to fully understand the legal system, which today must include understanding more about the administrators of their rights.

Historical constraints on the flow of information because of geography, the passage of time, creative form, or editorial gatekeepers, have all but disappeared in the digital age. We expect real-time video content of everything that is happening anywhere, and increasingly we are getting it. In this context it may appear incongruous that technological

transparency has not yet been achieved.[12] In the new digital paradigm it may even appear charmingly quaint that effectively sequestering judges from the public was an operational premise of our Western legal system. It may be argued that encouraging more transparently "knowable" judges equates to a more open and sure-footed system of justice. Virtually invisible (pun intended) judges could be seen as detracting from that accountability.

However the epistemological argument comes to be settled, it is no longer a stretch to suggest that denying judges first-hand knowledge of social media diminishes, to some degree, the resources available to demonstrate greater openness. Moreover, such knowledge might enhance the ability of judges to render the best possible judgments in a dynamic world demonstrably changed by digital media in ways that affect all of us in our daily lives. Indeed, it may not be irresponsible to suggest that the fundamental and ongoing redefinitions of the digital world (mobile, wearable, track-able sound- and gesture-based computing) already touches everything we do.

For example, Georgetown Professor Rebecca Tushnet makes the powerful point that the future of copyright law and in particular the concept of "fair use", depends on the ability of judges to fully appreciate that creative works have many simultaneous meanings.[13] This, in turn, requires that the courts allow for multiple and open-ended legal interpretations. Professor Tushnet highlights the deficiencies of copyright fair-use decisions that do not acknowledge such multiplicity of

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[12] In BC, for example, there is a prohibition on cameras in court without consent of the parties and judge, and a policy preventing everyone except accredited journalists from using social media in court without the judge granting permission. Certainly it is hard to imagine that, based on current rules, a member of the public who would want to record a trial and broadcast it live on YouTube while commenting on Twitter would be able to do so. See Supreme Court of British Columbia, Court of Appeal of British Columbia & Provincial Court of British Columbia, Joint Policy Statement, "Policy on Use of Electronic Devices in Courtrooms" (17 September 2012), online: <http://www.courts.gov.bc.ca>.

[13] Rebecca Tushnet, "Judges as Bad Reviewers: Fair Use and Epistemological Humility" (2013) 25 Law & Literature 20.

meanings.[14] Such decisions can lead to the risk of setting inappropriately high bars for understanding what might be a transformative work in the digital age.

Continuing through this Special Issue, Professor Tina van der Linden's paper, "Stealing Masks and Amulets: What's Law Got to Do with It?", explores the important role of judges in the evolution of the legal framework of digital realities. In examining the *RuneScape* decision of the Dutch High Court, relating to virtual property in the criminal-law context, the demarcations of the digital world are exposed as being entirely subject to judicial interpretation. With this, grave concerns regarding tendencies toward literal interpretations of the digital landscape hinted at by Professor Tushnet are given alarming context.

Judicial interpretations that are too literal stand revealed in Professor van der Linden's work as an enemy of truth, de-contextualizing the nuances of new forms of creative interaction existing amid new forms of technological interactivity. Literalism may manifest as a natural bias of legal structures capable of inhibiting the abilities of those same structures to adapt to the world's inevitable evolutions. Who can ever forget the haunting words of the prosecutor in the *Aaron Swartz* case, who insisted that "[s]tealing is stealing whether you use a computer command or a crowbar, and whether you take documents, data or dollars. It is equally harmful to the victim whether you sell what you have stolen or give it away."[15] These words exhibited profound misunderstandings of both the legal and human situations (are they really different?), which eventually and tragically came to encompass the suicide of the defendant, a 21-year-old information-rights activist.

Far from being a sign of rigor, the commitment to oversimplify and concretize legal concepts through literalism translates into the opposite: an unwillingness to look more deeply for justice coupled with a preference

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[14] *Ibid.*

[15] The United States Attorney's Office, District of Massachusetts, Press Release, "Alleged Hacker Charged with Stealing over Four Million Documents from MIT Network" (19 July 2011), online: <http://www.justice.gov/usao/ma/news/2011/July/SwartzAaronPR.html>.

to embrace what appears as a conveniently obvious metaphor. In stark contrast we find the laudable efforts of the Supreme Court of Canada in the so-called "copyright pentalogy",[16] released in July 2012, where the majorities of the Court expressly staked out positions allowing for subjective contextual interpretations of "users'" rights even within the outwardly more literal constraints of "copy" rights.[17]

A few missing pieces are revealed in considering the *RuneScape* case. Most obviously, there appears in law to be more appropriate potential remedies than criminal theft, in particular those related to tortious interference or criminal nuisance. Another curious omission is any reference to the contractual regime between the players and developers/distributors of the game in question. In most jurisdictions, the first step is recourse to the EULA or equivalent private contractual documents, which tend to delineate both the theoretical and practical ramifications attending "theft" of virtual property.

III. CREATING CHILDREN

Virtual theft involves the transformation of one person's virtual property into that of someone else's domain. The peculiarities of the digital world, which make digital property unique in its particular context (but infinitely replaceable and replicable in every other context), result in considerable legal complexity. It is this same power of transformation enabled by the tools of digital creativity that gives life to the problems identified by Professor Sara Grimes's article, "Persistent and Emerging

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[16] *Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 SCR 231; *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 SCR 283; *Society of Composers, Authors and Music Publishers of Canada v Bell Canada*, 2012 SCC 36, [2012] 2 SCR 326; *Alberta (Education) v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 SCR 345 ; *Re:Sound v Motion Picture Theatre Associations of Canada*, 2012 SCC 38, [2012] 2 SCR 376.

[17] For excellent analysis of the particulars of the pentalogy, see Michael Geist, ed, *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013).

Questions About the Use of End-User Licence Agreements in Children's Online Games and Virtual Worlds". The core conundrums described by Professor Grimes arise precisely because of the power to create that is enabled by digital technologies through a multitude of tools and design decisions. The content generated by children using these tools (known as user-generated content or "UGC") illustrates with surprising precision the problems embedded in allowing contractual regimes (through EULAs) drawn up by private companies to supersede statutory instruments, including the *Copyright Act*. In effect, the legal tensions between these two sets of acronyms (UGC & EULAs) are the exclusive offspring of the digital age, coming as they do with a virtual Rubik's Cube of challenging complication. Adding children's creativity into the mix neatly exposes the vulnerabilities of our largely analog-based laws as they face the bore of the digital tsunami. We watch, for the most part passively, as copyright law becomes squeezed between transformational fair use on the one hand and contract law, as expressed in EULAs, on the other. In the case of children, add in a liberal sprinkling of the ethics of consent (through the legitimate proxy of parents, or through a child's digital impersonation of their own parent) and the folly of having private contractual regimes effectively constitute the governance structure for virtually all of cyberspace and digital creativity becomes clearer.

It is particularly poignant that in the 1980s and early 1990s, it seems possible and even likely that the pioneers of the digital world were trying to protect consumers from what appeared to their utopian eyes as repressive domestic IP-law regimes. The contractual constraints which impact consumers today may, ironically, have been motivated by the independence to create a world where digital communication and connectivity flew an independent flag in favour of the creative. If it ever existed, that new-world independence seems rapidly to be giving way to corporate realities where even the most progressive and visionary of companies have co-operated with governments to facilitate surveillance on citizens.[18] In this context, the contractual fictions represented by EULAs

[18] Witness the myriad revelations by Edward Snowden and *The Guardian* regarding US digital spying on citizens, abetted by secret assistance of various consumer-facing

may seem of relatively small consequence. That said, the analysis proffered by Professor Grimes, regarding the appropriate legal building blocks for ethical relationships between digital consumers and users, triggers the perhaps far-fetched hope in the reader that a jumping-off point to necessary change may somehow be found in the betrayal of consumers by private companies supplying digital data to governments.

IV. TRANSFORMERS

The emergence of end-user licence agreements intended to mediate digital-world relationships also forms a direct backdrop to Michela Fiorido's "Moral Rights and Mods: Protecting Integrity Rights in Video Games". EULAs often provide creators with limited rights at the discretion of the corporate entity with whom they are contracting. But most often, these agreements specify the restraints that the consumer must follow, largely for the legal enhancement or protection of the digital supplier. Ms. Fiorido's paper focuses in particular on the prevailing tensions in defining "creator's rights" for our digital age. The dialectic appears on many levels to place integrity and compensation as movable chess pieces, often serving different masters. In fact, it is the compensatory structures of digital media that serve to animate the importance of end-user licence agreements. EULAs have become the engine of an economic-rights system for digital creativity. Accordingly, it is worth wondering whether a creator's right to protect the integrity of a work on a non-financial basis might form a more suitable framework than digital-rights "ownership" and the financial accountabilities they engender. A personal and inalienable understanding of creativity might significantly help us inform the legal paradigms in this era of infinite digital replication by superseding purely economic and alienable notions of creativity as property. Ms. Fiorido's paper takes user-generated content to the next level. Her examination focuses on the issue of game "mods", which are

providers of digital products and services. See e.g. Glen Greenwald, "Xkeyscore: NSA tool collects 'nearly everything a user does on the internet'", *The Guardian* (31 July 2013), online: <http://www.theguardian.com/world/2013/jul/31/nsa-top-secret-program-online-data>.

modifications generated by a user of a game originally created by someone else. Accordingly, mods raise very difficult issues of "fair use" and the circumstances in which the creativity of others should be constrained. Perhaps "moral rights" allow for new paths through these challenges.

Legal interpretations and ethical understandings of fair use also find themselves at the center of Professor Michael Carrier's "Only 'Scraping' the Surface: The Copyright Hole in the FTC's Google Settlement". Core questions revolve around the problem of a search engine scraping (finding, replicating, and inserting into a different context) a few words from restaurant or other reviews. Google places these words within its own digital search-engine presentation, with Google's own context and subject to Google's own system of monetizing content. Yet again, the legal question revolves around applications of the concept of "transformative use". The crux appears to be that by restricting digital content to particular niches and business models, we do not allow messages and meanings to spread naturally in the ways that digital technology permits. Though the question may be whether a search site creates sufficient transformation, that query implicitly applies to every form of content, technology, and format that is capable of creating coherency by recombining digital elements from various sources.

V. A LEGAL "MATRIX"

The consequences of conflating intellectual-property law and contract law in addressing the issues around who can use or take digital assets and for what purpose is an emergent theme of this Special Issue. That very question is also at stake when it comes to privacy as applied to every form of digital content, technology, or format. Until recently, privacy had seemed to be a relative priority of governments seeking to apply those principles to protect consumers in their relationships. As mentioned previously, recent events have revealed complex interrelationships and dependencies between governments and digital-media providers, casting that understanding into doubt. Lisa Jorgensen's "In Plain View?: *R v Jones* and the Challenge of Protecting Privacy Rights in an Era of Computer Search" speaks directly to the issues raised when search-and-seizure laws permit the seizing of evidence on computers where the seizure is outside the scope of a given search warrant.

The legal stakes become particularly high when we reflect on the fact that, increasingly, all manner of devices are computers of one sort or another. Certainly our cell phones are computers, our cameras have become computers, and appliances and wearable devices are increasingly becoming so as well. The "Internet of Things"(with the help of "big data") will eventually keep track of all of our needs with a view to anticipating them the next time. It will know where we are, when we are coming home, and more often than not, what we are doing and with whom. The idea of protecting privacy rights (particularly in the context of computer searches) carries meanings we could not have imagined only a decade ago. Moreover, it is becoming increasingly clear that the suppliers of digital goods and services to consumers seem to have become complicit in spying on consumers through the very products provided by them (aided and abetted by EULAs that arguably allow them to do so). Taken together it may be too difficult a task to predict what a legal re-formulation of privacy will look like as the digital age evolves. It is mind blowing to consider that we live in a world of perpetual data storage, where search warrants might be issued based on the patterns observed from metadata originally created from the digital footprints left by our devices.[19]

These questions of privacy and surveillance may occupy our concerns and define the brave new world of the future. Creativity is likely to thrive only in the context of freedom, as opposed to constraint and surveillance. In the digital age, where things move so quickly, many moments feel like crisis moments. It should be no surprise therefore that this time of legally uncertain personal digital boundaries feels like a time crisis.

Fittingly it is these kinds of issues that take us back to "Judicial Ethics in a Digital Age". Since court judgments will ultimately determine the meaning of digital privacy and digital creativity, the issues raised by Dean Sossin and Ms. Bacal involving the participation of judges in social media are of critical importance. First-hand understanding of what these privacy violations feel like, and first-hand understanding of the transformational creative powers of digital tools, will yield significant advantages in arriving at the best possible legal decisions and dispute resolutions. We will not be

[19] See *ibid.*

able to have our legal cake and eat it digitally. Attempts to mediate some sort of legal compromise straddling the orthodoxies of the past and the uncertainties of the future may not be possible. Though traditional methodologies have seemingly worked for past legal evolutions, the papers in this Special Issue suggest that this path may not have the same promise for our digital future.