# The Dubious Autonomy of Virtual Worlds[1]

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On the program for this conference, you will see that I am scheduled to give a talk called "Virtual Worlds as Laboratories for Copyright." It wasn't going to be a very interesting talk. The basic gist of it would have been something along the following lines: Normally, when I show up in audiences, they are full of lawyers and they don't have any gamers. So I would come in as a gamer and say, "Hey, you know there is this virtual world and it can actually teach you something interesting about your discipline, copyright law." I don't think I need to persuade this audience of that.

In any event, I spent yesterday meeting with the White House IP enforcement coordinator and reading up on the Obama administration's various efforts at IP enforcement, which include things like legislative proposals to direct Internet service providers to stop pointing to parts of the Internet that have bad stuff on them.[3] The government's idea is rather like an "Internet kill-switch," which we know worked quite well in Egypt.[4] The government seems determined to break down or pull out pieces of the Internet. And all I could think was, "Wow, I've been here before." The very first article I wrote as a law professor in 1994 was an

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[2] William H. Neukom Professor, Stanford Law School; partner, Durie Tangri LLP; player of far too many hours of MMORPGs. This is an edited transcript of a speech, and reads like it.

[3] PROTECT IP Act of 2011, S. 968, 112th Cong. (2011); Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011). For discussion of these bills and their problems, see Mark A. Lemley, David S. Levine, and David G. Post, *Don't Break the Internet*, 64 STAN. L. REV. ONLINE 34 (2011), http://www.stanfordlawreview.org/system/files/online/articles/64-SLRO-34_0.pdf.

[4] Egyptian President Hosni Mubarak tried to stave off the Arab Spring uprising by preventing Egyptian citizens from connecting via the Internet. Molly Hennessy-Fiske & Amro Hassan, *Mubarak, 2 Ex-Officials Fined $91 Million,* L.A. TIMES, May 29, 2011, at A13. It didn't work.

article called "Shrinkwraps in Cyberspace."[5] In it, I challenged a proposal then very much in vogue: that we should deal with the problem of law and the Internet by breaking the Internet into pieces that could interact with each other only through specified and approved regulated portals.[6] Here it is 2012, eighteen years later, and the United States government is once again proposing to wall off portions of the Internet and prevent others from accessing them.[7]

Now, this development might seem have nothing whatsoever to do with the regulation of virtual worlds. But it revealed to me that my proper role in this conference is not as an IP lawyer who actually plays an online game and therefore knows something about gaming. My proper role in this conference is as an Internet law curmudgeon. I was around for the first generation of Internet law. And the first generation of Internet law has a surprising, almost eerie, similarity to what is going on right now in the law of virtual worlds.

In the early days of Internet and Internet law, the Internet really was a place unto itself. It was a place inhabited by a small and relatively insular subculture which created its own set of norms.[8] And it created those norms largely outside the view of the world at large, and without the world at large much caring what Internet users did. Those of us on the Internet were second-class citizens in the eyes of the world. It didn't really matter what we did on the Internet because it was just the Internet. Bits—ones and zeros—didn't have any real significance.

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[5] Mark A. Lemley, *Shrinkwraps in Cyberspace*, 35 JURIMETRICS J. 3 (1995).
[6] *See* Robert L. Dunne, *Deterring Unauthorized Access to Computers: Controlling Behavior in Cyberspace Through a Contract Law Paradigm*, 35 JURIMETRICS J. 1 11 - 15 (1994).
[7] *See* Lemley et al., *supra* note 3.
[8] For discussion of some of this history, see Mark A. Lemley, *The Law and Economics of Internet Norms*, 73 CHI.-KENT L. REV. 1257 (1998).

I think that virtual worlds actually share a lot of those characteristics. If you talk to outsiders to the gaming world, you hear many of the same sorts of things. "It's just a game, right?" "It's just bits, it's just ones and zeros." I had an argument a couple of months ago with a very prominent federal judge—one of the more savvy federal judges in this area, who has actually spoken at conferences on virtual worlds—about the question of whether one could defame an avatar. And his answer was, "Well no, because it's not real. It doesn't actually mean anything. It's just there in this separate space."[9] Avatars—and by extension the people who play them—simply aren't important enough for the law to care about.

Now, in various respects, it sucks to be a second-class citizen. You can, in fact, defame an avatar: false and malicious statements about the reputation of a persistent online pseudonym can cause the same sorts of reputational and psychological injury online as offline. Those of us who invest a substantial amount of our personality into games do, in fact, understand that actions in the virtual worlds can have real-world consequences for us.[10] And it's galling when the law doesn't recognize that fact.

But one of the benefits of being a second-class citizen in the early days of the Internet was that you were, in fact, left alone. That didn't last on the Internet. As more and more money started to flow into the Internet, more and more people in the offline world started to pay attention to it. That money—and the things that it bought—started to substitute for things that people did or bought offline. We started to get our copyrighted works from the Internet and not from the physical world. We started to spend our time visiting web sites and not watching

[9] No, I'm not going to tell you who it is.

[10] *See, e.g.*, Julian Dibbell, *A Rape in Cyberspace: How an Evil Clown, a Haitian Trickster Spirit, Two Wizards, and a Cast of Dozens Turned a Database Into a Society*, THE VILLAGE VOICE, Dec. 10, 1993.

television. Not only did the Internet attract real-world interest, it started causing what real-world businesses recognized as harm.[11] Those businesses started to worry about the Internet. And as people in the physical world started to spend more and more of their time on the Internet, the very real harms it turned out one could suffer on the Internet—whether economic, psychological, or reputational—became things that those people increasingly thought ought to be remedied by law. And so law began to remedy online harms.[12] The more people are invested online, the more they (and others) can be injured online.

Virtual worlds are becoming more and more real. I don't mean simply that people are spending more time with them, though that is surely true. They are becoming more and more real in imagery, in point of view, in interactivity, in complexity, and also in how much money is at stake.[13] As virtual worlds become more and more real, as they become more and more salient and important to a larger and larger set of people, we change the nature of those worlds and how we interact with them. It's different to shoot someone who looks like you in a game[14] than it is to play a 1980s-style map-based dungeon game in which your little x-shaped character kills the little y-shaped character.[15] As we spend more time, invest more of ourselves in persistent personality, we subject ourselves to more reputational and psychological harm. That

[11] Cite to evidence

[12] *See, e.g.*, MARK A. LEMLEY ET AL., SOFTWARE AND INTERNET LAW (4th ed. 2011).) (discussing the myriad types of legal cases online, the vast majority of which were decided within the last dozen years).

[13] Compare Skyrim, 2011's breakout game, with a fantasy role-playing game from ten or more years ago. Older role-playing games required you to stick more or less to a script, and to move an icon or a small image around the screen to interact with other icons. Skyrim is first person: you appear to inhabit a character. You can control the appearance and actions of that character in detail. And you can make a wide variety of choices about where to go, who to speak to, what to say, and how to act, that affect how your character is perceived in that world. Each of those facts makes the game seem more real to its players.

[14] *Play, e.g*. Call of Duty 3.

[15] *Play, e.g.*, Legend of Zelda (the original version, not the recently released one).

risk of harm is amplified as the games begin to look more and more realistic. And as we spend more of our money in virtual worlds, the world outside, the world that cares about where the money goes, sits up and takes notice.

I lived through the Declaration of Independence of Cyberspace.[16] John Perry Barlow in 1994 announced to the world that "[w]e don't need you and your regulations. We're just fine on our own. Leave us be. Let the market do what the market wants to do, and we will be perfectly happy to ignore you."[17] In hindsight, that particular declaration of independence looks more like the failed Green revolution in Iran than the Arab Spring in Egypt. It didn't work. Governments rushed in to regulate the Internet notwithstanding its purported independence.[18]

Today's conference focuses on the governance of the *magic circle*.[19] The idea of the magic circle is very similar to the idea of the independence of cyberspace. In both cases, we treat the virtual environment as a separate place, removed from what the rest of the world is doing, and which creates its own set of rules insulated from that outside world. It is, probably, an analogy that should give us a little bit of pause. Because as far as I can tell, one of the two ironclad laws of entertainment is that any magic circle will be breached.[20] There aren't any books or TV shows that create magic barriers that don't ultimately end, at least in part, with people actually finding a way to break through it. I think we'll see the magic circle of virtual

[16] John Perry Barlow, *A Declaration of Independence of Cyberspace*, ELECTRONIC FRONTIER FOUNDATION (Feb. 8, 1996), https://projects.eff.org/~barlow/Declaration-Final.html.
[17] *Id*. *See* David R. Johnson & David G. Post, *Law And Borders: The Rise of Law* in *Cyberspace*, 48 STAN. L. REV. 1367, 1375-76 (1996) (for other arguments that the Internet was or ought to be its own jurisdiction).
[18] Communications Decency Act of 1996, 47 U.S.C. § 609 (1996); Child Online Protection Act (COPA), 47 U.S.C. §231 (1998); Digital Millennium Copyright Act 17 U.S.C. § 101 (1998).
[19] The magic circle in virtual worlds scholarship refers to the suspension of certain sorts of rules of behavior and the adoption of others within the sphere of the game.
[20] The other ironclad law of entertainment is that any fish tank that appears in an action movie will be shattered by the end of the movie.

worlds breached too. It's already starting to happen. There are lawsuits over copyright and trademark rights in Second Life.[21] There are complaints about defamation[22] and suits over virtual property.[23] And while the traditional attitude of the outside world—and of judges who mostly live in that outside world—has been, "Who cares? It's just a game," that traditional attitude is not going to last.

So the first lesson of the Internet independence movement is not a particularly optimistic one for those who would have virtual worlds stay independent of the law of the real world.

But I think there are other lessons too. One of the things that we learned from the early days of the Internet is the maxim, first suggested by Joel Reidenberg but popularized by Larry Lessig, that "Code is Law."[24] The idea is that the physical architecture of the world we create is at least as powerful a determinant of how people will act as the legal rules and the social norms that more directly intend to govern behavior. I think the Internet has shown that to be true. I also think it is directly applicable to virtual worlds, though there is an interesting difference between virtual worlds and the Internet. And I think that difference is worth exploring.

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[21] *See, e.g.*, Fahy v. Linden Research, Inc., No. 10-1561., 2010 WL 4025940 at *1 (E.D. Pa. Oct. 13, 2010). Full disclosure: my firm represents Linden Research, Inc. in defending some of these lawsuits.

[22] *See, e.g.*, Daniel Terdiman, *Newsmaker: Behind the Anshe Chung DMCA complaint*, CNET NEWS, Jan. 16, 2007, http://news.cnet.com/Behind-the-Anshe-Chung-DMCA-complaint/2008-1023_3-6150457.html.

[23] *See* Evans v. Linden Research, Inc., 763 F. Supp. 2d 735 (E.D. Pa. 2011 Feb. 3, 2011); Bragg v. Linden Research, Inc., et al., 487 F. Supp. 2d 593 (E.D. Pa. 2007 Dec. 5, 2007). *See* Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. Rev. 1047, 1071-72 (2005); F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CALIF. L. REV. 1, 72-73 (2004) (concluding that while virtual worlds are subject to legal regulation, courts should "recognize that virtual worlds are jurisdictions separate from our own" in order to allow internal governance to develop).

[24] *See* Joel Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553 (1997-1998) (discussing the related notion of "lex informatica"); Lawrence Lessig, CODE AND OTHER LAWS OF CYBERSPACE (1999).

The great virtue of the Internet, at least the Internet circa the 1990s, was its interconnectedness and interoperability. Having three dozen Internets would be as good as having none, because a divided Internet couldn't take advantage of network effects.[25] That's the point I made in the article I mentioned, "Shrinkwraps in Cyberspace."[26] So to say that "Code is Law" meant that we had to create an architectural structure for a single Internet. We had to make a single choice for the integrated Internet that traded off certain kinds of interests against others. We had to make that choice once and it had to apply everywhere. If Internet designers decided (as they ultimately did) to push the intelligence to the edges of the network, following the now-famous "end-to-end" principle, you get one set of rules.[27] If instead they decide to build in network management and file shaping and other functionality into the network itself, you get a very different set of rules.[28]

The advantage of virtual worlds over the Internet is that we're not limited to just one regulatory choice. Our games don't need to interoperate with each other. They can be laboratories for experimentation with different rule sets, as the Hickmanns talked about.[29] But they can also be laboratories for experimentation with different levels of interaction between the inside and the outside world. The loss of one game's independence from the legal world is not necessarily catastrophic in the same way that the loss of an architectural principle of the Internet would be.

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[25] *See, e.g.*, Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CALIF. L. REV. 479 (1998) (discussing network effects).

[26] Lemley, *supra* note 6.

[27] For a discussion of the policy significance of the end-to-end principle, see BARBARA VAN SCHEWICK, INTERNET ARCHITECTURE AND INNOVATION (2010)Mark A. Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era,* 48 UCLA L. Rev. 925 (2001).

[28] *See* JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET AND HOW TO STOP IT (2008).

[29] Cite to Hickmanns article.

The next lesson from the early history of the Internet is that law, which works by precedent, is backwards looking. As a result, law tends to flail around a little bit when it is confronted with something new. Courts don't know how to treat a truly new thing. The thing that law desperately wants when you hand it something truly new is an analogy. They are much more comfortable if they decide it's not really completely new, it's kind of like something else they have seen before.[30]

The creation of new spaces opens up room to question things that are established in other, more established spaces. As a result, lots of legal questions which are resolved—so resolved, in fact, that we often don't think about them—in the physical world turn out to be hard questions on the Internet because the Internet upends our analogies. Is the Internet more like this physical world analogy or is it more like that one? Orin Kerr talks about an internal versus external perspective on the Internet.[31] Should we conceive of the Internet by focusing on the way it actually works? Should we think of it as sets of protocols that drive information? Or should we instead treat it the way it appears? Should the law assume that I am, in fact, hitting someone in this game because it looks to the outside world like I'm hitting someone, even though at some level we all know that we are merely sending electrical impulses back and forth across copper wires?

There are a number of examples of this in Internet law. One involves a trademark law practice called keyword advertising.[32] The question here, basically, is: can Google and others

[30] *See* Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CALIF. L. REV. 439 (2003); Mark A. Lemley, *Place and Cyberspace*, 91 CALIF. L. REV. 521 (2003).
[31] Orin Kerr, *The Problem of Perspective in Internet Law*, 91 GEO. L.J. 357 (2003).
[32] *See* Gregory Shea, *Googling Trademarks and Keyword Banner Advertising*, 75 S. CALIF. L. REV. 529 (2002).

run ads next to their search results that are targeted to the things you are searching for? Now, there's no direct, real-world analogy to keyword advertising, but that doesn't stop the courts from trying. Courts start to say things like, "Well, this is just like hijacking, taking the user away from the place, the search they wanted, and sending them over to this competing trademark owner." "No," others might say, "it's really like putting things next to each other on a grocery store shelf." "Well, maybe it's like going to a grocery store, buying one product, and having a coupon for a competitor's product print out at the register." "No, really it is like a department store in which a bunch of different trademark owners coexist and you have to walk past one in order to get to the department you're looking for."[33] In fact, keyword advertising is not really like any of those things. But one of the things that the novelty of technological space does is open up the possibility of novelty in legal space. Because we don't have a clear and direct analogy, we have an opportunity to rethink certain legal rules not only as they apply to that technology, but in ways that might feed back into other spaces as well. If we rethink what proximity means in the Internet environment from the perspective of the trademark owner, we might rethink that question more generally in trademark law. I think we're going to see a similar kind of fluidity of legal rules with respect to virtual worlds.

This is an opportunity, but also a danger. A lot of legal rules that we think are well established are going to bump up against the virtual environment in ways that are unpredictable. They could lead to interesting, new, and positive changes in the law. They could also lead to unfortunate changes in the law. For instance, the fact that all participants in virtual

[33] For a general discussion of such views, and an articulation of several of these analogies, *see* Playboy Enterprises, Inc. v. Netscape Communications Corp., 354 F.3d 1020 (9th Cir. 2004) (Berzon, J., concurring).

worlds are nominally subject to browse-wrap contracts may lead courts to conclude that game companies have plenary authority over whatever users create in the game.[34]

The next lesson of the Internet revolution for virtual worlds is that openness breeds creativity. One of the things we got right in the design of the Internet was opening it to development, giving people space to create at the edges of the network. That worked really well.[35] That may surprise IP lawyers, because IP law takes the opposite perspective. IP law is based on the idea that the problem with openness is we won't get enough creation.[36] Advocates of treating IP like real property want to close things down, make it look more like land.[37] We know how to encourage people to produce in land, they reason, and if we can just make ideas look like land, we'll know how to actually generate economic activity. The fact that not doing that—that affirmatively creating space in which we didn't have control—nonetheless led to an unprecedented surge in creativity on the Internet is a powerful lesson.[38]

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[34] *See* Alfred Fritzsche, *Trespass to (Virtual) Chattels: Assessing Online Gamers' Authority to Sell In-Game Assets Where Adhesive Contracts Prohibit Such Activity*, 8 U.C. DAVIS BUS. L.J. 234, 239-244 (2007) (discussing browse-wrap contracts that prohibit users from real-world commercial transactions for virtual goods obtained in virtual worlds); Greg Lastowka, *Decoding Cyberproperty,* 40 IND. L. REV. 23 (2007); Michael A. Carrier, *Against Cyberproperty,* 22 BERKELEY TECH. L. J. 1485 (2007); Andrew Jankowich, *EULAw: The Complex Web of Corporate Rule-Making in Virtual* Worlds, 8 TUL. J. TECH. & INTELL. PROP. 1 (2006); Ian Rambarran & Robert Hunt, *Are Browse-Wrap Agreements All They are Wrapped Up to Be?*, 9 TUL. J. TECH. & INTELL. PROP. 173 (2007) (discussing the evolution of browse-wrap contracts in online transactions).

[35] *See* ZITTRAIN, *supra* note 34; Lemley & Lessig, *supra* note 33.

[36] *See* Robin Feldman & Kris Nelson, *Open Source, Open Access, and Open Transfer*, 7 NW. J. TECH. & INTELL. PROP. 14, 27-31 (2008).

[37] *See* Frank H. Easterbrook, *Intellectual Property is Still Property*, 13 HARV. J.L. PUB. POL'Y 108, 113 (1990); Richard A. Epstein, *Liberty versus Property? Cracks in the Foundations of Copyright Law*, 42 SAN DIEGO L. REV. 1, 5-19 (2005). For discussion of this paradigm in virtual worlds, see Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047, 1076-1084 (2005). For criticism of the IP-as-property approach, see Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2005).

[38] *See generally* LAWRENCE LESSIG, FREE CULTURE (2004); LAWRENCE LESSIG, THE FUTURE OF IDEAS (2001).

And it's not just the architecture of the Internet that promoted that openness. The law did, too. As Josh Fairfield has suggested, we passed various laws in the early days of the Internet—mostly by accident—that ended up promoting that openness.[39] Section 230 of the Communications Decency Act gave us freedom of speech on the Internet.[40] It was intended to do the exact opposite. The Communications Decency Act as a whole was designed to ban pornography on the Internet. A single provision in that law was designed to make sure that Internet service providers felt comfortable voluntarily pulling down bad stuff from the Internet, so it exempted them from liability for their decisions to take down or leave up information on the Internet.[41] The main part of the Communications Decency Act—the reason it got passed—was struck down by the courts as unconstitutional,[42] and that left only section 230. But that accidental protector of freedom has had a remarkable effect.

So the law can promote openness. But here, I think, is the last lesson of the Internet revolution: The powers that be will have every incentive to kill that openness. One of the reasons the Internet did not last as a separate space is that once it turns out that there is money at stake, that there is harm at stake, the people from the real world who worry about losing their existing business models or the injuries they may suffer are the ones who, by and large, end up having the power to pass legislation. The Internet has done very well for itself, largely because of laws like section 230 that kept the government's hands off the Internet. But

[39] *See* Joshua A.T. Fairfield, *Anti-Social Contracts: The Contractual Governance of Virtual Worlds*, 53 McGILL L.J. 427, 473-74 (2008). *See generally* Joshua A.T. Fairfield, *Cracks in the Foundation: The New Internet Legislation's Hidden Threat to Privacy and Commerce,* 36 ARIZ. ST. L.J. 1193 (2004) (discussing the unforeseen consequences of legislation in a new, developing area).
[40] Telecommunications Act of 1996, Title V, 47 U.S.C. § 230 (2006)..
[41] *Id.*
[42] *See* Reno v. ACLU, 512 U.S. 844, 885 (1997).

the Internet is still under threat from those who would use the law to stifle it in order to protect their own economic interests.[43] And nobody today would say what lots of scholars said fifteen years ago: that it should be its own jurisdiction, separate from the dictates of law.[44] Maybe it should be, but it isn't going to be.

In 1993 Howard Rheingold wrote, with respect to the Internet, something that I think is actually worth concluding with here:

> The odds are always good that big power and big money will find a way to control access to virtual communities; big power and big money always found ways to control new communications media when they emerged in the past. The Net is still out of control in fundamental ways, but it might not stay that way for long. What we know and do now is important because it is still possible for people around the world to make sure this new sphere of vital human discourse remains open to the citizens of the planet before the political and economic big boys seize it, censor it, meter it, and sell it back to us.[45]

I'm sorry to play Cassandra here. But the lesson from the Internet was not a promising one in that respect. Maybe virtual worlds will be different. But I wouldn't count on it.

[43] *See, e.g.* PROTECT IP Act (Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act), S. 968, 112th Cong. (2011) (proposing legislation that protects copyright holders from infringing and counterfeit goods, especially from those registered outside the U.S.); Stop Online Piracy Act (SOPA), H.R. 3261, 112th Cong. (2011) (proposing controversial legislation meant to fight online trafficking of copyrighted material).

[44] *See* David G. Post, *Betting on Cyberspace*, AMERICAN LAWYER, "PLUGGING IN," June 1997. David G. Post, *How Shall the Net Be Governed?*, AMERICAN LAWYER, "PLUGGING IN," Oct. 1996. *Cf.* Hannah Yee Fen Lim, *Who Monitors the Monitors?*, 11 VAND. J. ENT. & TECH. L. 1053, 1073 (2009) (arguing the limitation of rights in virtual worlds to contractual rights allows providers to create their own laws).

[45] HOWARD RHEINGOLD, THE VIRTUAL COMMUNITY: HOMESTEADING ON THE ELECTRONIC FRONTIER xix (2000), *available at* http://www.rheingold.com/vc/book/intro.html.