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The Dubious Autonomy of Virtual Worlds

Mark A. Lemley*

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 legislative proposals to direct Internet service providers to stop pointing to parts of the Internet that have bad stuff on them.1 The government’s idea is rather like an “Internet kill-switch,” which we know worked quite well in Egypt.2 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 article called Shrinkwraps in Cyberspace.3 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.4 Here it is 2012, eighteen years later, and

* © 2012 Mark A. Lemley. William H. Neukom Professor, Stanford Law School; partner, Durie Tangri LLP; player of far too many hours of massively multiplayer online role-playing games. This is an edited transcript of a speech, and reads like it.


2. 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.


the United States government is once again proposing to wall off portions of the Internet and prevent others from accessing them.5

Now, this development might seem to 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 the Internet and Internet law, the Internet really was a place unto itself. It was a place inhabited by a small and relatively insular subculture that created its own set of norms.6 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.

I think that virtual worlds actually share a lot of those characteristics. If you talk to those “outside” of 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.” 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 injuries 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.8 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

5. See Lemley et al., supra note 1.
6. 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).
7. No, I’m not going to tell you who it is.
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 websites and not watching television. Not only did the Internet attract real-world interest, it started causing what real-world businesses recognized as harm. 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. 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. 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 is different to shoot someone who looks like you in a game 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. As we spend more time and invest more of ourselves in persistent personalities, we subject ourselves to more reputational and psychological harm. That 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. 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

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

10. 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, which affect how your character is perceived in that world. Each of those facts makes the game seem more real to its players.

11. Play, e.g., CALL OF DUTY 3 (Treyarch 2006).

12. Play, e.g., LEGEND OF ZELDA (Nintendo 1986) (the original version, not the recently released one).

to do, and we will be perfectly happy to ignore you."14 In hindsight, that particular declaration of independence looked 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.15

Today’s conference focuses on the governance of the magic circle.16 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.17 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 them. I think we will see the magic circle of virtual worlds breached, too. It is already starting to happen. There are lawsuits over copyright and trademark rights in Second Life.18 There are complaints about defamation19 and suits over virtual property.20 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 isn’t 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.”21 The idea is that

14.  Id.; see also David R. Johnson & David G. Post, Law and Borders: The Rise of Law in Cyberspace, 48 STAN. L. REV. 1367, 1375–76 (1996) (arguing that the Internet was or ought to be its own jurisdiction).
16.  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.
17.  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.
21.  See LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999); Joel
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
ture. 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.

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. That’s the point I made in the article I mentioned, Shrinkwraps in
Cyberspace. Which is 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 would get one set
of rules. If instead they decided to build network management, file sharing, and
other functionality into the network itself, you would get a very different set of
rules.

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
Hickmans talked about. 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.

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

23. Lemley, supra note 3.
something truly new is an analogy. Courts are much more comfortable if they
decide something is not really completely new, but instead is like something else
they have seen before.27

The creation of new spaces opens up room to question things that are
established in other, more recognized spaces. As a result, lots of legal questions
that are resolved—so resolved, in fact, that we often don’t think about them—in
the physical world turn out to be hard questions in 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.28 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.29 The question here, basically,
is this: Can Google and others 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 users 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.”30 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

27. 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).
29. See Gregory Shea, Googling Trademarks and Keyword Banner Advertising, 75 S. CALIF. L. REV.
529 (2002).
30. For a general discussion of such views, and an articulation of several of these analogies,
see Playboy Enter., Inc. v. Netscape Commun’ns Corp., 354 F.3d 1020, 1034–36 (9th Cir. 2004)
(Berzon, J., concurring).
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. That could lead to interesting, new, and positive changes in the law. But it could also lead to unfortunate changes in the law. For instance, the fact that all participants in virtual worlds are nominally subject to browse-wrap contracts may lead courts to conclude that game companies have plenary authority over whatever users create in games.31

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.32 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.33 Advocates of treating IP like real property want to close things down and make it look more like land.34 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.35

And it’s not just the architecture of the Internet that promoted that openness. The law did, too. As Joshua Fairfield has suggested, we passed various laws in the early days of the Internet—mostly by accident—that ended up


32. See ZITTRAIN, supra note 25; Lemley & Lessig, supra note 24.


promoting that openness. Section 230 of the Communications Decency Act gave us freedom of speech on the Internet. 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. The main part of the Communications Decency Act—the reason it got passed—was struck down by the courts as unconstitutional, 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 the Internet is still under threat from those who would use the law to stifle it in order to protect their own economic interests. 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. 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


38. Id.


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.42

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.