

Governance and the Global Metaverse

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The governance of emerging global communities such as MMORPGs, virtual worlds and social networking sites, raises fundamental issues concerning the legitimacy of rule-making, including problems such as the applicability of democracy and the rule of law, issues of consent and accountability, public versus private rule making and the application of national laws to global virtual communities. This paper will consider questions regarding the legitimacy of decisions made by private entities, especially service providers, the relevance of applying territorial national laws to global technological spaces and the rights of citizens of virtual communities. It concludes that governance of such spaces must reflect the networked nature of the global metaverse which gives effect to individual choices regarding social actions.

Key Words: virtual worlds, Internet, governance, regulation

1. Introduction

This paper examines the complexity of governance issues arising in the context of virtual worlds. It identifies various levels of governance operating upon and within virtual worlds and considers the legitimacy of current forms of rule-making. It considers the governance issues that are particular to the virtual world environment and asks whether the debates concerning Internet governance generally contribute to or merely confuse the identification of a suitable governance model for virtual worlds. The purpose of the study is to demonstrate that issues of governance affecting virtual worlds are different from those relevant to the Internet generally, and involve a complex network of overlapping interests.

2. Virtual Worlds

Before we consider the application of governance mechanisms to virtual worlds, it is important to identify the nature of the environments captured within this term. It is now reasonably well recognised that not all virtual worlds are the same. Some are text based, others highly graphical, some open and others highly regulated. Some of the most successful worlds are aimed at children and young teens. However, the danger is that regulators, seeking to simplify the regulatory environment may wish to lump them in together, leading to inappropriate forms of regulatory control.¹ This

paper will focus upon massively multiplayer online role-playing games (MMORPGs) such as *World of Warcraft* and *EverQuest*, and social virtual worlds, such as *Second Life*, as they currently attract the highest number of users and demonstrate the range of issues to which virtual communities give rise.ⁱⁱ The key attributes of these environments is that participants interact in a shared, persistent environment, in real time, through an avatar and that the data creating the environment is hosted on a central server (or servers) controlled by the service provider.ⁱⁱⁱ MMORPGs generally have a game object, requiring players to adopt a character from a predetermined set of characteristics and to level up through a series of challenges and tasks, whereas as social virtual worlds may have no object other than socialising. However, many spaces within social virtual worlds are dedicated to role-play and prescribe their own rules and objects, further muddying any attempts to clearly categorise such environments.

3. Governance Issues

As the number of people participating in virtual worlds increases, along with the amount of money invested in and circulated through virtual worlds, increasing demands will be made by national governments to control the activities that occur within them. Key governance issues identified by virtual worlds stakeholders at *Virtual Policy 08* (UK) as requiring further exploration included:

- The complex nature of governance of virtual worlds which consists of a mix of self-regulation, End User Licence Agreements ('EULAs'), national regulation and codes of conduct;
- The applicability of classifying virtual worlds as a separate classification for regulatory purposes (as distinct from broader regulation of the Internet);
- The perceived lack of lobbying power/ cohesive interests amongst service providers;
- The question of whether national laws should apply to virtual worlds, or whether they should be recognised as a separate place and the related matter of determination and enforcement of jurisdiction with respect to applicable laws;
- The nature and quality of consent provided by users;
- Clarification of the question of whose interests should be protected pursuant to regulatory intervention (ie children or adults);
- Recognition that enforcement procedures were a necessary aspect of effective regulation;
- Recognition of the variety of models of virtual worlds;
- The need for clearer induction procedures and education of users;
- and

- The identification of an appropriate legal model for participation in virtual worlds.^{iv}

As can be seen from this list, these are fundamental issues in need of resolution. There is a danger that if such questions are not meaningfully resolved by the service providers and key stakeholders, governments will move to regulate virtual worlds without fully understanding the nature of such environments.

Virtual world creators and inhabitants alike have thus far resisted calls for greater regulation on the basis that they are artificial spaces and hence protected by ‘the Magic Circle’. The concept of the magic circle is derived from Johan Huizinga’s discussion of play spaces and identifies the game space, in which players are separated from the real world and agree to abide by the applicable game rules whilst they are in that space, as being outside the application of ‘real world’ laws.^v Virtual world pioneer Richard Bartle describes this as a willingness to forgo certain freedoms so that certain benefits and freedoms of the virtual world may be experienced during the time in-world.^{vi}

However, this concept is under attack from many quarters, including national regulators, on the basis that many of these in-world actions have impacts upon people outside of the ‘game’. Media reports of fraud, sexual grooming, money laundering and terrorism have led to greater scrutiny from domestic governments, particularly with respect to threats posed to children. Joshua Fairfield has recently argued that the magic circle distinction between in game and out of game activities is not helpful in determining when real world laws should apply to in-world events.^{vii} Fairfield argues that it should be replaced with the recognition that virtual worlds should be permitted to create their own rules, acknowledged and accepted by members in their consent to the terms of service (‘ToS’) and community norms. When a dispute arises, these rules should be respected and in most cases enforced by domestic courts.

We will return to the question of whether there is any need for increased regulation and governance of virtual worlds, but first we will identify current sources of governance in virtual worlds.

4. Current sources of governance

The sources of law (rules) which may be currently be identified in virtual worlds are:

- The EULA/ToS: the contractual terms accepted by the end user, albeit frequently without reading them;
- The community rules or acceptable use guidelines;
- The code: the underlying physics of the world which determines what the avatar can (or cannot) do;

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- The general law applicable to the end user and/or the service provider; and
 - Possibly, the specific norms or rules that apply to the particular environment, such as rules regarding speech, conduct and appearance, for example, the steampunk sim of Caledon (and surrounding sims) in *Second Life*.

Grimes, Jaeger and Fleischmann further simplify this down to two forms of governance, being the underlying source code of the program and the civil code of rules.^{viii}

Even with these multiple layers of control, there remains within the virtual world some gaps or capacity for change and uncertainty. In some environments this gap may be left deliberately to facilitate expansion of the world through user creation of new content. As Humphreys observes MMORPGs (and by analogy social virtual worlds) continue to evolve and grow after launch, with input from both service provider and users.^{ix} For example, the code may allow or enable some particular activity that may be prohibited by the game rules or community norms. A question then arises as to whether an exercise of this power is ‘cheating’ or merely exploiting an aspect of the world’s functionality. Your point of view on this would be dictated by both the nature of the world and your attitude as a member of that world. Castells has identified four layers of cultural attitudes underpinning the Internet being the techno-meritocratic, the hacker, the virtual communitarian and the entrepreneurial.^x The hacker, representing a ‘culture of convergence between humans and their machines in a process of unfettered interaction’, may regard such actions merely as a potential waiting to be fulfilled.^{xi} The virtual communitarian, on the other hand, may place a higher value on mutual respect for community norms.

As Grimes et al observe, there are multiple forms of governing documents in virtual worlds, however there is no fixed or common terminology regarding what terms such documents should contain, nor any commonality of language or structure.^{xii} A key aspect of such documents is the software licence agreement which permits the user to use the underlying computer software subject to the terms of use dictated by the service provider. As the recent litigation involving Blizzard, the owners of *World of Warcraft*, and MDY, the creators of Glider, a program which facilitates automated play, demonstrates, this structure represents an extremely powerful form of control. Blizzard has alleged that end users of WoW, who have paid their subscription fee and are otherwise legitimate authorised users of the WoW software, are in breach of the software licence when they use Glider in conjunction with WoW. Thus this use of the unauthorised program places them in breach of the contract and transforms them into copyright infringers. MDY they claim is then liable for inducing end users to breach contract and copyright. This claim has been upheld by the District Court of

Arizona, with the judge finding on summary judgment that MDY was liable for tortious interference with contract and contributory and vicarious copyright infringement.^{xiii} On a further hearing the Court concluded that MDY is also liable under the Digital Millennium Copyright Act provisions relating to trafficking in technological products designed to circumvent technological measures that control access to a protected work and that protect a right of the copyright owner; that Donnelly, the president and day to day manager of MDY, was personally liable for the tortious interference, copyright infringement and DMCA violations and that Blizzard is entitled to a permanent injunction against the continued sale and distribution of Glider.^{xiv} The key interest of this case from a governance perspective is the finding of the Court that the grant of the limited license to use the game software is expressly made subject to the user's 'agreement to and continuing compliance with this License Agreement.' Further, the licence agreement provides that '[a]ll use of the Game Client is subject to' the EULA and the ToU. This strict enforcement of the copyright licence ignores the fact that modifications (or 'mods') of game software, despite being explicitly prohibited by the Licence Agreement and ToU, are frequently made by gamers and are seen as part of the gaming culture.^{xv} There are thousands of mods available on the Internet and Blizzard provides some support to the modder community. Hence there is ambivalence and tension in the relationship between the service provider and users, reflecting fear, respect and resistance at the same time.^{xvi}

5. The Nature of Control

Service providers are both creator and controller of the virtual world. As Sal Humphreys asserts, in developing the code that generates the virtual world service providers do not merely launch a completed environment, but from that time forth must also take responsibility for civic control as the 'manager of communities'.^{xvii} This may be a role that the developer neither understands nor wants. On the other hand, as Bartle has argued it may be a deliberate strategy, actively wanted by developer and players alike.^{xviii}

Linden Lab, the developers of *Second Life*, have had a troubled relationship with their users ('residents'), at times asserting control in the guise of the benevolent dictator and at others seeking to shelter behind the mantle of service provider. As the discussion of the Glider case demonstrates, the relationship between the service provider and community involves elements of devotion and resistance and, as each community has unique attributes and aspirations, that relationship requires more constant maintenance than the service provider may have anticipated. The players are dedicated to supporting and nurturing their virtual worlds, through fan forums, blogging and conventions. However, where interests of players or

citizens and the service provider diverge, there can be serious dissent, for example the ban on ‘broadly offensive content’ in *Second Life*. Bartle’s description of the game providers as ‘gods’ does not apply so directly to worlds such as *Second Life*, where so much control is granted to citizens through allowing them to create content and acquire a sense of ownership.^{xix}

6. Consent

So, reflecting this need for bespoke governance, does the EULA provide the most effective form of governance?

The development of the ability to transmit content electronically, and hence to monitor, charge for and potentially restrict the use, reuse, modification and further transfer of that content, has led to a shift from the regulation of distribution of such content from general laws such as copyright to the private ordering of rights through contract. On the one hand, proponents of greater control over such uses, headed up by the US content industries, have argued for greater control over access and re-use through the legal enforcement of technological protection mechanisms and contractual waiver of exceptions existing under the copyright law. On the other hand, advocates of greater rights of access and manipulation, such as the Creative Commons movement, have bemoaned the overly restrictive nature of the copyright law and created suites of ‘copyleft’ licences to be attached to new works, flagging the rights of re-use and attribution to be accorded to a work. In this climate, private ordering through contract has been advocated as a superior form of rights management, albeit for very different reasoning.^{xx}

This thinking has of course influenced issues of governance of virtual worlds, the worlds themselves being creative manifestations of the service provider, assisted in most cases by user created content. Therefore the trend has been to regard the best way to regulate such worlds as to leave it up to service providers to enter into a contract with users.

However, this model has many flaws, not the least of which is the fact that most users do not read the EULA, and even if they did there is no scope for them to negotiate its terms. Membership of the world is offered solely on a take it or leave it basis. Further, citizens entering a virtual world will carry with them a belief that they carry with them certain entrenched values or norms, which may be legally enforced in that virtual world. As noted above, citizens also acquire a sense of ownership over the virtual world when they engage in creation of content.

7. Internet Governance

Does the Internet governance debate provide any guidance on effective governance of virtual worlds? Internet mythology provides us with two stories regarding the governance and control of the Internet. One approach, taken from the stories told by the cyberlibertarians such as John

Perry Barlow, tell us that the Internet is not susceptible to control. As an end to end network, connected by users' adoption of the TCP/IP protocol and operating on a distributed network, offering redundant links, these commentators tell us that: 'You can't stop the signal'.^{xxi} On the other hand the cyberpaternalists conclude that the architecture of the Internet can be used to determine and dictate and therefore effectively control behaviour.

In his recent work on Internet governance and regulation, Andrew Murray draws upon these two opposing views of Internet control and concludes that neither is accurate.^{xxii} Building on Castells' concept of network individualism, Murray argues that the key to understanding regulatory challenges is to be found in network individualism or weak collectivism.^{xxiii} He states:

Network individualism or weak collectivism is an effect of modern communications cultures and is particularly strong in the decentred network that is the internet. With no single point of control, as is found in other media carriers, the opportunity for regulation through law or code is diminished and the opportunity for communities to set standards and values (short of norms) which challenge regulatory communications from regulatory bodies is enhanced.^{xxiv}

This leads to the development of a broader network of networks as communities gravitate towards other communities that share similar values. In linking together and sharing their cultures each community affects and influences the others, the points of contact being individuals who are members of multiple communities. This means that any attempt to intervene in one part of the network will have unanticipated consequences for other parts of the network. Murray concludes: 'This makes traditional command and control regulation highly disruptive.'^{xxv}

Therefore regulation of this network of communities is not merely a question of identifying and imposing the 'correct' existing laws on virtual worlds, but to ask as Poster did with respect to the broader Internet in 1995: 'are there new kinds of relations occurring within it which suggest new forms of power configurations between communicating individuals?'^{xxvi} Poster concludes: 'Internet communities function as places of difference from and resistance to modern society. In a sense, they serve the function of a Habermasian public sphere without intentionally being one.'^{xxvii} This networked model of interconnected public spheres may provide some guidance regarding governance of virtual worlds.

8. Conclusions: Governance of the Global Metaverse?

Can it be said then that there is justification for a blanket approach to governance of virtual worlds? There is a diversity of environments that may satisfy the definition of a virtual world, yet each represents and reflects the interests and expectations of a diversity of users. The value of such

worlds lies in this very diversity, which should be respected and encouraged. Therefore any governance model adopted should reflect the importance of the network as the organising agency, respecting the need of the individual to participate in a range of interconnected experiences, which should not be fragmented or interrupted by the interference of inconsistent domestic laws. This analysis still reflects the choice between control by national governments or control by service providers, there is little reflection of control by the citizens of virtual worlds. National governments can best support the development of virtual worlds by creating consistent supportive and facilitative frameworks, which respect the needs of users and service providers rather than imposing external controls. However, it is also desirable to clarify the relationship between the service provider and the citizen regarding important matters such as privacy, surveillance, ownership of intellectual property, transparency of terms and age appropriate content. This approach would be most likely to facilitate the development of productive, vibrant virtual communities embodying values of the public sphere.

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Notes

ⁱ ‘Virtual worlds are not all the same, and the law should therefore be careful about treating them as if they were all the same.’ R Bartle ‘Why Governments aren’t Gods and Gods aren’t Governments’ *First Monday*, Special issue number 7 (September 2006), http://firstmonday.org/issues/issue11_9/bartle/index.html, accessed 9 September 2008, fn 11.

ⁱⁱ For further discussion of the classes of virtual worlds see ENISA Position Paper: *Virtual Worlds, Real Money, Security and Privacy in Massively-Multiplayer Online Games and Social and Corporate Virtual Worlds*, November 2008, p 8 and R Reynolds ‘The Four Worlds Theory’, *Terra Nova Blog*, 28 August 2005, http://terranova.blogs.com/terra_nova/2005/08/the_four_worlds.html, accessed 18 December 2008.

ⁱⁱⁱ ENISA Position Paper, above, p 8.

^{iv} Virtual Policy ’08 – Summary of Policy Discussions, available from: <http://www.virtualpolicy.net/VP08.html>, accessed 4 February 2009.

^v Johan Huizinga, *Homo Ludens*, 1938, trans. 1971, see discussion in R Bartle ‘Virtual Worldliness: What the Imaginary Asks of the Real’ (2004) 49 *New York Law School Law Review* 19 at p 23-27.

^{vi} Bartle, ‘Virtual Worldliness’, above p 23.

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- ^{vii} J Fairfield ‘The Magic Circle’ *Vanderbilt Journal of Entertainment and Technology Law* (forthcoming 2009).
- ^{viii} J Grimes, P Jaeger and K Fleischmann ‘Obfuscatocracy: A stakeholder analysis of governing documents for virtual worlds’ *First Monday*, Volume 13 Number 9 – 1 September 2008, <http://www.uic.edu/htbin/cgiwrap/bin/ojs/index.php/fm/article/viewArticle/2153/2029>, accessed 9 September 2008. See also S Humphreys ‘Ruling the virtual world: Governance in massively multiplayer online games’ (2008) 11(2) *European Journal of Cultural Studies* 149, pp 153-154.
- ^{ix} Humphreys, above, p 150.
- ^x M Castells, *The Internet Galaxy: Reflections on the Internet, Business, and Society*, Oxford, Oxford University Press, 2001, pp 37- 61.
- ^{xi} Castells, above, p 50.
- ^{xii} Grimes, Jaeger and Fleischmann, above, p 10.
- ^{xiii} *Blizzard Entertainment, Inc and Vivendi Games, Inc v MDY Industries, LLC*, 14 July 2008, Arizona District Court, Judge David Campbell.
- ^{xiv} *MDY Industries, LLC v Blizzard Entertainment, Inc and Vivendi Games, Inc and Blizzard Entertainment, Inc and Vivendi Games, Inc v Michael Donnelly*, No CV-06-2555-PHX-DGC, Order, Arizona District Court, Judge David Campbell, 28 January 2009. The decision is likely to be appealed.
- ^{xv} H Postigo ‘Video Game Appropriation through Modifications: Attitudes Concerning Intellectual Property among Modders and Fans’ (2008) 14 *Convergence* 59.
- ^{xvi} See, for example, the official Blizzard post on the outcome of the Glider litigation, <http://forums.worldofwarcraft.com/thread.html?topicId=14910002728&sid=1>, accessed 6 February 2009, and the cautious response of the modder community: Mike Schramm, ‘Blizzard Responds to the Glider Decision’, *WoW Insider*, 5 February 2009, <http://www.wowinsider.com/2009/02/05/blizzard-responds-to-the-glider-decision/>, accessed 6 February 2009.
- ^{xvii} Humphreys, above, p 151.
- ^{xviii} Bartle ‘Virtual Worldliness’, above, p 30.
- ^{xix} T Malaby ‘Coding Control: Governance and Contingency in the Production of Online Worlds’ *First Monday*, Special issue number 7 (September 2006), http://firstmonday.org/issues/special11_9/malaby/index.html, accessed 9 September 2008.
- ^{xx} N Elkin-Koren ‘Governing Access to Users-Generated-Content: The Changing Nature of Private Ordering in Digital Networks’ in E Brousseau, M Marzouki & C Meadel (eds) *Governance, Regulations and Powers on the Internet*, Cambridge University Press, 2009.

^{xxi} <http://www.serenitymovie.com/>, accessed 4 February 2009. Mr Universe: 'There is only the truth of the signal. Everything goes somewhere and I go everywhere'.

^{xxii} A Murray, 'Symbiotic Regulation', 2008, ExpressO, http://works.bepress.com/andrew_murray/1, accessed 6 February 2009. See also A Murray, *The Regulation of Cyberspace: Control in the Online Environment*, Oxford, Routledge, 2006.

^{xxiii} M Castells, *The Internet Galaxy*, above, pp 129-133.

^{xxiv} Murray, 'Symbiotic Regulation', above, p 14-15.

^{xxv} Murray, 'Symbiotic Regulation', above, p 16.

^{xxvi} M Poster 'CyberDemocracy: Internet and the Public Sphere' 1995, <http://www.hnet.uci.edu/mposter/writings/democ.html>, accessed 4 February 2009. See also P Boeder 'Habermas' heritage: The future of the public sphere in the network society', *First Monday*, volume 10, number 9 (September 2005). http://firstmonday.org/issues/issue10_9/boeder/index.html, accessed 4 February 2009.

^{xxvii} Poster, above.